DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Virgin Airlines Australia Pty Ltd
v
Dylan Macnish
(C2024/5936)

VICE PRESIDENT GIBIAN SYDNEY, 2 SEPTEMBER 2024

Appeal against decision [2024] FWC 2154 of Commissioner Lim at Perth on 13 August 2024 in matter number U2024/1853 – stay application – stay against order for reinstatement – stay refused.

Introduction

[1] Virgin Airlines Australia Pty Ltd (**Virgin** or the **appellant**) has filed a notice of appeal in relation to a decision of Commissioner Lim of the Fair Work Commission (the **Commission**) handed down on 13 August 2024. The Commissioner ordered that Dylan Macnish (**Mr Macnish** or the **respondent**) be reinstated within 21 days of the order being made. The reinstatement order is required to be complied with on or before 3 September 2024. In the notice of appeal, Virgin seeks a stay of the reinstatement order. This decision concerns the stay application. A hearing in relation to the stay application was conducted on 30 August 2024.

[2] The decision under appeal concerned an application for an unfair dismissal remedy made by Mr Macnish under s 394 of the *Fair Work Act* 2009 (Cth) (the **Act**) filed on 20 February 2024. Mr Macnish was employed as a Cabin Crew Member for Virgin until his dismissal on 1 February 2024. As the Commissioner described, Mr Macnish was dismissed after he had one glass of prosecco at a Christmas party for Virgin staff before 2.30pm on Sunday 17 December 2023, and then later signed up for a red-eye flight which meant that his shift commenced approximately 7.5 hours later.

[3] Mr Macnish was dismissed because his consumption of alcohol breached the "8-hour rule" set out in Virgin's "A4 Manual" that cabin crew should abstain from alcohol for a minimum of 8 hours before commencing duty. The "A4 Manual" refers to "Volume A4: Cabin Crew Policy and Procedures Manual" which is several hundreds of pages long and represents the manual for cabin crew members covering a comprehensive list of topics. Virgin also has a "Drug and Alcohol Management Program" referred to as the "DAMP Manual", the purpose of which is described as to "consolidate the policy and processes relating to the management of alcohol and other drugs in the workplace". The Commissioner found that the DAMP Manual does not contain a blanket prohibition on drinking eight hours prior to duty.

[4] In the disciplinary process which preceded Mr Macnish's dismissal, three allegations of misconduct were advanced. Allegations 1 and 2 arose from an earlier incident in which it was alleged that Mr Macnish had failed to comply with Virgin's Fatigue Risk Management System (**FRMS**) Manual by removing himself from rostered duties on grounds he was fatigued and subsequently inviting a guest to his room. It was also alleged he was dishonest when questioned about this incident. The allegation of dishonesty was found not to be sustained and, although the allegation of a failure to comply with the FRMS Manual was sustained, the decision-maker was of the view that the allegation should not contribute towards the termination of his employment. Virgin nonetheless relied on that allegation at first instance as constituting a valid reason for dismissal. The Commissioner did not accept that submission and the grounds of appeal allege no error in that respect. That allegation can be put to one side.

[5] In relation to the remaining allegation, the Commissioner accepted that Mr Macnish breached the 8-hour rule contained in the A4 Manual by consuming one glass of prosecco 7.5 hours prior to signing on for duty. However, the Commissioner found that it was not unreasonable for Mr Macnish to have understood the concept of not drinking eight hours prior to a duty as a guideline rather than a firm rule and that this understanding was shared by other employees. The Commissioner further found that it was reasonable for Mr Macnish to rely on the DAMP Manual as being a comprehensive account of Virgin's drug and alcohol policies and that the DAMP Manual did not contain the 8-hour rule.

[6] Given the submissions advanced with respect to the stay application, it is appropriate to record the evidence as to the steps taken by Mr Macnish prior to commencing duty on the night of 17 December 2023 and following. The evidence is set out by the Commissioner at paragraphs [72]-[86] of the decision. The steps taken by Mr Macnish were, in summary, as follows:

(a) At approximately 5.30pm, the cabin supervisor, Mr McEwan, sent a message indicating that he was down one cabin crew member for the red-eye flight that night and asking if anyone would like to pick up the duty.
(b) Mr Macnish called Mr McEwan and disclosed that he had consumed alcohol at the Christmas party. Mr McEwan said words to the effect of: "I'm pretty sure 8 hours is just a guideline. You will need to be 0.00% when you sign in. I need to get a bit more rest, but you'll find the information in the DAMP Manual. Let me know how you go".
(c) Mr Macnish looked up the DAMP Manual and read through the section on "Fitness for Duty and Work". Mr Macnish undertook a search of the terms "8 hours", "8" and "hours" in the DAMP Manual. His assessment was that there was nothing in the DAMP Manual that restricted him from taking up the duty on the red-eye flight.
(d) At approximately 7pm, Mr Macnish used an Australian Standard certified breathalyser he had at home and recorded a BAC level reading of 0.00%. He then reported for duty at the rostered sign on time of 9.55pm, although the flight was delayed and the actual departure time was 11.22pm.
(e) Mr Macnish subsequently heard rumours that he had performed work while drunk and, on 20 December 2023, came forward and reported to relevant managers that he had consumed the glass of prosecco at the Christmas party and then signed on approximately 7.5 hours later.

[7] The Commissioner concluded that, in circumstances in which it was reasonable for Mr Macnish to understand that the 8-hour rule was a guideline and he had taken steps to satisfy

himself that he would not be breaching policy, the breach of the A4 Manual was not a valid reason for dismissal. The Commissioner indicated that, even if the breach of the A4 Manual did constitute a valid reason for dismissal, she would have found the dismissal was harsh for the following reasons (at [163]):

> (a) Mr Macnish took steps to check whether he was fit to sign-on for duty, such as checking with the relevant Cabin Crew Manager, checking the DAMP Manual and breathalysing himself.
> (b) Mr Macnish was entitled to think that the DAMP Manual contained everything he needed to know about Virgin's drug and alcohol management at the workplace. He was not in breach of the DAMP Manual when he presented for work on Sunday 17 December 2023.
> (c) Ms Ridge and Ms McGregor both acknowledged that in their dealings with Mr Macnish at both the Ground School and at the meeting on Wednesday 11 October 2023, at no point did they reference the A4 Manual when referring to the 8-hour Rule.
> (d) Mr Macnish was proactive in addressing the issue. Once he became aware that he may have breached a policy, he spoke with Ms Solis (in lieu of Ms Ridge) on Wednesday 20 December 2023. It arguably would have been easier for him to try and ignore the gossip and hope that it went away but he chose to try and be proactive in addressing his concerns regarding his employment.
> (e) Virgin has a rightfully strong stance on the consumption of alcohol in the workplace. However, it is not a strict 'zero-tolerance' stance as shown by the Doe example.

[8] Having considered the matters set out in s 387 of the Act, the Commissioner concluded that the dismissal was unfair. The Commissioner found that it was appropriate to reinstate Mr Macnish and relied on the following matters (at [173]):

> (a) As acknowledged by Ms Ridge, Mr Macnish was well regarded by Cabin Crew Managers who gave him "glowing" feedback.
> (b) Mr Macnish conducted himself professionally and politely throughout the investigation and the show cause processes.
> (c) Mr Macnish's engagement with the investigation process and his responses. His show cause replies showed genuine contrition and reflection. His email on Saturday 6 January 2024 demonstrated that he had reviewed Virgin's policies and summarised them in his own words. I am satisfied that Mr Macnish has learned a lasting lesson from this experience and will act accordingly if he is reinstated.

[9] The Commissioner made an order to maintain the continuity of Mr Macnish's employment but recorded that no order for backpay was sought. Accordingly, no order with respect to remuneration lost as a result of dismissal was made.

[10] In the notice of appeal, Virgin seeks a stay of the decision and order of the Commissioner and indicated that it proffered an undertaking to pay Mr Macnish's base salary plus interest from 3 September 2024 should the appeal not succeed. At the hearing of the stay application, Virgin proffered a revised undertaking in the following terms:

> The Appellant undertakes that, should the appeal not succeed, it will pay to the Respondent his wages (including any payments above his base rate based on a reasonable calculation of a 12 month average of his previous service immediately before his suspension, but applying the rates and entitlements in the Virgin Australia Cabin Crew Agreement 2023 (EA 6)) from 3 September 2024, plus interest at the rate of 10.35%, within 14 days of the judgment dismissing the appeal.

[11] Notwithstanding the revised undertaking offered by Virgin, Mr Macnish opposed a stay being granted and asserted his desire to return to work.

Principles in relation to granting a stay application

[12] The power to grant a stay pending the hearing and determination of an appeal lodged under s 604 is contained in s 606(1) of the Act, which provides:

> (1) If, under section 604 or 605, the FWC hears an appeal from, or conducts a review of, a decision, the FWC may (except as provided by subsection (3)) order that the operation of the whole or part of the decision be stayed, on any terms and conditions that the FWC considers appropriate, until a decision in relation to the appeal or review is made or the FWC makes a further order.

[13] A commonly cited formulation of the principles applicable to the grant of a stay is found in *Kellow-Falkiner Motors Pty Ltd v Edghill* [2000] AIRC 758 in which Ross VP (as his Honour then was) said:[1]

> In determining whether to grant a stay application the Commission must be satisfied that there is an arguable case, with some reasonable prospects of success, in respect of both the question of leave to appeal and the substantive merits of the appeal. In addition, the balance of convenience must weigh in favour of the order subject to appeal being stayed. Each of the two elements referred to must be established before a stay order will be granted.

[14] Assistance may also be derived from the approach adopted by the courts in relation to an application to a stay pending appeal.[2] The principles applied in those cases were summarised in *Re Transport Industry - Waste Collection and Recycling (State) Award* (2000) 102 IR 192 at [19] as follows:

> (1) The mere filing of an appeal will not of itself provide a reason or demonstrate an appropriate case nor will it discharge the onus which the applicant bears.
> (2) A court has an appropriate discretion whether or not to grant the stay and as to the terms that would be fair if a stay be granted.
> (3) The onus is upon the applicant for a stay to demonstrate a proper basis for a stay that will be fair to all the parties.
> (4) In the exercise of its discretion all considerations including the balance of convenience and the competing rights of the parties need to be considered and weighed.
> (5) Where there is a risk that the appeal will prove abortive or nugatory if the stay is not granted then the normal exercise of discretion will result in the grant of a stay.
> (6) Although, generally speaking, it is inappropriate in relation to an application for a stay to speculate as to the appellant's prospects of success, this does not prevent a court, in the context of considering the specific terms of the stay that will appropriately and fairly adjust the interests of the parties, from making a preliminary assessment as to whether the appellant has an arguable case.

[15] The authorities suggest that an applicant for a stay must positively demonstrate that the balance of convenience weighs in favour of a stay being granted. There is no *prima facie* position in favour of the granting of a stay and the grant of a stay is not to be regarded as the usual course.[3]

[16] It is appropriate to make clear that no different principles are applicable where a stay of a reinstatement order is sought. In *Supreme Caravans Pty Ltd v Pham* [2013] FWC 4766, Hatcher VP (as his Honour then was) said (at [11]):

> As to the balance of convenience, the appellant submitted that the grant of a stay in an appeal against a reinstatement order was the "normal" or "usual" course. I reject this submission. It is always the case that an applicant for a stay, even of a reinstatement order, must positively satisfy the Commission that the balance of convenience favours the grant of a stay. That there is no *prima facie* position in favour of the stay of a reinstatement order was made clear by the Full Bench in *Edwards v Telstra Corporation Limited*:
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> "We only wish to note that previous Commission decisions have suggested that where the intervention of the Commission has imposed an obligation or duty on a party then prima facie the balance of convenience would favour a stay being granted. One reason why such an approach has been adopted is that the creation of a requirement to pay monies under an award which is subsequently quashed gives rise to the practical difficulty of recovering monies paid to what may be a large number of employees covered by the relevant award. It seems to us that the difference in approach to the granting of stay orders between that taken by the Commission and the general Courts arises from the fact that the Commission is generally making or varying awards which apply to a large number of employers and employees. The same problem does not arise in respect of an order under s 170CH which is directed at an individual applicant …
> In our view previous statements about the prima facie position favouring the granting of a stay require reconsideration in the context of s 170CH orders providing for a remedy following a decision that a termination was harsh, unjust or unreasonable. In this regard we note that in *Re Thiess Watkan's White Group and others* [Print J0194, 14 November 1989 per Maddern P, Moore DP and Smith C] the Commission said:
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> > … These appeals are made on the basis that the result obtained by the FEDFA was obtained unfairly. Without canvassing the merits of the appellants' cases it appears there are issues that warrant fuller consideration by a Full Bench and that should occur, in our view, on the basis that the various orders and awards are stayed pending the hearing of these appeals. We reach this conclusion with the knowledge that the appeals will shortly be listed for hearing next month and are likely to be dealt with expeditiously. This factor is especially important in considering whether to stay the reinstatement order made by the Commissioner where employees' incomes are affected by the granting of such a stay. It may be that in a case where there is no apparently substantial challenge to the jurisdiction of the Commission to make an order for reinstatement, the Commission should be cautious about staying the operation of a reinstatement order even if an undertaking was given of the type given by the employer in these proceedings."

[17] There are potential consequences of reestablishing an employment relationship in circumstances in which it may be interrupted again if the appeal is successful. There may be cost, or inconvenience, associated with integrating the employee into the workplace. Relationships within a workplace, or the employer's operations, might be upset. The situation of the dismissed employee may be such that a possibly temporary reinstatement is not ideal. Such consequences, if they are likely to occur, will be relevant to an assessment of the balance of convenience considering whether to grant a stay of a reinstatement of order. However, the extent and significance of any potential consequences an employee returning to the workplace, and whether the balance of convenience favours the granting of a stay, will turn on a review of all the circumstances of a particular case.

Should a stay be granted?

[18] It is necessary to first consider whether Virgin has demonstrated an arguable case on appeal and with respect to permission to appeal. Mr Ellery, who appeared with permission of the Commission for Virgin, emphasised that an assessment of the grounds of appeal for the purposes of considering a stay application is preliminary in nature. Mr Ellery stressed that it is not necessary, or appropriate, to exhaustively investigate the grounds of appeal or to go further than undertaking a preliminary assessment of the grounds relied upon. This is because the Commission will not have had the benefit of hearing the appellants' arguments in full and usually will not have had the opportunity to properly peruse the relevant materials.[4]

[19] Virgin relies on four grounds of appeal which are lengthy. In short, ground 1 alleges that the Commissioner erred by improperly considering and placing weight on Mr Macnish's subjective understanding of the 8-hour rule rather than the objective content of Virgin's policies and training records; ground 2 alleges that the Commissioner erred in finding that it was reasonable for Mr Macnish to have regard only to the DAMP Manual; ground 3 alleges that the Commissioner made significant errors of fact in finding that Mr Macnish "self-referred" his breach of the 8-hour rule and that the 8-hour rule was a guideline; ground 4 alleges that the decision to reinstate Mr Macnish was unreasonable and/or plainly unjust, including in that the Commissioner failed to consider, or give adequate weight to, what were said to be Virgin's reasonable and genuinely held concerns about Mr Macnish.

[20] Virgin submits that, on the basis of these grounds, it has at least an arguable case on appeal with some reasonable prospects of success. Virgin also submits that there are reasonable grounds for the grant of permission to appeal given the appeal concerns the application of a safety policy in a safety-critical industry and because the appeal raises important questions, including as to the weight to be given to the subjective understanding of an employee of a workplace policy in the case of dismissal for breach of the policy.

[21] For the purposes of the stay application, I accept that Virgin may have an arguable case on appeal and with respect to permission to appeal albeit I have not formed any view beyond that as to the strength of the grounds upon which it relies. Based on a preliminary assessment of the type referred to above, the grounds appear to have varying degrees of strength. Ground 3 alleges errors of fact which, on one view, are premised on the Commissioner having made findings that it is not clear were made in the decision. Ground 4 faces the challenge of demonstrating that the Commissioner's exercise of discretion with respect to remedy was unreasonable and/or plainly unjust and that the Commission did not consider matters that are at least referred to in the decision.

[22] Grounds 1 and 2 raise a question as to the relevance of, or weight to be attached to, the subjective understanding of an employee of an employer's policy in circumstances in which breach of the policy is relied upon as a valid reason for dismissal. This is said to be of particular significance where the policy involved is a safety policy. It is not entirely clear to me how this ground will be developed. The reasoning of the Commissioner might be regarded as involving no more than an acceptance that it was reasonable for Mr Macnish to regard the 8-hour rule as a guideline having reviewed Virgin's policies and the training Mr Macnish had received. At

this stage, I am unable to form any firm view as to the strength of these arguments. However, I cannot say the grounds are not arguable or do not have some prospects of success.

[23] Turning to consider the balance of convenience, Virgin relied primarily on three matters said to favour a stay being granted. First, Virgin submitted that, because of his absence from the workplace, Mr Macnish would need to undertake refresher training and supervised flights prior to recommencing active duties and that, if the appeal is successful, those processes would be wasted. In that respect, Virgin relied on the witness statement of Jodie Calvert dated 29 August 2024. Ms Calvert explained that Mr Macnish would be required to undertake refresher training prior to returning to duty and that the next scheduled training is not to occur until 30 September 2024. He would then be supervised for a period before returning to full duty.

[24] The need for Mr Macnish to undertake refresher training is relevant to an assessment of the balance of convenience and I have taken it into account. However, I do not regard that consideration as having substantial weight in this case. Ms Calvert's evidence was that the refresher training is scheduled monthly, is conducted by Virgin (except for security training which is outsourced) and would be conducted for other participants whether or not Mr Macnish is involved. In those circumstances, I do not regard the requirement to provide training to Mr Macnish imposes a significant burden on Virgin.

[25] The evidence as to the requirement to undertake refresher training and supervised flights also indicates prejudice that would be caused to Mr Macnish if a stay is granted. If a stay is granted and the appeal is ultimately decided in Mr Macnish's favour, his return to active duty would inevitably be delayed beyond the period required to determine the appeal. Even after the appeal is decided, Mr Macnish would then have to undertake the refresher training and wait for a further period of weeks or (depending on the timing of the training) one to two months to return to normal duty as a cabin crew member.

[26] Mr Ellery submitted that the prejudice caused was negligible because Mr Macnish had already been away from the workplace for a substantial period. I do not accept that submission. The fact that Mr Macnish has already been away from work since he was suspended on 23 December 2023 accentuates rather than diminishes the prejudice of further delay. Ms Calvert's evidence also indicated that Mr Macnish would be required to comply with additional training requirements if his absence from the workplace exceeds 12 months. That is possible if a stay is granted.

[27] Second, Virgin submitted that it apprehends that Mr Macnish will remain a serious work health and safety risk and that this apprehension is reasonable having regard to the Commissioner's adverse findings against Mr Macnish. The difficulty with that submission is that it does not find support in the findings of the Commissioner. It is true that the Commissioner accepted that Mr Macnish had breached the 8-hour rule. However, the Commissioner found that Mr Macnish genuinely believed the 8-hour rule to be a guideline rather than a strict requirement and that it was not unreasonable for Mr Macnish to hold that view having regard to the terms of the Virgin's policies and what he had been told.

[28] The Commissioner made other findings, which are not directly challenged, relevant to an assessment of whether Mr Macnish would present a risk to health and safety if he returns to work. The steps taken by Mr Macnish before and after attending for duty on 17 December 2023

to ensure he would not breach Virgin's policies are set out at paragraph [6] above. Those steps included disclosing his consumption of alcohol to the cabin manager, checking the DAMP Manual to ensure he would not breach Virgin's policies, administering a breathalyser test and reporting himself when he realised he may have breached policy. Those actions do not suggest he is a person who is likely to disregard his employer's work health and safety policies. Having observed Mr Macnish give evidence, the Commissioner accepted that Mr Macnish had demonstrated genuine contrition and reflection and learned a lasting lesson. On the available material, I am unable to accept that Mr Macnish presents a work health and safety risk.

[29] Third, Virgin submitted that the revised undertaking addresses any financial prejudice that would be caused to Mr Macnish if a stay is granted. I do not accept that is so. The revised undertaking would restore Mr Macnish to the financial position he would have been in if reinstated from 3 September 2024 if Virgin's appeal is unsuccessful. For the purposes of assessing prejudice, the relevant comparison is between what would happen if a stay is granted or refused. If a stay is refused, Mr Macnish will have had the opportunity to perform work and earn the associated remuneration for some months. That opportunity will be lost if a stay is granted. Virgin's revised undertaking will not remedy that prejudice if Virgin's appeal is successful. When this possibility was raised in the hearing, Mr Ellery accepted this was the case. No further undertaking was proffered. This is a further matter that must be considered in relation to the balance of convenience.

[30] The submission also overlooks that the capacity to work in one's chosen occupation has an intrinsic value which is separate and distinct from the benefit of the remuneration received for the performance of such work.[5] Work is more than a way to make a living; it is a form of continuing participation in society.[6] In his witness statement in the proceedings before the Commissioner, Mr Macnish gave the following evidence:

> 126. The last four months have been the hardest and mentally darkest four months of my life. Before I started at Virgin Australia, I didn't have many friends and my social skills lacked. I also had difficulties with my mental health for many years. The people I worked with had become a second family to me, and never before in my life has my mental health flourished so much. If I had consumed that glass potentially only 30 more minutes earlier or the duty was rostered to start 30 minutes later, my entire livelihood would not have been swept out from under my feet. I would not have had to endure so much isolation, loss, and pain.
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> 127. If I was in error on 17 December last year it was, unintentional, not carried out recklessly and voluntarily reported. The honesty and courage I showed in reporting it should not have been met with the worst possible consequence. The only evidence Virgin Australia has is my self-reporting of the incident.
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> 128. If given the opportunity I would never repeat these actions again. This still can be a learning opportunity.
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> 129. I had zero other disciplinary action other than 1 late slip for being late by only a few minutes during Ground School.
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> 130. This job honestly means the world to me and no amount of money in the world could replace it. I've wanted to do this job ever since I was a little kid.

[31] Although admittedly by way of self-assessment by Mr Macnish, the witness statement speaks to the value of the actual performance of work to many individuals and of the feelings of self-worth and social connection that are often associated with participation in the workplace. Granting a stay may only prevent Mr Macnish returning to the workplace for a few months depending on the outcome of the appeal. Nonetheless, the value that Mr Macnish places on his work is a matter relevant to the assessment of the balance of convenience.

[32] Taking all the circumstances into account, the balance of convenience does not favour granting a stay. Although some inconvenience may be occasioned by refusing a stay as a result of the steps necessary to reintegrate Mr Macnish into the workforce, the possible and likely prejudice to Mr Macnish tips the balance against granting a stay of the orders of the Commissioner.

Conclusion

[33] For these reasons, the application for a stay is refused.

VICE PRESIDENT

Appearances:

N Ellery, counsel, instructed by McCullough Robertson for the Appellant.
J Nicholas, principal, Nichaolas Legal for the Respondent.

Hearing details:

2024.
Sydney (via Microsoft Teams):
30 August.

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[1] *Kellow-Falkiner Motors Pty Ltd v Edghill* [2000] AIRC 758 at [5].

[2] See, for example, *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694; *Powerflex Services Pty Ltd v Data Access Corporation* (1996) 67 FCR 65 at 66.

[3] *Supreme Caravans Pty Ltd v Pham* [2013] FWC 4766 at [11] citing *Edwards v Telstra Corporation Limited* [1998] AIRC 679, Print Q2467.

[4] *Construction, Forestry and Maritime Employees Union v UGL Rail Services Pty Ltd* [2024] FWC 2167 at [24].

[5] *Blackadder v Ramsay Butchering Services Pty Ltd* [2005] HCA 22; (2005) 221 CLR 539 at [32] (Kirby J) and [80] (Callinan and Heydon JJ); *Quinn v Overland* [2010] FCA 799; (2010) 199 IR 40 at [101] (Bromberg J); *Maritime Union of Australia v Fair Work Ombudsman* [2016] FCAFC 103; (2016) 247 FCR 154 at [22] (Tracey and Buchanan JJ).

[6] *Transport Workers Union of Australia v Qantas Airways Ltd (No 4)* [2021] FCA 1602; (2010) 312 IR 133 at [139] (Lee J).