DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Travis Cairns
v
Oceaneering Australia Pty Ltd
(U2024/3475)

COMMISSIONER JOHNS MELBOURNE, 28 OCTOBER 2024

Application for an unfair dismissal remedy

Introduction

[1] On 26 March 2024, Mr Travis Carins (**Applicant**) made an application to the Fair Work Commission (**Commission**) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy in respect of his dismissal by Oceaneering Australia Ptd Ltd (**Respondent**).

[2] The Respondent dismissed the Applicant on grounds of serious misconduct, alleging breach of company policies related to privacy and workplace behaviour. The Applicant denies any misconduct, claiming that his actions were part of his lawful union activities as an Australian Manufacturing Workers Union (**AMWU**) delegate.

[3] For the reasons that follow, I have determined that the dismissal was unfair.

Background

[4] The following matters were either agreed between the parties or not otherwise substantially contested:

(a) The Applicant was employed by the Respondent as an Advanced NDT Technician from 2 October 2017 until his dismissal on 5 March 2024.[1] His role involved conducting Non-Destructive Testing (**NDT**) services to assess the structural integrity of industrial equipment, particularly in offshore environments.[2] He was a fly-in/fly-out (**FIFO**) worker. These services were part of the Respondent's contract to provide NDT and inspection services in the Bass Strait.[3]
(b) The NDT workforce comprised of approximately 38 employees, split into two shifts. The Applicant worked one of these shifts. The Applicant was also a delegate for the AMWU.[4]
(c) As an AMWU delegate, the Applicant played an active role in the collective bargaining process for the NDT workforce under the *Oceaneering Australia Pty Ltd Offshore NDT*

& Inspection Agreement 2021. To facilitate communication during this process, the Applicant created a WhatsApp group chat in April 2023, inviting his colleagues to discuss bargaining claims and workplace issues. By May 2023, approximately 30 employees from both shifts had joined the group. [5]

(d) The Applicant also created a spreadsheet using OneDrive, which he shared in the WhatsApp group. This spreadsheet catalogued bargaining claims and suggestions. The table comprised the headings "Name", "Membership" and "Phone".[6]

(e) On 5 October 2023, the Applicant shared a message in the WhatsApp group celebrating that Shift 2 had achieved 100% union membership. He accompanied this message with a screenshot of the spreadsheet, showing employees who were AMWU members, and wrote "Shift 2 = 100% [stars with hearts for eyes emoji]".

(f) Around 6 weeks after the posting, the message prompted complaints from two employees who expressed concern about their union membership status and phone numbers being shared without their consent.[7]

(g) Following the complaints, the Respondent initiated a disciplinary process. On 17 November 2023, the Applicant was stood down with full pay while the company conducted an external investigation.[8] The investigation focused on allegations of unauthorised sharing of personal information and potential targeting of non-union employees.

(h) On 15 December 2023, the Applicant was provided with allegations and invited to attend a meeting.

(i) On 18 December 2023, the Applicant attended a first meeting. The Applicant requested further and better particulars of the allegations. During the meeting, the investigator indicated he had not seen the entire WhatsApp chat. The Applicant offered to provide it to him, and later did so.

(j) On 19 February 2024, the Respondent informed the Applicant that the investigation had substantiated three of the four allegations made against him (**Outcomes Letter**). The Respondent determined that his actions had breached workplace policies concerning privacy and respectful conduct.[9] The Outcomes Letter went on to state, "The Company has not yet made a decision in relation to your ongoing employment."[10]

(k) On 22 February 2024, the Applicant provided his response to the Outcomes Letter.

(l) On 23 February 2024, the Applicant received a letter (**Show Cause Letter**) directing him to attend a meeting "to show cause why [his] employment should not be terminated on account of alleged serious misconduct". The Show Cause Letter made a new allegation (not particularised) of his behaviour having "had the effect of humiliating and intimidating other Oceaneering employees."

(m) On 27 February 2024, the Applicant attended a further meeting. There is some dispute about the respective behaviour of those in attendance.

(n) On 5 March 2024, the Respondent terminated the Applicant's employment citing serious misconduct. He was paid five weeks' salary in lieu of notice.[11] The Applicant subsequently lodged an application with the Fair Work Commission arguing that his dismissal was unfair and asserting that his actions were consistent with his responsibilities as a union delegate.

Procedural history

[5] The procedural history of this matter prior to the recusal decision was previously detailed in my decision [2024] FWC 1912, issued on 22 July 2024, dismissing the recusal application.

[6] Following the recusal decision, a determinative conference to address the merits of the unfair dismissal application took place on 23 July 2024, 30 July 2024, and 5 August 2024.

[7] On 9 August 2024, my Chambers issued directions for the filing of closing submissions. The Respondent was directed to file its closing submissions by 19 August 2024, and the Applicant by 26 August 2024.

[8] On 19 August 2024, the Respondent duly filed its closing submissions. On 26 August 2024, the Applicant sought, and was granted, a one-day extension (with the Respondent's consent) to file its closing submissions, which were subsequently filed on 27 August 2024.

[9] In advance of the determinative conference, both parties submitted materials, which were compiled into a Digital Tribunal Book (**DTB**). For completeness, I list below the documents relied upon by the parties, all of which have been considered in making this decision:

No.	Document title	Date
1	Form F2 – Unfair Dismissal Application	26-03-2024
1.1	TC-01 – Correspondence regarding Investigation Findings	06-03-2024
1.2	TC-02 – Correspondence providing Show Cause Response	19-02-2024
1.3	TC-03 – Correspondence regarding Termination of Employment	22-02-2024
2	Form F3 – Employer Response Form	18-04-2024
3	Applicant's Outline of Submissions	17-06-2024
3.1	Statement of Witness – Applicant	17-06-2024
3.1.1	TC-1: Final Payslip	14-03-2024
3.1.2	TC-2: Correspondence from WhatsApp Group Chat	Various
3.1.3	TC-3: Sheets in the OneDrive Spreadsheet	Undated
3.1.4	TC-4: Screenshot of Mr Colin Rodd's Email	04-10-2023
3.1.5	TC-5: Screenshot of Spreadsheet linked to Mr Rodd's Email	13-12-2023
3.1.6	TC-6: Email from Mr Patrick Hill with Attachments	Various
3.1.7	TC-7: Correspondence from Ms Elizabeth Prewett	19-02-2024
3.1.8	TC-8: Email from Applicant providing Show Cause Response	Various

3.1.9	TC-9: Correspondence regarding Show Cause Interview	23-02-2024
3.1.10	TC-10: Copy of Termination Letter	06-03-2024
3.1.11	TC-11: Facebook Message from Andy Considine	Undated
3.1.12	TC-12: Copy of LinkedIn Chat with Chris Hammon	Various
4	The Respondent's Outline of Submissions	01-07-2024
4.1	Application for Confidentiality Orders	01-07-2024
4.2	Draft Order – Confidentiality Evidence	01-07-2024
4.3	Statement of Witness – "Alpha"	27-06-2024
4.4	Statement of Witness – "Omega"	29-06-2024
4.5	Statement of Witness – "Delta"	01-07-2024
4.6	Statement of Elizabeth Prewett	01-07-2024
4.6.1	EP – 1: Stand Down Notice – without Prejudice	17-11-2023
4.6.2	EP – 2: Code of Business Conduct and Ethics	01-06-2012
4.6.3	EP – 3: Human Resources Policy Manual	26-04-2013
4.6.4	EP – 4: Fair Treatment at Work	26-04-2013
4.6.5	EP – 5: Offer of Employment	15-08-2017
4.6.6	EP – 6: Company Policies Acceptance Form	28-08-2017
4.6.7	EP – 7: Applicant's Training Logs	Various
4.6.8	EP – 8: Training Transcript for Applicant	Various
4.6.9	EP – 9: Correspondence regarding Investigation Findings	19-02-2024
4.6.10	EP – 10: Show Cause Response	22-02-2024
4.6.11	EP – 11: Show Cause Interview – Allegations of Misconduct	23-02-2024
4.6.12	EP – 12: Termination of Employment	06-03-2024
4.6.13	EP – 13: Screenshot of LinkedIn Message	08-05-2024
4.6.14	EP – 14: Screenshot of LinkedIn Message	Undated
4.6.15	EP – 15: Print of Website	Undated

4.6.16	EP – 16: Details for ABN 95 768 105 856	01-07-2024
5	Applicant's Submissions in Reply – FTC – 1 – Text Exchange with "Omega" – FTC – 2 – Images and Gifs – FTC – 3 – Profit and Loss Statement	19-07-2024
5.1	The Applicant's further statement	19-07-2024
5.2	Statement of Witness – Colin Leggett – CL – 01 – Screenshot of WhatsApp Message to Applicant	19-07-2024
5.3	Statement of Witness – Simon Peel	19-07-2024
5.4	Statement of Witness – Daniel Peatey	19-07-2024

[10] On 22 July 2024, the Applicant emailed my Chambers seeking consent to file a further witness statement by Mr. Colin Leggett, which has been marked as **Exhibit 6** in these proceedings.

[11] **Exhibit 7** is a Bundle of Produced Documents, which includes various attachments such as three company policies and a confidential investigation report.

[12] On 29 July 2024, the Respondent submitted a supplementary witness statement from Ms. Elizabeth Prewett, which has been marked as **Exhibit 8**.

[13] On 5 August 2024, the Respondent filed the script of the Applicant's termination meeting, which has been marked as **Exhibit 9**.

Protection from Unfair Dismissal

[14] An order for reinstatement or compensation may only be issued where the Commission is satisfied the Applicant was protected from unfair dismissal at the time of the dismissal.

[15] Section 382 sets out the circumstances that must exist for the Applicant to be protected from unfair dismissal:

> '**382 When a person is protected from unfair dismissal**
>
> A person is ***protected from unfair dismissal*** at a time if, at that time:
>
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
>
> (b) one or more of the following apply:
>
> (i) a modern award covers the person;
>
> (ii) an enterprise agreement applies to the person in relation to the employment;
>
> (iii) the sum of the person's annual rate of earnings, and such other

amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high-income threshold.'

[16] There is no dispute, and the Commission, as presently constituted, is satisfied, the Applicant has completed the minimum employment period and was covered by a modern award. Consequently, the Commission, as presently constituted, is satisfied the Applicant was protected from unfair dismissal.

[17] I will now consider if the dismissal of the Applicant by the Respondent was unfair within the meaning of the FW Act.

Was the dismissal unfair?

[18] A dismissal is unfair if the Commission is satisfied, on the evidence before it, that all of the circumstances set out at s.385 of the FW Act existed. Section 385 provides the following:

'**385 What is an unfair dismissal**

A person has been ***unfairly dismissed*** if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Note: For the definition of ***consistent with the Small Business Fair Dismissal Code***: see section 388.'

Was the Applicant dismissed?

[19] A person has been unfairly dismissed if the termination of their employment comes within the definition of 'dismissed' for purposes of Part 3–2 of the FW Act. Section 386 of the FW Act provides that:

'**386 Meaning of *dismissed***

(1) A person has been ***dismissed*** if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.'

[20] There is no dispute, and the Commission, as presently constituted, is satisfied, the Applicant has been dismissed.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[21] A person has not been unfairly dismissed where the dismissal is consistent with the Small Business Fair Dismissal Code (**the Code**).

[22] The Respondent did not contend that the Code applied. Therefore, this is not a relevant consideration.

Was the dismissal a genuine redundancy?

[23] The Respondent did not submit that I should dismiss the application because the dismissal was a case of genuine redundancy. Therefore, this is also not a relevant consideration.

Harsh, unjust or unreasonable

[24] Having been satisfied of each of s.385(a),(c)-(d) of the FW Act, the Commission must consider whether it is satisfied the dismissal was harsh, unjust or unreasonable. The criteria the Commission must take into account when assessing whether the dismissal was harsh, unjust or unreasonable are set out at s.387 of the FW Act:

> '**387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.'

[25] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:

> '.... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.'

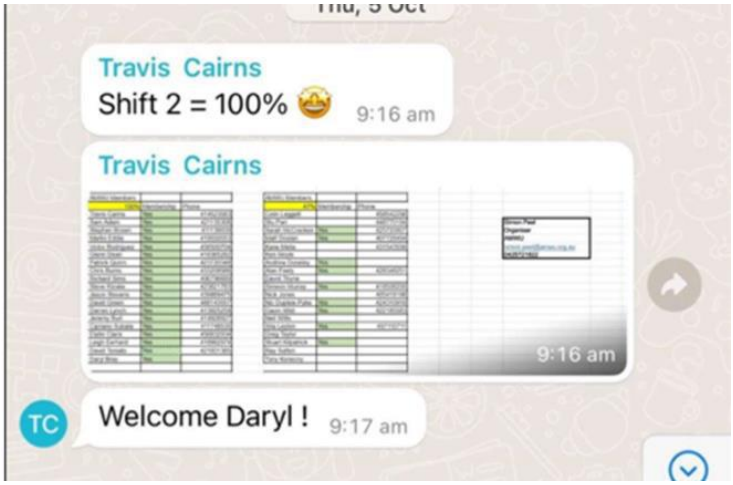
[26] I am under a duty to consider each of these criteria in reaching my conclusion.[12]

[27] I will now consider each of the criteria at s.387 of the FW Act separately.

Valid reason - s.387(a)

[28] The Respondent must have a valid reason for the dismissal of the Applicant, although it need not be the reason given to the Applicant at the time of the dismissal.[13] The reasons should be "sound, defensible and well founded"[14] and should not be "capricious, fanciful, spiteful or prejudiced."[15]

[29] The Respondent submits that the dismissal of the Applicant was justified due to misconduct relating to his posting of a spreadsheet in a WhatsApp chat group on 5 October 2023. This spreadsheet, which was an image of a table, listed the names of all the Respondent's employees, working across the two shifts. The spreadsheet also contained columns headed "Membership" and "Phone". Some of the rows under each heading were blank. The Applicant posted the spreadsheet with a message stating "Shift 2 = 100%".[16]



[30] The Respondent submits that it was this conduct that breached several company policies and created a hostile work environment for non-union members.

[31] The relevant parts of the Respondent's policies that were cited in relation to the Applicant's dismissal include the Code of Business Conduct and Ethics, the Human Resources Policy Manual, and the Fair Treatment at Work Policy.[17] The Applicant did not dispute that he was aware these policies as part of his employment obligations.[18]

[32] The relevant parts of the Respondent's policies cited in relation to the Applicant's dismissal include the following:

1. Code of Business Conduct and Ethics, section 6.1, states that the company expects all employees to promote a positive working environment and will not tolerate any form of illegal discrimination. It provides:

> 6 Our Commitment to Each Other
>
> We expect each employee to promote a positive working environment for all.
>
> 6.1 Respect for Our Employees
>
> Our Company's employment decisions will be based on reasons related to our business, such as job performance, individual skills and talents and other business-related factors. Our Company policy requires adherence to all national, state or other local employment laws. We will not tolerate illegal discrimination of any kind.[19]

2. Human Resources Policy Manual, section 4.9.1, outlines that private information about employees must be handled with care and should only be shared with proper authorisation. The policy states:

> 4.9.1 Privacy
>
> Note that one example of laws both Oceaneering and the employee are bound to comply with are those relating to Privacy, at both the State and Federal level. The Privacy Act protects the way an individual's personal information is handled and Oceaneering is compliant with current legislation.
>
> In the conduct of an employee's work, you may come across private information relating to another employee, a client or to a potential employee. This may be during the recruitment process, the Professional Development and Review process, a disciplinary process or simply during the course of a confidential conversation as part of your job.
>
> Any such personal information should be stored in a confidential and secure manner. This information should not be used for any purpose other than that for

which it was intended. This information should not be discussed with anyone, or passed to any third party other than one who is clearly required to perform the task for which the information was gathered. No information should be shared or requested about a third party unless you have been authorised by the person concerned.

When this information is no longer required it should be destroyed. Oceaneering will take any breaches of the privacy laws by employees very seriously and may resort to disciplinary action or termination, as appropriate.

Employees should note that whilst people generally have a right to request access to their personal information that there are certain exceptions that relate to the employer and employee relationship and Oceaneering may choose to rely on such exceptions from time to time, as it deems necessary.[20]

Section 5.1 of the same manual emphasises adherence to company rules regarding confidentiality, fairness, and respect in all dealings:

5.1 Employee Standards

The standards expected of employees include:

- Compliance with all company policies, procedures, rules, regulations and contracts.
- Compliance with all reasonable and legal instructions of managers and supervisors.
- Honesty and fairness in dealings with customers, clients, co-workers, company management and the general public.
- Maintaining punctuality, attendance and reliability.
- Maintenance of work performance standards and expectations as outlined in the Position Description.
- Adherence to health, safety, environmental and quality policies and procedures.
- Respect of the company's ownership of all company funds, equipment, supplies, books, records and property.
- Maintenance of the confidentiality of any privileged information, records or other materials acquired during the course of employment and not use this information as a means of making personal profit.
- During your employment at Oceaneering, not to accept any employment with another organisation that is a supplier or competitor or takes on any other employment that is in conflict with your position at Oceaneering without the prior approval of the relevant Oceaneering Director.
- Raising any concerns about a conflict of interest immediately with your manager or supervisor.

- Maintain integrity, efficiency, fairness and impartiality in all dealings and under no circumstances will business interests or advantage be achieved through unlawful monetary incentives, favours, bribes or deceit.
- Dress in an appropriate manner (Personal Protective Equipment where this is required) and to ensure that appearance is presentable, clean and tidy.
- Refrain from making any unauthorised statements to the media about the company's business (requests for media statements are referred to the Directors).
- No physical fighting in the workplace.
- Treat other employees and clients with dignity, respect and sensitivity as to their rights and cultural background.
- No unlawful harassment (verbal, psychological, physical or sexual) or bullying in the workplace.
- No non-prescribed or illegal drugs or unauthorised alcohol in the workplace.
- Compliance with the employment requirements of their Contract of Employment.
- Work effectively and collaboratively as a team member.[21]

3. Fair Treatment at Work Policy, section 7.2, provides the following in respect of discriminatory harassment:

> 7.2 Discriminatory Harassment
>
> Oceaneering employees and other persons present at a Workplace must not engage in Discriminatory Harassment. Discriminatory Harassment is conduct by one person toward another person on the basis of an Attribute that is reasonably likely to humiliate, offend, intimidate or distress that person. A person can be subjected to Discriminatory Harassment on the basis of their association with someone with an Attribute.
>
> It is irrelevant whether or not the person engaging in the harassment intends for the conduct to humiliate, offend, intimidate or distress the other person. Harassing behaviour can range from very serious to less serious. One-off incidents can still constitute harassment.
>
> - For example, behaviour such as imitating a person's accent may constitute Discriminatory Harassment based on race.[22]

[33] The Respondent relied upon the witness statements provided by Alpha and Omega, two employees whose names were listed in the spreadsheet. Both employees testified that they thought the blank space next to their name under the heading "Membership" identified them as not being a member of the AMWU and that they felt marginalised and concerned about the potential harassment in the workplace due to the publication of their private information. Parts of each of the witness statements of Alpha and Omega were objected to and addressed during the hearing.

[34] The statement of witness "Alpha" after the resolution of objections read as follows:

Introduction

1. I am currently employed by Oceaneering Australia Pty Ltd (Company).
2. I work offshore in relation to the non-destructive testing (NDT) services the Company provides to its clients, including Esso.
3. I have a number of years of experience working in the construction and maintenance industries.

Publishing of my personal details

4. In around October/November 2023 I became aware that my personal details had been published without my consent.
5. [objected to] …
6. I don't recall who showed it to me, but I saw a copy of a message on another employee's phone, that had been sent to a group of employees in my work group. My name was listed with other Company employees. The list indicated whether each person was a member of the AMWU. I thought it indicated that I was not a member of the AMWU. I am not a member of the AMWU
7. Another employee, Travis Cairns, had circulated the list to the message group. I was not on the message group.
8. I was disgusted that, without my knowledge or consent, my name was on a list sent to members of my work group that indicated I was not a paid member of the AMWU. I believed that was against the law, and Company policy, and not anyone else's business.
9. I was concerned that I and other Company employees who were not union members may be ostracised and victimised by the general offshore workforce [objected to] …
10. Working offshore is very confined and very personal. We sleep in cabins with other workers that we don't always know, not just employees of Oceaneering. I share living space with employees of other contractors, some of whom are very militant union members. We sleep with numbers ranging from two to four people to a small room and share the same facilities.
11. [objected to] …
12. [objected to] …
13. [objected to] …
14. I was concerned about the way I might be treated by other workers offshore if they knew I was not a member of the union. I did not want to be forced to resign my position and lose my position through no fault of my own.
15. The message group started conversations in the workplace about why some people were not in the union.
16. I felt the publication of the information about whether employees were members of the union was a form of harassment.
17. Previously I was a member of the AMWU but chose to resign because of the lack of real support and care they generally have for their members.

Complaint and Investigation

18. Later in around mid-November 2023, I spoke with my supervisor about the issue.
19. On around 29 November 2023 I sent a confidential email to Human Resources about the issue. I stated in the email that I wanted to remain anonymous. I wanted to remain anonymous for reasons previously mentioned above.
20. In around early December 2023 I was interviewed by a representative of the Australian Resources and Energy Employer Association (AREEA) who I understood had been engaged by the Company to investigate my complaint.
21. I told the AREEA Representative about what I have set out above regarding the message sent to my work group.
22. Just before Christmas in December 2023, I was contacted by Damien Singh from HR regarding the investigation. We discussed speaking with the AREEA representative again. I said that I may have some more information relating to the investigation.
23. I was interviewed again by a representative of AREEA on around mid- January.
24. I told the AREEA representative:
    (a) I had had very little contact with other employees since my first interview, due to breaks and the type of work I had done in that time.
    (b) During one day I worked, I noticed a change in people's attitude to me. One person in particular whom I know to be an active union member wouldn't look me in the eye or engage with me.
    (c) I believed that Travis Cairns or anyone else should be held accountable for these unacceptable, illegal actions. I thought it was clearly a breach of Company policies and I believed that the Company has a duty of care to myself and any other worker that is in the same position as myself.
    (d) If the Company did not make an appropriate response to the behaviour of Travis Cairns, then I would take my complaint further.
    (e) I suggested that the AREEA representative speak with some other employees about whether they have been bullied in the past.

My concern about publishing of my personal details

25. My complaint related to the publication of my name in a way that indicated that I was not a union member. It was not based on any direct experience at the time of being ostracised by other employees, but based on my past experience, I thought that may occur…[23]

[35] Under cross-examination, the witness Alpha maintained his concern regarding the spreadsheet shared in the chat, which displayed his name alongside a black space under the "Membership" column. Alpha found this identification unacceptable because, according to him, it specifically singled him out as a non-union member. The witness clarified that he did not have a difficulty with being identified as a person on Shift 1. When asked if he could a see a difference between the statement "This man is not a union member" and "This man may not be a union member", Alpha accepted that a distinction exists. He stated that he might interpret the two statements differently if presented with them explicitly but maintained that, in this specific

context, the spreadsheet's blank space next to his name lacked any indicator of union affiliation, which he interpreted as a definitive indication that he was not a union member.

[36] The statement of witness "Omega", after the resolution of objections, read as follows:

Introduction

1. I am currently employed by Oceaneering Australia Pty Ltd (Company)
2. The Company provides non-destructive testing (NDT) and Inspection services to customers, including in the oil and gas industry. One customer in the oil and gas industry is ExxonMobil, which is often still referred to as Esso.
3. For quite a few years, I have done NDT work for the Company on Esso sites. The work involves working with other employees of the Company and workers employed by Esso and other contractors. We work and live in close proximity when working an offshore cycle.
4. The workplace is a hazardous environment, where our focus needs to be on safety as the number one priority. Maintaining good relationships amongst the work group is important.
5. I have a number of years' experience doing NDT work, both offshore and onshore, in the oil and gas industry. That includes work in the Bass Strait and on Esso sites.
6. In my experience, there has been a lot of union activity on Esso sites and in relation to work in the Bass Strait. There have been some serious industrial disputes. During the disputes, non- union members have sometimes been called scabs, and been disrespected by other workers.
7. I was a member of a union for a number of years.
8. I have not been a member of a union for several years now. I have chosen not to be a member of a union. That choice is important to me.

Publishing of my personal details

9. In around October 2023 I became aware that my personal details had been published without my consent. My name had been included in a spreadsheet, that was circulated by another employee of the Company, Mr Travis Cairns, in a WhatsApp group he had set up.
10. I saw the WhatsApp group messages and the spreadsheet.
11. The spreadsheet included a list of names of employees of the Company, and a column regarding whether the person named was a member of the AMWU. It indicated many employees in the list were union members. That column was blank next to my name, and the names of some other employees who worked on my shift. There was also a column for telephone numbers.
12. I believe that the spreadsheet circulated by Travis Cairns publicly identified me as a non-union member. I was shocked and concerned.
13. I was concerned about being publicly identified as a non-union member. Based on my past experiences, I thought that may mean that I would be treated differently in the workplace. I was worried that I may be disrespected by other workers. Nobody wants to be called a scab or made to feel like they are not part of the team.

14. I was also shocked that my personal details had been published without my knowledge or approval. Sharing my personal information has made me feel like my privacy had been invaded. Privacy issues are often covered in the media, and in this day and age I was shocked that someone would do this.
15. The Company has rules regarding our responsibilities as employees in relation to confidentiality and handling personal information. These rules have been covered in training modules I have completed.
16. Originally, I had understood that the WhatsApp group had been set up to communicate about issues leading into the renegotiation of the enterprise agreement later in 2024. But it later appeared from the messages that it was being used for union recruitment.
17. I did not wish to be affiliated with the union. I felt like I was being pressured to join the union, to be part of the team. Being made to feel like I have to join the union by someone else's choice instead of my own is not a good feeling.

My Complaint

18. In around November 2023, I complained about the conduct of Travis Cairns to my supervisor.
19. Later in November 2023, I put my complaint in writing. I sent a confidential written complaint to the Company's Human Resources department about Travis Cairns publishing my personal details without my consent. I provided the complaint on the basis that I would remain anonymous.
20. In around early December 2023 I was interviewed by a representative of the Australian Resources and Energy Employer Association (AREEA), who I understood had been engaged by the Company to investigate my complaint.
21. I told the AREEA representative about the conduct of Travis Cairns that I have referred to above, and my concerns.
22. After the AREEA first interview, I spoke with Damien Singh from HR and my supervisor, Colin Roads, on a confidential basis about the investigation of my complaint. I was informed that my complaint was being taken seriously, and that Travis Cairns had been stood down pending the outcome of the investigation. I confirmed that interview had taken place and asked if they could keep me updated.
23. I spoke with Damien Singh on around 22 December 2023 about the progress of the investigation. I told him I was prepared to speak with the AREEA representative again about further information relating to the investigation.
24. I was interviewed again by a representative of AREEA in around mid-January.
25. I told the AREEA representative:
    a. I had had no direct contact with Travis Cairns since my first interview.
    b. I had heard other employees on my shift discussing the fact that Travis Cairns had been stood down and that an investigation was being conducted.
    c. I was deeply offended and extremely disappointed when I discovered that I had been identified in a public forum as being a non-union member. I felt shock, bewilderment and anger.
    d. I expected a disciplinary response to Travis Cairns' conduct.

e. Failing appropriate response by the Company, I would reassess my position and consider resigning.
f. I suggested that the AREEA representative also interview some other employees, who I thought may have been pressured to join the union (although I had no direct knowledge if that had taken place).

My concern about publishing of my personal details

26. My complaint was not based on any direct experience at the time of inappropriate behaviour by any Company employee resulting from the publication of my details. I complained because I was concerned that, without my consent, I had been identified in the workplace as not being a union member. I was worried that I would be treated differently.
27. I am still concerned about that, and I do not wish to be publicly identified. In this statement I have used the name "OMEGA" and have signed this statement with the mark "Z". I am concerned that I will be subject to disrespectful conduct by other workers in the workplace if I am identified.
28. [objected to] …

[37] Under cross-examination, the witness Omega clarified that his primary concern was not the inclusion of his name in the spreadsheet but rather the indication that he was not a member of the AMWU, which he felt was made evident by the spreadsheet shared by the Applicant. When asked if he would be concerned about simply having his name revealed to his colleagues on shifts, Omega stated that he was only troubled by the implication that he was not a union member, as his colleagues already knew his name. The witness was presented with a hypothetical scenario where some employees displayed AMWU badges during enterprise bargaining. Omega accepted that in such a case, an observer might assume someone not wearing a badge was not an AMWU member, although it could also mean the person chose not to disclose their membership.

[38] The Respondent submitted that it initiated an investigation after these complaints were lodged. The investigation, conducted by the Australian Resources and Energy Employer Association (AREEA), concluded that the Applicant's actions were in breach of the above policies.

[39] The Outcomes Letter from the Respondent to the Applicant dated 19 February 2024 set out the four allegations and referred to the particular sections of the Respondent's policies that were relevant to the allegations:

Allegation One

On or around 5 October 2023, in a group chat forum of approximately 29 participants, you published the personal details of employees on Shift 1 and Shift 2 including phone numbers and whether or not those individuals were members of the union.

Finding

On the balance of probabilities, Allegation One is substantiated regarding the disclosure of individuals who were not union members and amounts to a breach of:

- Code of Business Conduct and Ethics (section 6, 6.2)
- Human Resources Policy Manual (section 4.9.1 and 5.1)
- Fair Treatment at work policy (section 7.2)

Allegation Two

Your communication in this chat forum has had the effect of targeting and/or marginalising those on Shift 1 and Shift 2 who may not wish to join the union.

Finding

On the balance of probabilities allegation two is substantiated and amounts to a breach of the:

- Code of Business Conduct and Ethics (section 6.2)
- Human Resources Policy Manual (section 5.1)
- Fair Treatment at work policy (section 7.2)

Allegation Three

The result of your communications and disclosure of personal information is that individuals who are not members of the union have been harassed and/or marginalised creating a health and safety risk.

Finding

The behaviour did humiliate, offend, intimidate and distress the Primary Complainants. The Attribute in question was their non-membership of the AMWU.

The six weeks between the first and second interviews had not diminished the psychological impact on these employees. It is reasonable to conclude that the conduct of Cairns has had the affect of engaging in Discriminatory Harassment.

On the balance of probabilities allegation three is substantiated and amounts to a breach of the:

- Code of Business Conduct and Ethics (section 6.2)
- Human Resources Policy Manual (section 5.1)
- Fair Treatment at work policy (section 7.2)

Allegation Four

Your communications are alleged to have infringed an employees' freedom of association right to not become members of an industrial association (i.e union).

Finding

> The fact that Witness 2 revealed the repeated nature of Cairns' public recruitment attempts of non-members on his shift indicates that Cairns was not prepared to accept any responses that were non-compliant. This could be construed as an infringement of an employees' freedom of association right to not become a member of an industrial association under the Fair Work Act 2009.
>
> On the balance of probabilities allegation four is partially substantiated and amounts to a breach of the:
>
> - Fairwork Act 2009 (Cth) ss 346
> - Code of Business Conduct and Ethics (section 6, 6.1, 9.1)
> - Human Resources Policy Manual (section 5.1)
> - Fair Treatment at work policy (section 7.1).[24]

[40] Before me allegation 4 was abandoned as a basis for establishing a valid reason for the dismissal of the applicant.[25]

[41] The Respondent submitted that the spreadsheet and message in the WhatsApp group had the effect of harassing and marginalising non-union employees, particularly those on Shift 1, who felt pressured to join the union due to the comparison to Shift 2, which was 100% unionised.[26] It was submitted that the Applicant had previously used the WhatsApp group to discuss union density and his message on 5 October 2023 was viewed as part of a broader pattern of union recruitment efforts that created division among employees.[27]

[42] The Applicant submitted that his actions were part of his duties as an AMWU delegate and were in line with normal union activity. He argues that the WhatsApp group was created to facilitate communication between employees about enterprise bargaining and other work-related matters. As the group grew, it became apparent that not all members had each other's phone numbers, which led the Applicant to add a spreadsheet that included employees' names, phone numbers, and union membership status. The Applicant states that the inclusion of union membership information was for the purpose of tracking union density, which is a common practice among union delegates.[28]

[43] The Applicant asserts that many employees voluntarily provided their phone numbers and union status, either by editing the spreadsheet themselves or by requesting the Applicant to update it on their behalf. He denies that the spreadsheet was intended to pressure or marginalize non-union members, and he argues that his message, "Shift 2 = 100%," was a celebratory post meant to highlight the unionization of his shift, not to shame or harass non-union employees.[29]

[44] The Applicant disputes the Respondent's claim that the spreadsheet identified employees as non-AMWU members.[30] He argues that the spreadsheet did not explicitly label anyone as a non-member and that any negative reaction from Alpha and Omega was based on a misunderstanding.[31] The Applicant further submits that union delegates routinely assess union density as part of their role in enterprise bargaining and that his actions were aligned with these responsibilities.[32]

[45] The Applicant contends that there was no objective evidence that his actions caused harm or violated privacy laws. He argues that the emotional reactions of the complainants were exaggerated and based on subjective interpretations of the spreadsheet, which did not objectively identify any employee as a non-union member. The Applicant emphasises that there was no evidence of any adverse treatment of Alpha or Omega following the publication of the spreadsheet, and he suggests that their reactions were driven by misunderstandings rather than any real impact on their working conditions.[33]

[46] The Applicant also contends that Mr. Leggett's comment about "shaming" employees for not joining the union was a throwaway remark and not an accusation of harassment.[34] He argues that the Respondent's reliance on this comment is misplaced, and the investigation failed to consider the broader context of normal union delegate activities, which include assessing union membership.

Consideration

[47] There is no dispute between the parties that the Applicant posted the spreadsheet in the WhatsApp group on 5 October 2023.

[48] The issues to be determined are whether the act of posting by the Applicant:

a) resulted in him publishing "personal details of employees on Shift 1 and Shift 2 including phone numbers and whether or not those individuals were union members." (Allegation 1),
b) had "the effect of targeting and/or marginalising those on Shift 1 and Shift 2 who may not wish to join the union" (Allegation 2),
c) resulted in "individuals who are not members of the union [being] harassed and/or marginalised creating a health and safety risk." (Allegation 3).

[49] Only if any of Allegations 1, 2 and/or 3 are made out do I then need to consider whether the conduct is a valid reason for the dismissal in the sense that it is a justifiable response to what I find the Applicant did.

Allegation 1 – published personal details

[50] How the spreadsheet came into existence is not in dispute. Largely it was self-populated by employees on each of Shift 1 and Shift 2. Sometimes the Applicant populated cells in the table with the permission of the relevant employee (because of their inability to do so).

[51] In respect of Shift 2, every cell is populated except one phone number is missing. Against every name on Shift 2 under the heading "Membership" there is recorded "Yes". The table records "100%". I understand this to mean that there was 100% union density on Shift 2. It was this fact that the Applicant acknowledged in his 5 October 2023 post when his wrote "Shift 2 = 100% [stars with hearts for eyes emoji]". As a union delegate, in the context of bargaining, there is nothing wrong with the Applicant celebrating the union's recruitment efforts.

[52] Concerning the Shift 1 list:

a) 19 people are listed.
b) in respect of 9 people, there is a blank cell under the heading “Membership”.
c) in respect of 8 people, there is a blank cell under the heading "Phone”.
d) in respect of 6 people, there is a blank cell under both the “Membership” and “Phone” headings. Witnesses Alpha and Omega are 2 of the 6.

[53] The identity of each of the people on Shift 1 was not confidential nor personal information. No breach of any policy arises out of the list of names.

[54] There has been no compliant from any employee that their phone number was on the list. Witnesses Alpha and Omega do not have their phone numbers listed. Where there are blanks in the cells under “Phone”, the logical conclusion is that the person’s phone number is unknown. No breach of any policy arises out of the list of phone numbers.

[55] In fact, the evidence is that the Applicant had witness Omega’s phone number, but did not add it to the spreadsheet because witness Omega had not volunteered that to the group.[35] The Applicant was respectful of that. Further the Applicant asked witness Omega if he could join witness Omega to the group chat. Witness Omega replied “No worries mate your call”[36]

[56] When completing the “Membership” column, it seems that the entries could have been “Yes”, “No”, “Unknown”, “Not disclosed.” However, in the published spreadsheet, only those where the union membership is known is the word “Yes” recorded.

[57] The logical conclusion is that where there is a blank in the cell under “Membership”, the person’s union membership is unknown (just as their phone number is unknown where that cell is blank).

[58] There is simply nothing in the table, read in context, to suggest that the necessary conclusion must be that the person is not a member of the union. Both witnesses Alpha and Omega assumed this to be the case (because they knew about their respective non-union membership). But, in reality, no one else knew. The subjective and not entirely logical view of witnesses Alpha and Omega should not prevail. Regrettably their views were given too much primacy by the Respondent, and, it seems, coloured the Respondent’s objectivity.

[59] The reference in the Shift 1 table to “53%” simply records that 53% of the shift are known “Yes” members. It does not follow that 47% are not members of the union. The only conclusion to be drawn is that 47% are unknown. No confidential or personal information is disclosed by virtue of a blank cell in the table. Consequently, no breach of any policy arises out of the list of blank cells under the heading “Membership”.

[60] For these reasons I reject the Respondent’s finding that Allegation 1 was “substantiated’.

Allegation 2 – had the effect of targeting/marginalising

[61] The evidence of witnesses Alpha and Omega does not support an allegation that the "effect" of the publication was them being targeted or marginalised.

[62] Their own evidence was as follows:

Witness Alpha	• "The list indicated whether each person was a member of the AMWU." • "I thought it indicated that I was not a member of the AMWU." • "I was disgusted that, without my knowledge or consent, my name was on a list sent to members of my work group that indicated I was not a paid member of the AWMU." • "I believed this was against the law, and Company policy, and not anyone else's business." • "I was concerned that I and other Company employees who were not union members may be ostracised or victimised…" • "I was concerned about the way I might be treated by other workers offshore if they knew I was not a member of the union." • "The message group started conversations in the workplace about why some people were not in the union." • "I felt the publication of the information about whether employees were members of the union was a form of harassment." • "My complaint related to the publication of my name in a way that indicated that I was not a union member." • "It was **not based on any direct experience at the time of being ostracised** by other employees, but based on my past experience, I thought it may occur." (emphasis added)
Witness Omega	• "In around October 2023 I became aware that my personal details had been published without my consent." • "My name had been included in a spreadsheet, that was circulated by another employee of the Company, Mr Travis Cairns, in a WhatsApp group he had set up." • "The spreadsheet included a list of names of employees of the Company, and a column regarding whether the person named was a member of the AMWU. It indicated many employees in the list were union members." • "That column was blank next to my name, and the names of other employees who worked on my shift." • "There was also a column for telephone numbers." • "I believe that the spreadsheet circulated by Travis Cairns publicly identified me as a non-union member. I was shocked and concerned."

	• "I was concerned about being publicly identified as a non-union member. Based on my past experiences, I thought that may mean that I would be treated differently in the workplace." • "I was worried that I may be disrespected by other workers. Nobody wants to be called a scab or made to feel like they are not part of the team." • "I was also shocked that my personal details had been published without my knowledge or approval." • "Sharing my personal information has made me feel like my privacy had been invaded." • "I felt like I was being pressured to join the union, to be part of the team." • "Being made to feel like I have to join the union by someone else's choice instead of my own is not a good feeling." • "I was deeply offended and extremely disappointed when I discovered that I had been identified in a public forum as being a non-union member." • "I felt shock, bewilderment and anger." • "My complaint **was not based on any direct experience at the time of inappropriate behaviour** by any Company employee resulting from the publication of my details." (emphasis added)

[63] Witness Alpha and Omega had subjective feelings, and they had concerns. But none of them came to fruition. The publication did not have the "effect" of targeting them in any way. Neither of them gave any evidence about any direct adverse experience from any other employee by reason of the publication. Their original letters of complaint to the company also make no such allegations.

[64] A review of the entirety of the WhatsApp chat[37] does not demonstrate that any employee (including witnesses Alpha or Omega) was targeted or marginalised in any way. The "effect" of the publication was not to cause witnesses Alpha or Omega to be targeted. They were not marginalised in their employment. Any fear that they might have been targeted or marginalised, never materialised.

[65] One witness, Mr Colin Leggett, made a comment in the WhatsApp chat that suggested that the Applicant was "shaming" people into becoming union members. Before me Mr Leggett explained his WhatsApp chat post of 7 September 2023. Under cross-examination he rejected the contention that the Applicant's messages in the WhatsApp group were "shaming". Instead, he regarded it to be a "tongue in cheek" comment.[38] He clarified that his reference to "shaming" was intended as a "throwaway comment" and part of "intercompany banter between shift 1 and shift 2," rather than a serious accusation of coercion or pressure to join the union.[39] He stated that he never felt pressured to join the union, nor did he believe others felt pressured by Applicant's posts in the chat, stating that membership was ultimately "our choice".[40] The

Respondent submits that I should reject that contention by Mr Leggett. Mr Leggett referred to the Applicant's posts as him showing pride (e.g. in Shift 2 being at 100%).[41]

[66] I reject entirely the suggestion that examples of the Applicant making comments that high union density was a good thing to increase the employees' bargaining power, or where he made positive comments about such matters, targeted non-members or had the intention of marginalising them. There was nothing in the Applicant's conduct that was inconsistent with the proper actions of a union delegate.

[67] For these reasons I reject the Respondent's finding that Allegation 2 was "substantiated'.

Allegation 3 – resulted in harassment/marginalisation

[68] When AREEA produced its first report into allegations on 20 December 2023, Allegation 3 was found to be "not substantiated". That finding should have been maintained. But it was not in the final report.

[69] Just as the publication did not have the effect of targeting any employee (including witnesses Alpha or Omega), nor did the publication have the result of causing harassment of any employee. There is simply no evidence of any such result. There is no evidence that the Applicant harassed anyone. There is no evidence that, as a result of the publication, any other employee harassed anyone or was harassed.

[70] How the conclusion of substantiation was reached by the investigator is a mystery. No evidence of harassment was presented to the Applicant at any time during the investigation. Nor was any such evidence presented to me.

[71] Finally, there is no evidence of any health or safety risk being experienced by any employee. Neither witness, Alpha nor Omega, gave any evidence about the affect of the publication on their health.

[72] For these reasons I reject the Respondent's finding that Allegation 1 was "substantiated'.

[73] Because I have not found that any of Allegations 1, 2 or 3 were substantiated, it follows that I find there was no valid reason for the dismissal.

Notification of the valid reason - s.387(b)

[74] It necessarily follows that, if there was no valid reason for the dismissal, there can be no notification of the same.

[75] However, it is necessary to say something more about the notification of allegations and findings made by the Respondent.

[76] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made,[42] in explicit terms[43] and in plain and clear

terms.[44] In *Crozier v Palazzo Corporation Pty Ltd*[45] a Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations FW Act 1996* stated the following:[46]

> '**[73]** As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.'

[77] The Respondent submits that the Applicant was properly notified of the reasons for his dismissal through the disciplinary process. The Respondent argues that the Applicant was informed of the four allegations during the investigation process, and these allegations were sufficiently detailed in the Outcomes Letter dated 19 February 2024. The Respondent maintains that the letter provided further particulars on the allegations, specifically outlining how the Applicant's conduct breached various company policies, including the Fair Treatment at Work Policy, the Code of Business Conduct and Ethics, and the Human Resources Policy Manual.

[78] The Respondent contends that the Applicant was given sufficient details of the reasons for dismissal and was provided with a reasonable opportunity to respond, as discussed in subsequent meetings, including the one on 27 February 2024, where the allegations and findings were reiterated. The Respondent rejects the Applicant's assertion that they were denied procedural fairness, asserting that the Outcomes Letter and the disciplinary meeting sufficiently notified the Applicant of the reasons for the termination.

[79] The Applicant submits that they were not properly notified of the reasons for dismissal. The Applicant contends that the allegations communicated were vague, particularly in relation to Allegation 3. The Applicant claims that Oceaneering initially provided broad and unspecific charges, including references to violations of the Fair Work Act without any clear explanation of the alleged breaches or the specific conduct in question. This lack of clarity, according to the Applicant, prevented them from fully understanding the reasons for the dismissal.

[80] The Applicant argues that the investigation report was reopened after an initial conclusion and further allegations were added without proper notice or opportunity for response. Furthermore, the Applicant submits that the Outcomes Letter provided little information about the specific conduct that allegedly caused the psychological impact on the Complainants, which was central to Allegation 3. The Applicant contends that the failure to provide specific information on this point severely undermined the fairness of the notification process.

Consideration

[81] A reading of the 19 February 2024 Outcomes Letter demonstrates its clear deficiencies. Allegation 1 says nothing about the publication being without consent. As drafted, it would

cover publication with consent. Allegation 2 says nothing about how the alleged conduct "has had the effect of targeting/and/or marginalising". No particulars are given. Allegation 3 says nothing about who has been harassed and/or marginalised. Nothing is said about the alleged "health and safety" issues that have been caused. There are no particulars. Sensibly, Allegation 4 was withdrawn before me.

[82] It is a fundamental tenant of procedural fairness that an accused knows who their accuser is and that they know the details of what they are accused of. It is not expected that an employer drafts a notice with the particularity of legal pleadings. That is not the complaint here. The complaint is that the Outcomes Letter is severely deficient. It was unreasonable to expect the Applicant to respond to it. Notwithstanding, he did his best.

[83] Had there been a valid reason for dismissal, I would likely have found that, on balance, there was not proper notification.

Opportunity to respond - s.387(c)

[84] An employee protected from unfair dismissal must be provided with an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the person. This criterion is to be applied in a common-sense way to ensure the employee is treated fairly and should not be burdened with formality.[47]

[85] The Respondent asserts that the Applicant was given ample opportunity to respond during the disciplinary process. This included receiving the Outcomes Letter, which detailed the allegations against him, and submitting a written response to this letter. Additionally, the Respondent highlights that the Applicant was issued a Show Cause Letter and was given another chance to respond during a meeting on 27 February 2024, where he was allowed to have a support person present.[48]

[86] The Applicant submits that they were not provided with a fair opportunity to respond to the allegations. They argue that the show cause process was flawed, as key details regarding the conduct in Allegation 3 were only revealed during the 27 February 2024 meeting, and even then, the Applicant felt blindsided by new information, particularly the in-person conduct aspect. [49]

[87] The Applicant argues that the lack of clarity in the allegations, especially with regard to what constituted discriminatory harassment, made it difficult to formulate a comprehensive response. The Applicant further submits that their requests for additional particulars were not adequately addressed, particularly concerning the Complainants' experiences of harassment. The Applicant contends that they had not been made aware of the nature of the psychological impact on the Complainants before the meeting, which limited their ability to mount a proper defence.[50]

[88] Moreover, the Applicant submits that the Respondent had already made up its mind regarding the dismissal, citing the reopening of the investigation after certain allegations were not substantiated and the dismissive handling of the Applicant's concerns during the

disciplinary meeting.[51] The Applicant contends that this procedural shortcoming amounts to a significant denial of procedural fairness.

Consideration

[89] I accept that the Outcomes Letter stated, "The company has not yet made a decision in relation to your ongoing employment." To that extent the letter was drafted with a mind to providing an opportunity to respond, but the way in which the Allegations were framed was deficient that made it difficult for the Applicant to meaningfully respond.

[90] The Show Cause Letter also stated "For avoidance of doubt the Company has not made any decisions in relation to this matter."

[91] However, the Show Cause Letter made a new allegation (not particularised) that the Applicant's behaviour "had the effect of humiliating and intimidating other Oceaneering employees." The Applicant was never provided with an opportunity to respond to this allegation.

[92] For these reasons I find that the Applicant was not provided with an opportunity to respond.

Unreasonable refusal by the employer to allow a support person - s.387(d)

[93] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.

[94] The Respondent submits that the Applicant was provided with the opportunity to have a support person present throughout the disciplinary process.[52] The Respondent acknowledges that Mr. Daniel Peatey, a representative from the AMWU, accompanied the Applicant during the 27 February 2024 meeting. The Respondent argues that the Applicant's support person was allowed to be present and participate in the process in accordance with the requirements of s.387(d).

[95] The Applicant submits that while they were allowed to have a support person present, the Respondent unreasonably restricted the support person's involvement during the disciplinary meeting. The Applicant contends that Mr. Peatey was prevented from asking questions or clarifying key aspects of the allegations, which undermined the effectiveness of his role in the meeting.[53]

Consideration

[96] Support people are there to provide support to employees. They are not advocates. There was no unreasonable refusal by the Respondent to allow a support person in this matter.

Warnings regarding unsatisfactory performance - s.387(e)

[97] Where an employee protected from unfair dismissal is dismissed for the reason of unsatisfactory performance, the employer should warn the employee about the unsatisfactory performance before the dismissal. Unsatisfactory performance is more likely to relate to an employee's capacity than their conduct.[54]

Consideration

[98] The Applicant was not dismissed for unsatisfactory performance. Therefore, this is not a relevant matter in the present matter.

Impact of the size of the Respondent on procedures followed - s.387(f)

[99] The size of the Respondent's enterprise may have impacted on the procedures followed by the Respondent in effecting the dismissal.

[100] The Applicant submits that the Respondent is a large company with dedicated internal HR representatives and access to experienced external industrial relations advisers, which implies that it should be held to a higher standard when it comes to investigation and dismissal processes.[55]

Consideration

[101] I reject the submission that I am required to hold the Respondent to a higher standard because of its size. However, it is concerning that such a large employer, with significant resources and which used an advisor in the matter, could so badly have conducted an investigation and made such erroneous findings.

Absence of dedicated human resources management specialist/expertise on procedures followed - s.387(g)

[102] The absence of dedicated human resource management or expertise in the Respondent's enterprise may have impacted on the procedures followed by the Respondent in effecting the dismissal.

[103] The Applicant has correctly conceded that this criterion is not relevant in this case as the Respondent had dedicated HR representatives who were directly involved in the disciplinary process.[56] Therefore, this is a neutral consideration.

Other relevant matters - s.387(h)

[104] Section 387(h) provides the Commission with a broad scope to consider any other matters it considers relevant.

[105] The Applicant submits that differential treatment is a relevant matter under s.387(h). The Applicant submits that in comparable cases, other employees were not subject to the same

disciplinary action, even though their conduct was similar to his own. The Applicant submits that Mr. Colin Roads sent an email on 4 October 2023 to multiple employees, including a link to a spreadsheet containing their names and phone numbers. The Applicant submits that this conduct was comparable to his own, yet Mr. Roads faced no disciplinary action.[57]

[106] Similarly, the Applicant submits that Mr. Victor Rodriquez shared the same spreadsheet with participants in the WhatsApp group chat. According to the Applicant, Mr. Rodriquez's conduct was identical to his, yet Mr. Rodriquez faced no disciplinary action. The Applicant submits that the differential treatment between himself and Mr. Rodriquez, despite engaging in the same actions, points to the harshness of his dismissal.[58]

[107] Additionally, the Applicant argues that his long and unblemished work history should weigh in favour of a finding that the dismissal was harsh. He points out that he had over six years of satisfactory service with no prior disciplinary issues or performance concerns.[59]

[108] The Respondent denies the Applicant's allegation of differential treatment. The Respondent distinguishes the Applicant's conduct from the two alleged comparators – Mr. Roads and Mr. Rodriquez – arguing that neither of these employees engaged in comparable conduct. Mr. Roads' email, which was used for business purposes and was subject to privacy protections, was said by the Respondent to be of a completely different character from the Applicant's actions. Similarly, the Respondent submitted that there is no evidence that Mr. Rodriquez shared information or messages in a way that violated privacy rules or pressured employees to join the union.[60]

[109] The Respondent further submits that the mitigating factors advanced by the Applicant do not alter the conclusion that the dismissal was appropriate. The Respondent submits that the Applicant's conduct was deliberate and calculated. There is no evidence that it was a spur of the moment action or that the Applicant sought consent from the affected employees prior to publishing their personal information.[61] The Respondent also highlights the Applicant's lack of remorse and failure to acknowledge the alleged harm caused to the Complainants, even after having the opportunity to view the Complainant's written statements.[62]

Consideration

[110] I am not satisfied that there was differential treatment of the Applicant. This finding is based on several factors. First, the conduct of Mr Roads, as described, served a business purpose, distinct from the Applicant's publication of personal information related to union membership in a forum unrelated to business needs. Second, while Mr Rodriquez may have shard the spreadsheet in the WhatsApp group, there is no evidence demonstrating that he did so with the intent of influencing union membership or that his actions were likely to be perceived as coercive or intrusive by other employees.

Conclusion about unfairness

[111] Having considered each of the matters specified in s.387, the Commission, as presently constituted, is satisfied the dismissal of the Applicant was:

a) unjust because the Applicant was not guilty of the alleged misconduct,
b) unreasonable because the evidence before the Respondent did not support the conclusion in the Outcomes Letter, and
c) harsh on the Applicant due to the economic and personal consequences resulting from being dismissed.

[112] Accordingly, I find the Applicant's dismissal was unfair.

Remedy

[113] Section 390 of the FW Act sets out the circumstances in which I may make an order for reinstatement or compensation:

> "**390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The Commission may make the order only if the person has made an application under section 394.
>
> (3) The Commission must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
>
> Note: Division 5 deals with procedural matters such as applications for remedies."

[114] I have already dealt with the issues at s.390(1)(a)–(b) above. The Commission, as presently constituted, is satisfied the Applicant was protected from unfair dismissal pursuant to s.382 of the FW Act and the Applicant was dismissed unfairly.

[115] Accordingly, I am required to determine whether to order the reinstatement of the Applicant or, in circumstances where reinstatement is inappropriate, an order for compensation if I am satisfied such an order is appropriate in all the circumstances.

Reinstatement

[116] The Applicant seeks compensation as the primary remedy. Regardless of the remedy sought by the Applicant, s.390 of the FW Act requires I first determine whether reinstatement is appropriate before I may consider an order for compensation.

[117] The Applicant submits reinstatement would be inappropriate because there has been a "breakdown in trust between Oceaneering and [himself and he does] not see returning to work for them as a viable outcome."

[118] The Respondent noted that the Applicant is not seeking reinstatement but otherwise made no submission about whether reinstatement would be appropriate.

Consideration

[119] In *Regional Express Holdings Ltd T/A Rex Airlines*[63] a Full Bench of Fair Work Australia considered what factors may be considered when deciding if reinstatement is inappropriate under s.390(3)(a) of the FW Act:

> "**[26]** Whenever an employer dismisses an employee for misconduct, assuming the employer is acting honestly, there is an implied loss of trust and confidence in the employee. If it is subsequently found that the termination was harsh, unjust or unreasonable it is appropriate to consider whether the relationship can be restored if the employee is reinstated. That question cannot be answered solely by reference to the views of management witnesses. All of the circumstances should be taken into account. In this case there are a number of relevant matters. They include the fact that not all of the conduct alleged against the respondent has been proven, the respondent's apparently unblemished record in the performance of his flying duties over a period of 14 years, the fact that the misconduct is not directly related to the performance of the respondent's professional duties as a first officer and Rex's failure to pursue any substantial disciplinary action against another pilot who, it is alleged, has been guilty of misconduct at least as serious as that of which the respondent was accused. The significance of the last consideration is that the pilot in question is still carrying out the full range of his duties, despite allegations of conduct of a kind which, in the respondent's case, is said to have led to an irrevocable loss of trust and confidence. Assuming a positive approach on both sides we find there is a reasonable chance that the employment relationship can be restored with the necessary level of mutual trust."[64]

[120] In the present matter I consider it relevant that the Applicant was a FIFO worker. I can take some quasi-judicial notice of the impacts of this type of work as it is well documented:

a) High compression rosters can lead to fatigue.
b) Long hours, physically taxing roles, and the often-hazardous conditions can contribute to stress, anxiety, and fatigue
c) A stoic/macho culture can affect the mental health of workers.
d) The fact that a FIFO worker may be absent from their partner and family for long periods of time, can place a strain on a worker's relationships.
e) Being a FIFO worker also means you are a FIFO parent. I note that the Applicant has 3 children, 2 of whom are still school age.

[121] In the context of the Applicant having worked FIFO (and having regard to the matters listed above) and the fact that the Applicant still has school aged children, in all the circumstances the Commission, as presently constituted, is satisfied that reinstatement is inappropriate. Compelling a worker to return to FIFO would be unfair.

Compensation

[122] Section 390(3)(b) provides the Commission may only issue an order for compensation to the Applicant if it is appropriate in all the circumstances.

[123] The Applicant submits that an order for compensation is appropriate in all the circumstances of this case because:

[124] The Respondent submits that an order for compensation is not appropriate in all the circumstances of this case because the Applicant failed to mitigate his loss. I address this matter below.

[125] The Commission, as presently constituted, is satisfied that an order for compensation is appropriate in all the circumstances of this case having regard to the manifest unfairness (as set out above) visited upon the Applicant.

[126] Section 392 of the FW Act sets out the circumstances that must be taken into consideration when determining an amount of compensation, the effect of any findings of misconduct on that compensation amount and the upper limit of compensation that may be ordered:

> ‘**392 Remedy — compensation**
>
> *Compensation*
>
> (1) An order for the payment of compensation to a person must be an order that the person’s employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.
>
> *Criteria for deciding amounts*
>
> (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
>
> (a) the effect of the order on the viability of the employer’s enterprise; and
>
> (b) the length of the person’s service with the employer; and
>
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

Note: subsection 392(5) indexed to $61,650 from 1 July 2012

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

> (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.'

[127] The method for calculating compensation under s.392 of the FW Act was dealt with by a Full Bench of the Commission in *Bowden, G v Ottrey Homes Cobram and District Retirement Villages Inc. T/A Ottrey Lodge*[65] (*Bowden*). In that decision the Full Bench set out the order in which the criteria and other factors should be applied, taking into account authority under the *Workplace Relations FW Act 1996* in *Sprigg v Paul's Licensed Festival Supermarket*[66] and *Ellawala v Australian Postal Corporation*[67].

[128] In its closing submissions the Respondent referred me to *Sprigg*. However, it cautioned that "at the same time the *Sprigg* guidelines are not determinative, nor should they be slavishly followed."[68] I agree.

[129] Below I have adopted the methodology utilised in *Bowden* in determining the amount of a payment of compensation. At the end of the assessment, I will consider whether, having applied the *Sprigg* formula it 'yields an amount which appears either clearly excessive or clearly inadequate'. If so, I will reassess the assumptions made in reaching that amount.[69] Compensation should be appropriate having regard to all of the circumstances of the case.[70]

[130] I will now consider each of the criteria in s.392 of the FW Act.

Remuneration that would have been received: *s.392(2)(c)*

[131] The Applicant's remuneration with the Respondent was $5,394.60 per week ($280,519.20 per annum).

[132] I should now determine the period of time that the Applicant would have remained employed by the Respondent, or would have likely remained employed with the Respondent, had they not been dismissed.

[133] The Applicant submitted that,

> "… before the events leading to termination, [Mr Cairns] had a spotless work record over 8 years. He enjoyed and was proud of this job, which was high paying. He was a highly skilled worker in an industry facing, on Oceaneering's case, a skills shortage. It is more likely than not that he would have remained in Oceaneering's employ for at least three years. In that period, he would have earned at least $841,557.60 plus superannuation."[71]

[134] The Respondent failed to engage with this consideration and made no submission about the period of time the Applicant would have remained employed had the dismissal not occurred.

[135] I note that a survey of FIFO workers in 2014 found that "Majority of respondents (61%) have been a FIFO work between 2 – 9 years." Only 8% of respondents worked as FIFO for between 10 – 14 years.[72]

[136] Having already worked for 6 years, it is not out of the bounds of possibility that, as the Applicant submitted, he would have worked FIFO for another 3 years. However, it is entirely possible that a person with school age children would want to cease working FIFO earlier. Job mobility data is also relevant.[73]

[137] While this consideration is necessarily speculative, I find that the Applicant would have continued to be employed by the Respondent for 2 years had he not been dismissed.

[138] The amount the Applicant would have received is therefore $561,038.40.

Remuneration earned: s.392(2)(e)

[139] It is now necessary to consider the remuneration earned by Applicant since the dismissal with reference to the evidence.

[140] It is not in contest that when the Applicant was dismissed, he was paid 5 weeks' notice (in the amount of $26,973).

[141] I find that, between the date of the dismissal and 16 July 2024 (a period of 19.57 weeks), the Applicant earned $52,127.86 in trading income and $48.63 in other income (i.e. a total of $52,176.49)[74] from his new work as a franchisee of "Hire A Hubby".

[142] I deduct these amounts from the compensation to be ordered:

$561,038 less,
$26,973
$52,176
= $481,889

Income likely to be earned: s.392(2)(f)

[143] I should also deduct what the Applicant would have earned for the balance of the period I have found he would have been employed (i.e. the balance of the 2-year period, that being 84.43 weeks).

[144] This is difficult to assess because the Applicant's new work as a franchisee for "Hire a Hubby" is in its infancy. It is a small business. It may not be successful. However, the Applicant is clearly a highly skilled person (he is a carpenter by trade[75]), and I have every confidence in him being successful in his new endeavour.

[145] Based on what the Applicant earned up to 16 July 2024 (i.e. $2,666.14 per week), I find the Applicant is reasonably likely to earn $225,090 in income for the balance of the period up to two years after the dismissal.

[146] I will deduct this amount from the compensation to be ordered:

$481,889 less,
$225,090
=$256,799

[147] Also relevant under "step 2" is mitigation (s.392(2)(d)).

[148] In considering whether the Applicant has taken steps to mitigate the loss suffered as a result of the dismissal, I should take into account whether the Applicant acted reasonably in the circumstances.[76]

[149] The failure of an applicant to act reasonably to mitigate their loss may lead to a reduction in the amount of compensation awarded.

[150] In the present matter the Respondent submitted that "the Applicant's efforts to mitigate any loss fall so far short of being considered reasonable, that no award of compensation should be ordered." In support of the submission the Respondent notes,

a) the highly skilled nature of the Applicant's work in the NDT industry,
b) that the Applicant made no attempt to stay in the NDT industry,
c) there exists a high demand for employees with offshore experience with the Applicant's skills,
d) the Applicant has "freely chosen, which is his right, to vacate the industry and embark on a new career by purchasing a "Hire a Hubby" franchise,
e) the Applicant "has chosen to move to a significantly lower paying enterprise".

[151] The Respondent contends that "the Applicant cannot fail to apply for work that is known to exist, and that would enhance his opportunity to fully mitigate his loss, and then expect the Commission to make an order to cover any loss incurred by not doing so."[77]

[152] The Respondent's submission mischaracterises the obligation to mitigate. It does not require an employee to stay in the same job or the same industry. It does not require an employee to fully mitigate their loss. It required reasonable efforts. I have set out above the personal hazards of FIFO work. I note that 2/3 of workers only work up to 9 years. Changing careers is not unreasonable. However, I agree there should be a discount for having decided to do so.

[153] The Applicant contended that "no discount for a failure to mitigate is appropriate".[78] However, in relation to other matters (considered below) the Applicant proposed a discount of 40%.

[154] In the present matter I am satisfied that the Applicant has made reasonable (but not perfect in the sense of him making the same income he made with the Respondent) attempts to mitigate his loss.

[155] However, in the present matter the Applicant has chosen to work and earn a weekly rate of pay that 49.4% of his weekly salary with the Respondent.

[156] Consequently, I consider it reasonable in all the circumstances to reduce the amount of compensation to be award by 49.4%.

$256,799 x 49.4% = $126,858

Other matters: s.392(2)(g)

[157] The Respondent made no submissions about deductions for contingencies.

[158] The Applicant submitted,

> "… some reduction in compensation is appropriate to reflect the likelihood of further income being earned, although this cannot be mechanically quantified. Given the inherent uncertainty, this discount should be no more than 40% of the remuneration that Mr Cairns would otherwise have earned."[79]

[159] I have already made a deduction for an amount for future earnings ($225,090) and a applied a discount in respect of mitigation (a further 49.4% reduction). Consequently, there is no sound basis for making a further deduction for contingencies.

[160] I find it is not appropriate in the circumstances that a contingency should be applied.

Viability: s.392(2)(a)

[161] No submissions were made by the Respondent about viability. I find an order for compensation in the amount proposed will not affect the viability of the Respondent's enterprise.

Length of service: section (s.392(2)(b))

[162] I find that the Applicant's period of service with the Respondent, being more than 6 years, should not affect the amount of compensation to be ordered.

Misconduct: s.392(3)

[163] I have not found any misconduct by the Applicant that contributed to the dismissal.

Shock, Distress: s.392(4)

[164] I note that the amount of compensation calculated does not include a component for shock, humiliation or distress.

Compensation cap: s.392(5)

[165] I must reduce the amount of compensation to be ordered ($126,858) if it exceeds the lesser of the total amount of remuneration received by the Applicant, or to which the Applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal ($140,259), or the high-income threshold immediately prior to the dismissal ($83,750).

[166] The high-income threshold immediately prior to the dismissal was $167,500/2 = $83,750.

[167] The amount the Applicant would have earned, or to which the Applicant was entitled, for the 26-week period immediately prior to the dismissal was $140,259.60.

[168] The amount of compensation calculated above after having applied the Sprigg formular (being $126,858) exceeds the compensation cap.

[169] Consequently, I must reduce the amount of compensation to be ordered to $83,750.

[170] I will consider whether, having applied the *Sprigg* formula it 'yields an amount which appears either clearly excessive or clearly inadequate'. If so, I should reassess the assumptions made in reaching that amount.[80] As I have stated above, compensation should be appropriate having regard to all of the circumstances of the case.[81]

[171] In the present matter I have found that the Applicant was unfairly dismissed from a high-paying job in circumstances where the dismissal was:

a) unjust because the Applicant was not guilty of the alleged misconduct, and
b) unreasonable because the evidence before the Respondent did not support the conclusion in the Outcomes Letter.

[172] The payment of compensation (significantly adjusted down because of the application of the compensation cap) equates to 15.5 weeks' pay. I do not consider this amount to be clearly excessive. It is a large amount but that is because the Applicant was a high-income earner.

[173] For these reasons I have decided not to further adjust the compensation to be awarded.

Payment by instalments: s.393

[174] The Respondent made no submissions that it needed to pay any order by instalments. Consequently, payment should be made within 21 days of the date of the order being issued with this decision.

Conclusion

[175] The Commission, as presently constituted, is satisfied that the Applicant was protected from unfair dismissal, that the dismissal was unfair and a remedy of compensation in the amount of $83,750 is appropriate.

[176] An order will be issued with this decision [PR780660] requiring the compensation to be paid within 21 days.

COMMISSIONER

Appearances:
Mr Leo Saunders for the Applicant
Mr David Parker (Australian Resources & Energy Employer Association) for the Respondent

Hearing details:
23 July 2024, 30 July 2024, and 5 August 2024

Final written submissions:
Respondent's final submissions filed on 19 August 2024
Applicant's final submissions filed on 27 August 2024

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[1] Form F2 at pg. 5 DTB; Form F3 at pg. 27 DTB.

[2] Witness Statement of Applicant at pg. 48 DTB; Respondent's Outline of Submissions at pg. 182.

[3] Ibid.

[4] Applicant's Closing Submissions at [10].

[5] Applicant's Outline of Submissions at pg. 38 DTB.

[6] Ibid.

[7] Respondent's Outline of Submissions at pg. 185 DTB; Applicant's Submissions in Reply at pg. 300.

[8] Respondent's Outline of Submissions at pg. 185 DTB.

[9] Investigation Findings at pg. 278.

[10] TC-7.

[11] Termination Letter at pg. 175 DTB.

[12] *Sayer v Melsteel* [2011] FWAFB 7498.

[13] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-378.

[14] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373.

[15] Id.

[16] Respondent's Closing Submissions at [4].

[1717] Respondent's Closing Submissions at [14].

[18] Annexure TC-6 – DTB [92]-[133]; Transcript PN1228 – PN1243

[19] Code of Business Conduct and Ethics, Section 6 at pg. 106 DTB.

[20] Human Resources Policy Manual, Section 4.9.1 at pg. 115 DTB.

[21] Ibid, Section 5.1 at pg. 118 and 119 DTB.

[22] Fair Treatment at Work, Section 7.2 at pg. 127 – 128 DTB.

[23] Witness Statement – Alpha at pg. 202 DTB.

[24] Outcome Letter at Pg. 15 – 16 DTB.

[25] Confirmed in the Respondent's Closing Submissions, para 44.

[26] Respondent's Outline of Submissions at pg. 189 DTB.

[27] Respondent's Closing Submissions at [22].

[28] Applicant's Closing Submissions at [6] – [12].

[29] Applicant's Closing Submissions at [13].

[30] Applicant's Closing Submissions at [15].

[31] Applicant's Closing Submissions at [19].

[32] Applicant's Closing Submissions at [14].

[33] Applicant's Closing Submissions at [18] – [20].

[34] Applicant's Closing Submissions at [21].

[35] Exhibit 5.1, Further Witness Statement of Travis Cairns, para [11].

[36] FTC-1

[37] TC-2.

[38] Transcript PN1742.

[39] Transcript PN1337.

[40] Transcript PN1339.

[41] Transcript PN1794.

[42] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41].

[43] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[44] *Previsic v Australian Quarantine Inspection Services* Print Q3730.

[45] (2000) 98 IR 137.

[46] Ibid at 151.

[47] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[48] Respondent's Outline of Submissions at pg. 190 DTB

[49] Applicant's Closing Submissions at [22] – [33].

[50] Applicant's Outline of Submissions at pg. 45 DTB.

[51] Applicant's Closing Submissions at [26].

[52] Respondent's Outline of Submissions at pg. 191 DTB.

[53] Applicant's Closing Submissions at [31].

[54] *Annetta v Ansett Australia Ltd* (2000) 98 IR 233, 237.

[55] Applicant's Closing Submissions [35].

[56] Applicant's Closing Submissions [36].

[57] Applicant's Written Submissions [70 – 72] at pg. 46 of DTB.

[58] Applicant's Written Submissions [73 – 77] at pg. 46 – 47 of DTB.

[59] Applicant's Written Submissions [78 – 80] at pg. 47 of DTB.

[60] Respondent's Written Submissions [60 – 66] at pg. 194 – 195 of DTB.

[61] Respondent's Written Submissions [56] at pg. 193 of DTB.

[62] Respondent's Written Submissions [57] at pg. 193 of DTB and Respondent's Closing Submissions [73].

[63] [2010] FWAFB 8753.

[64] Ibid at [26].

[65] [2013] FWCFB 431.

[66] (1998) 88 IR 21.

[67] Print S5109.

[68] *Hanson Construction Materials Pty Ltd v Darren Pericich* [2018 FWCFB 5960 at (39).

[69] *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at para. 32.

[70] *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at para. 32; see also *Haigh v Bradken Resources Pty Ltd* (2014) 240 IR 366 at para. 12.

[71] Applicant's Closing Submissions dated 27 August 2024.

[72] https://documents.parliament.qld.gov.au/com/IPNRC-C217/FQ-6DD4/02-aqon3-25Jun2015.pdf

[73] https://www.abs.gov.au/statistics/labour/jobs/job-mobility/latest-release

[74] FTC-3.

[75] Exhibit 3.1, para [6].

[76] *Biviano v Suji Kim Collection* PR915963 at [34].

[77] Respondent's Closing Submissions, para 88.

[78] Applicant's Closing Submissions, para 44.

[79] Applicant's Closing Submissions, para 45.

[80] *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at para. 32.

[81] *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at para. 32; see also *Haigh v Bradken Resources Pty Ltd* (2014) 240 IR 366 at para. 12.