



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Heidi Black

v

Baker Heart and Diabetes Institute
(U2024/4175)

DEPUTY PRESIDENT CLANCY

MELBOURNE, 28 NOVEMBER 2024

Application for an unfair dismissal remedy – dismissal unfair – application granted.

[1] Mrs Heidi Black has made an unfair dismissal application pursuant to s.394 of the *Fair Work Act 2009* (**the Act**). The Respondent to the application is Baker Heart and Diabetes Institute (**Respondent**). The application was the subject of a hearing at which witness evidence was received from Mrs Black, Professor John Greenwood (Director of the Respondent), Ms Annette Crawford (Acting General Manager of Human Resources for the Respondent), Ms Priya Darshani (HR Co-ordinator for the Respondent) and Ms Danni Zhou (a former HR Co-ordinator for the Respondent). Both parties were granted permission to be represented by lawyers.

Initial matters to be considered – s.396 of the Act

[2] The application was made within the required 21-day period after the dismissal took effect (s.396(a) of the Act). There is no dispute that Mrs Black is a person protected from unfair dismissal because she had completed the minimum employment period and the *Baker Heart and Diabetes Institute Enterprise Agreement 2021* (**Agreement**) applied to her employment (s.396(b)). Further, it is not disputed, and I am satisfied, that the Respondent was not a small business employer, such that the question of whether the dismissal was consistent with the Small Business Fair Dismissal Code (s.396(c)) does not fall for determination. Finally, it has not been claimed by the Respondent, and nor does the material before me suggest, that the dismissal was a case of genuine redundancy (s.396(d)).

Section 385 of the Act – was the dismissal unfair?

[3] As to the circumstances set out at s.385 of the Act, there is no question or dispute that Mrs Black was dismissed (s.385(a)). Further, as outlined above, this is not a matter that involves a small business and the consequent consideration of whether the dismissal of Mrs Black was consistent with the Small Business Fair Dismissal Code (s.385(c)). Nor is it one which requires the Commission to consider whether or not the dismissal was a case of genuine redundancy (s.385(d)).

[4] Only s.385(b) remains to be considered in this case so I must therefore determine whether the dismissal of Mrs Black was harsh, unjust or unreasonable.

Background

[5] Mrs Black said she commenced employment with the Respondent as Senior Human Resources Advisor on 21 November 2016. It would seem that Mrs Black held this position until 31 July 2021 and from 1 August 2021 – 14 March 2022, she then served as Senior HR Business partner and Employment law/Industrial relations lead. On 15 March 2022, Mrs Black became the Acting General Manager of Human Resources and Payroll of the Respondent pursuant to a letter of variation dated 8 March 2022.¹ Mrs Black asserted that due to budget cuts she remained required to perform her former Senior Human Resources Advisor role in addition to running the human resources department of the Respondent with the assistance of Niamh McCarthy, Senior Human Resources Business Partner. With effect from 1 January 2023, Mrs Black was promoted to the General Manager, Human Resources and Payroll pursuant to a letter of variation dated 19 December 2022.²

[6] Mrs Black claims that in mid-2023, her workload was becoming extremely high, she was concerned about the lack of support she was receiving, and she began feeling the effects of depression and burnout. She claims she spoke to Hilary Bolton, Deputy Director Administration and Company Secretary, to address these issues and Ms Bolton said that she could hire someone as a Human Resources Operations Manager to assist her. Ms Crawford was appointed to the position of Human Resources Operations Manager role on 29 August 2023. Mrs Black said despite this, she became significantly overwhelmed and exhausted and began experiencing symptoms of burnout due to working 50-60 hours per week. She began consulting her general practitioner at this time and described having been prescribed medication as a result.

[7] There was an incident involving Mrs Black and Ms Zhou on 11 October 2023. It arose from some discussion associated with contemplated training in a human resource information system. Following the incident, Mrs Black felt unable to continue working and, having obtained approval from Ms Bolton, left the workplace and went home.

[8] Mrs Black obtained a medical certificate from her general practitioner on 12 October 2023 which certified her as unfit for work for the period from 12 October 2023 until 26 October 2023 (inclusive). This period was extended a number of times and Mrs Black obtained further medical certificates outlining that she was unfit for work during the following periods:

- 1) 25 October 2023 to 7 November 2023;
- 2) 21 November 2023 to 22 December 2023; and
- 3) 2 January 2024 to 30 January 2024.

[9] Mrs Black disclosed that during this period she was formally diagnosed with depression, anxiety and burnout. She said that she was extremely exhausted and experienced various symptoms, including low mood, self-blame and heightened anxiety. On 12 January 2024, Mrs Black received an email enclosing a letter from Professor Greenwood requesting information from Mrs Black in relation to her condition and its likely effect on her fitness for work in the

future, her capacity for work and whether any reasonable adjustments were required. This letter also enquired as to when a full medical clearance might be given. On 23 January 2024, Mrs Black's general practitioner certified her medically fit to return to work from 31 January 2024 with the only recommended restriction being that Mrs Black not work in excess of her contracted hours of work.

[10] On 2 February 2024, Mrs Black attended an independent medical examination (**IME**) with Dr Timothy Doyle from which a report dated 9 February 2024 resulted.³ This comprehensive report concluded that Mrs Black could safely perform her duties and responsibilities without adjustments, albeit Dr Doyle expressed concern that while Mrs Black had significantly improved, she was not nearly as "*well*" as she appeared. Dr Doyle expressed concern that on her return, Mrs Black would return to her previous ways of coping (i.e. taking on more and more work) and that this would almost certainly lead to a "*significantly heightened risk of a relapse*". Dr Doyle therefore endorsed the recommendation of Mrs Black's general practitioner that she not work in excess of her contracted hours of work.

[11] On 12 February 2024, Ms Bolton telephoned Mrs Black to advise her that she was permitted to return to work the next day. Ms Bolton also informed Mrs Black that a complaint had been made against her and the details of the complaint would be supplied by Professor Greenwood. Mrs Black said that due to the length of her absence from work, this information caused her significant anxiety.

[12] Upon returning to work on 13 February 2024, Mrs Black received a letter from Professor Greenwood⁴ which stated that an external investigation was being conducted regarding numerous allegations that had been made against her. In broad terms, the allegations were that Mrs Black had engaged in unreasonable and inappropriate workplace behaviour towards Ms Crawford and the HR team. Thereafter, Mrs Black was interviewed by an external investigator, Ms Tracey O'Neill. Mrs Black had the opportunity to review, edit and confirm Ms O'Neill's interview notes and was informed that she was to directly report to Professor Greenwood instead of Ms Bolton. Mrs Black also learned that the payroll team would no longer be reporting to her. Mrs Black said she attended a meeting with Professor Greenwood and Ms Lisa Riddell, Executive Assistant, on 22 March 2024. As part of the process at this meeting, Mrs Black had the opportunity to review a letter dated 22 March 2024 that outlined the outcomes of the investigation (**outcomes letter**). This outlined that on the balance of probabilities, it had been determined that Mrs Black had engaged in the following unreasonable behaviour:

“ALLEGATION 1 – That between August 2023 and 12 October 2023, you behaved in an unreasonable manner towards Annette as follows:

- **Allegation 1.1(a)** - That you failed to ensure that Annette had an office in circumstances where Raed and Niamh had their own office and Annette was forced to sit in the open plan office area with her back to the HR Team.
- **Allegation 1.2(c)(i) and (ii)** - That when Annette assisted you with the Budget Report, you publicly criticised Annette to the HR Team saying that Annette "stuffed up the Budget Report" and told Anita that Annette had "stuffed up the Budget Report" and you implied that Annette was incompetent.

ALLEGATION 2 - That between August 2023 and 12 October 2023, you engaged in unreasonable behaviour towards the HR Team as follows:

- **Allegation 2.1(b)** - You were in tears and in a highly emotional state on a regular basis, causing staff to feel they are "walking on eggshells" around you and creating an unsafe/unhealthy environment.
- **Allegation 2.2(b)** - You directed Annette to terminate the employment of certain staff without reasonable cause saying words to the effect of: "*You need to get rid of Raed, Priya and Danni*".
- **Allegation 2.3** - On 11 October 2023, you behaved in an unprofessional and unreasonable manner towards Danni, when you became agitated and in an aggressive and intimidating manner said to Danni words to the effect of: "*You always ask questions I cannot answer*" and when you became angry and aggressive when Danni tried to defend herself."⁵

(**bold** and *italics* in original)

[13] Having had the opportunity to review the outcomes letter, Mrs Black was then given a second letter dated 22 March 2024,⁶ which asserted that Mrs Black had engaged in unreasonable conduct towards Ms Crawford on two occasions and unreasonable conduct towards the HR Team, and that this conduct:

- constituted a breach of the Respondent's Bullying and Harassment Policy because it related to separate incidents and to more than one person;
- constituted a serious breach of Mrs Black's obligations to the Respondent, including a failure to comply with lawful directives in relation to her conduct at work, the Respondent's policies and her employment contract;
- had created a serious risk to the health and safety of others, including members of the HR Team;
- was inconsistent with Mrs Black's continued employment; and
- had caused significant embarrassment and damage to the Respondent, including internally amongst the Respondent's staff (including the HR team).

[14] The Respondent further advised through this letter that it considered that Mrs Black had engaged in serious misconduct such that her continued employment was untenable and immediate termination was warranted.

[15] The Respondent provided Mrs Black an opportunity to provide a response by midday on 26 March 2024 and it committed to considering any matter Mrs Black raised before finalising its decision in respect of her employment. The Respondent concluded this letter by advising that it anticipated it would be in a position to provide Mrs Black with its decision by no later than Wednesday 27 March 2024.

[16] Mrs Black responded by sending an email to Professor Greenwood at 11.42am on 26 March 2024,⁷ asserting that those of the allegations said to have been substantiated or partially substantiated “*would not meet the threshold for dismissal let alone serious misconduct warranting summary dismissal*” and providing comments in relation to each.

[17] Further, Mrs Black outlined the following by way of mitigation:

- She had been employed for over 7 years, with a good record of conduct and behaviour;
- She had been a loyal and exemplary employee during her time, and for the previous few years had worked over and above her contracted hours to ensure the Respondent was supported when resources within the HR team were reduced for significant periods of time and that this had resulted in her “burnout”; and
- During that period she did not seek extra payment and gave this time freely, only accepting higher pay upon being appointed Acting General Manager.

[18] Mrs Black says that at 10.23am on 28 March 2024, she was provided with a payslip for the pay period 1 March – 27 March 2024 which outlined particulars of a payment made on 27 March 2024. The total payment included termination payments for annual leave, annual leave loading and long service leave.⁸

[19] Mrs Black says she thereafter received an email from Professor Greenwood dated 2 April 2024,⁹ which stated, inter alia:

“All the findings have been based on an assessment of the evidence. Whilst I appreciate you may not agree with that assessment, you are not privy to all that information.

...

In relation to the basis upon which the Institute has assessed your conduct as serious misconduct, warranting summary dismissal, I again refer you to the correspondence provided to you.”

Was the dismissal harsh, unjust or unreasonable?

[20] In considering whether I am satisfied that the dismissal of Mrs Black was harsh, unjust or unreasonable, I must take into account the criteria outlined in s.387 of the Act and will do so below.

Section 387(a) – whether there was a valid reason for the dismissal related to Mrs Black’s capacity or conduct (including its effect on the safety and welfare of other employees)

[21] The Respondent submitted there was a valid reason for the termination of Mrs Black’s employment arising from her conduct between August and 11 October 2023 and that Mrs Black’s conduct had damaged its reputation, created risks to its profitability, viability and good name, caused damage and ongoing risks to the health and safety of others, damaged the relationship of trust and confidence, and was inconsistent with the continuation of her employment. Conversely, Mrs Black submitted that there was no valid reason for her dismissal in relation to her capacity or conduct. Mrs Black claims that the “various alleged conduct did not occur and / or that the alleged conduct was not of sufficient gravity or seriousness such as to justify dismissal as a sound, defensible or well-founded response to the conduct”.¹⁰ Mrs Black submitted that although she conceded that “perhaps there was an opportunity” for her to improve her management approach at times, that does not render her conduct to be unreasonable or constitute misconduct nor a valid reason for dismissal.¹¹

[22] The Respondent also asserted that Mrs Black was not an impressive witness and submitted that to the extent Mrs Black’s evidence conflicted with the evidence produced by the Respondent’s witnesses, the Commission should prefer the evidence as put by the Respondent’s witnesses. The Respondent submitted that Mrs Black’s evidence was to be viewed with caution due to the following reasons:

- a) Mrs Black’s evidence contained contradictions, such as outlining in her first statement that despite the hiring of Ms Crawford her workload continued to increase¹² but then stating in her reply statement that by the time Ms Crawford joined the HR team, her workload was decreasing.¹³

I am not persuaded in relation to this purported example of a contradiction because Mrs Black identified at the commencement of her oral testimony that she needed to make a correction and then identified what that correction needed to be.¹⁴ Therefore I do not consider this was evidence that required viewing with caution.

- b) Mrs Black revealed a lack of insight and self-awareness into her own behaviour and had issues accepting fault in her own behaviour, going so far as to blame her involvement in the 11 October 2023 incident on the “Israel/Palestine war”, which was a “good example” of the lengths she would go to in order to not concede an obvious issue with her own behaviour.¹⁵

I am not persuaded by this submission. The Respondent’s submission infers that Mrs Black was opportunistically prepared to stretch the bounds of credibility in suggesting that the incident with Ms Zhou was partly due her reaction to the news coverage of the Hamas invasion into Israel on 7 October 2023,¹⁶ and in particular the beheading and

killing of children.¹⁷ Mrs Black’s evidence that these matters distressed her was not challenged, so at best this particular submission of the Respondent is misguided. At worst, it is nothing more than a slur on Mrs Black’s character.

- c) Mrs Black’s evidence conflicted with what was recorded as her disclosures during her assessment by the medico-legal examiner on 2 February 2024.

As to this, I observe that when Mrs Black was assessed by the medico-legal examiner on 2 February 2024, the Respondent had informed the medico-legal examiner that allegations had been made about Mrs Black but it had not yet disclosed to Mrs Black that she was to be the subject of a workplace investigation. Therefore at the time of the IME, as far as Mrs Black was aware, the incident with Ms Zhou was nothing more than an interaction between two staff members that, while not great, was not serious.¹⁸ This is consistent with Mrs Black’s account denying that she used the descriptor “*benign*” and that she had instead described her interaction with Ms Zhou on 11 October 2023 as minor.¹⁹ While the Respondent’s assertion was that Mrs Black had described her interaction with Ms Zhou on 11 October 2023 as a “*benign*” interaction, when regard is had to the relevant section of the report of the medico-legal examiner, I do not consider that the cross examination of Mrs Black relied upon by the Respondent,²⁰ was based on an accurate account of what the medico-legal examiner had in fact outlined:

“Ms Black’s description of Danni fluctuated across the interview. She noted that at times Danni was highly effective, that Danni was always willing to help, that Danni had to be handled with ‘kid gloves’ lest she be emotional or volatile in the workplace or as she did on one occasion that Danni cried in the bathroom for several hours after a benign interaction and then began organising the staff against Ms Black.

It was after one of these ‘benign interactions’ that Ms Black left the office and went to her doctor (on 11 October 2023). Ms Black stated that “*Danni had a go at me on the last day*” and that this action, although, “*not major*”, was “*the last straw*”.”²¹

(italics from original)

I consider it reasonable to conclude from this text that the word ‘benign’ was used by the medico-legal examiner and the words in italics were those used by Mrs Black. I also consider that the references in the report of the medico-legal examiner to crying in the bathroom after a benign interaction, and the organising of staff by Ms Zhou, were not references to the incident on 11 October 2023.

As such, I reject the submission of the Respondent that there is a record of the conversation contained in the report of the medico-legal examiner that should be preferred over the evidence given by Mrs Black at the hearing.

[23] As to “Allegation 1.1(a)”, which charged Mrs Black with a failure to ensure that Ms Crawford had an office and was forced to sit in the open plan office area with her back to the HR Team while others in the team had their own offices, Mrs Black explained there were issues

with the Respondent's overall office layout and that the HR team only had 3 offices. Mrs Black said these were all occupied when Ms Crawford commenced working for the Respondent in August 2023 and, while she was working on a solution for more office space, this was not going to solve the shortage issue in the short term. Mrs Black also explained that one of the occupants of an office was going to be leaving within four months and that Ms Crawford had been asked to sit in an open plan area as a short-term measure.

[24] "Allegation 1.1(a)" can be briefly dealt with. It was an allegation that was not substantively prosecuted as a valid reason for the termination of Mrs Black's employment by the Respondent in either its written submissions or at the hearing. In any event, I characterise the lack of office space as a matter that was outside of Mrs Black's control and do not consider her conduct in relation to Ms Crawford's seating arrangements to have been inappropriate. To the extent it was ultimately relied upon by the Respondent, I attach no weight to "Allegation 1.1(a)" in my consideration of whether there was a valid reason for Mrs Black's dismissal relating to her conduct.

[25] In her evidence in chief, Mrs Black challenged the manner in which "Allegation 1.2(c)(i) and (ii)" were framed. Ms Crawford's account was that she was made aware by other members of the Respondent's staff that Mrs Black had described her as being "*hopeless*" and "*incompetent*" and as having "*stuffed up the report.*" Ms Crawford also accused Mrs Black of not having explained what she needed in the budgetary report. While Mrs Black admitted to having been frustrated at errors within the Budget Report, she denied criticising Ms Crawford publicly or intentionally and said that she had apologised to Ms Crawford for the manner in which she had handled things. At the hearing, Mrs Black stated:

"I did not publicly criticise Annette or any employee, but I do not doubt, under my stress at that time, I was definitely grumbling. I have admitted to grumbling. It's an open plan office. I regret grumbling. I can only excuse myself with it being my stress, but it wasn't good and I regret it and I apologise for my - yes, and I've learnt from that. It was a stress outreach, yes. I have never denied that I grumbled in the open space."²²

[26] There was no direct evidence before the Commission of Mrs Black having described Ms Crawford as "*hopeless*" and Mrs Black denied having done so. Mrs Black also denied either having suggested to others that Ms Crawford was not very good at her job or accusing Ms Crawford of having "*stuffed up the report.*" An employee to whom this latter comment was alleged to have been made (Ms Anita Furnell) was not called to give evidence so that left only Ms Zhou's direct testimony that she witnessed Mrs Black saying that Ms Crawford "stuffed up" the budget on a number of occasions and Ms Crawford's testimony regarding what she had been told by Ms Zhou and Ms Furnell. On balance, I conclude that it was more likely than not that Mrs Black told Ms Zhou and Ms Furnell that Ms Crawford had "*stuffed up*" the budget report. Such commentary about a colleague from a General Manager of Human Resources is to be eschewed.

[27] Through "Allegation 2.2(b)", the Respondent contended that Mrs Black directed Ms Crawford to terminate the employment of Ms Zhou, Ms Darshani and Mr Serradi without reasonable cause, saying words to the effect of "*You need to get rid of Raed, Priya and Danni.*" Ms Crawford's evidence was that Mrs Black told her that she wanted her to terminate these

employees but did not give any instructions about the reasons for the terminations.²³ The Respondent proffered that Ms Crawford confirmed this is what happened in re-examination.

[28] Mrs Black denied conversations of such a nature took place. She said she and Ms Crawford had discussed the team structure and that it was in fact Ms Crawford who had suggested that Mr Serradi, Ms Zho and Ms Darshani were not a good fit for the team and had recommended they all leave. Mrs Black also said that she and Ms Crawford had agreed to undertake a skills analysis of the team. Mrs Black argued it was not possible for her to instruct Ms Crawford to terminate anyone because redundancies and restructures could only be managed by her.

[29] The following cross-examination of Ms Crawford leaves me unconvinced that Mrs Black directed Ms Crawford to dismiss Ms Zhou, Ms Darshani and Mr Serradi:

“Employees at the Baker do not just get dismissed out of the blue, on any day, do they? As you said, they receive emails, they receive documents?---Well, since I've been in - at the Baker, of course, yes.

But none of those documents were completed for either Riatt, Priya or Danni, were they?---No, and why would they be?

Just a no is fine?---No.

That's because you follow a process at the Baker, don't you? If someone intended to dismiss those three people those documents would have been created?---It was Heidi's role to do that when I was there.

So you're saying that it was Heidi's role to dismiss people, but you're also saying you were given a direction to dismiss someone?---She discussed it with me and we discussed creating a new role, which she was going to call an HR generalist. I put a position description together. She came out and she told me she'd spoken to the lawyer about releasing Priya, because Priya was working three days and that she could release her, so we had those discussions. **It was a discussions only.**

Discussions only?---**Yes.**

Now, you know the difference between a discussion only and a lawful and reasonable direction, don't you?---Yes, I do.

Because it was only discussions that occurred, isn't that the case?---But of course you're going to have a discussion **before** you take that path.

Yes?---You can't just create an email. Of course we had that discussion and she talked about her concerns, in relation to - especially to Priya and Danni, we had - we had conversations. As I said, I put a PD together for the new role that she wanted to hire.

So a PD with the new role isn't anywhere near enough documents to then be able to dismiss someone, is it?---**It wasn't about dismissing someone. She was looking at**

making those roles redundant and bringing in a generalist. So it was a different role, so that takes another process.

You're saying that this was going to happen, potentially, in the future?---Yes.

Then how do you say that there was a direction to dismiss these three people and you didn't do it?---**It wasn't a direction.** When I spoke with Danni and Priya, on my one to one, I came out and I spoke to Heidi about their negative feedback towards her and she said, 'Well, let's just get rid of them'. So it wasn't a professional directive.

Okay. So to confirm, Heidi never directed you to dismiss those three people, did she?---**Well, it wasn't at that stage.** She did make a comment that that was her intention, or our intention, that was she was going to change the HR department and bring in some new people, or a new person as an HR generalist.

And it's just as possible that she could go back on that and not dismiss these people, isn't that right?---Well, she could. I don't know what she would have thought in her mind.

Yes. Now, there was also no permission from the director to dismiss these people, were there?---I never had that discussion with Tom. Is that who you're talking about?

Yes, that's correct?---Well, I wouldn't have that discussion with him.

Because you wouldn't dismiss them?---**I could dismiss them if I had authority and Heidi had given authority to do so.**

Yes, but you didn't have that direction, did you?---**I didn't** - why would I ask Tom? I don't know why I'd be asking Tom. That's not my role. It'd be Heidi's role to ask Tom.

But you didn't have the direction to dismiss those three people, did you?---Heidi told me about her plans to want to have them dismissed.^{1,24}

(my emphasis)

[30] It is clear from this testimony that Ms Crawford asserted Mrs Black was looking at making the roles redundant.²⁵ I have also noted that while highly critical of Mrs Black in relation to a wide range of matters in the email sent to Professor Tom Marwick on 29 October 2024 (**Marwick email**),²⁶ Ms Crawford did not level "Allegation 2.2(b)" against Mrs Black at that time. Having regard to these considerations, I am not persuaded that Mrs Black directed Ms Crawford to terminate the employment of Ms Zhou, Ms Darshani and Mr Serradi. I consider Mrs Black and Ms Crawford may well have been discussing matters pertaining to the composition of HR team of the Respondent, but I have not been persuaded that these discussions ascended to the level of a direction being issued to terminate their employment.

[31] The gravamen of "Allegation 2.1(b)" relied upon by the Respondent was that Mrs Black created an unsafe and/or unhealthy environment in the Respondent's workplace.

[32] Ms Crawford gave evidence that working with Mrs Black was “*difficult because of her behaviour in the workplace and her emotional state*” and expressed the opinion that an unsafe working environment had been created because of Mrs Black’s behavioural traits.

[33] Ms Crawford wrote in the Marwick email, that Mrs Black cried on a daily basis but I regard the evidence of Mrs Black and Ms Zhou on this point more compelling. Mrs Black was candid in admitting that there were occasions when she was in tears at work, but she said that these were not regular. While stating little overall that was positive about Mrs Black, Ms Zhou voluntarily attested to never having seen Mrs Black in tears at work.

[34] Ms Darshani’s evidence at the hearing was that while she felt a bit nervous and uncomfortable when Mrs Black returned from her extended period of personal leave, she was never abused by Mrs Black during her employment and nor did Mrs Black pose a threat to her safety.²⁷

[35] Ms Zhou said she was extremely unhappy while working for the Respondent. She charged Mrs Black with creating a health and safety risk, attested to feeling stressed and nervous and said she had adopted strategies to avoid contact with Mrs Black. Ms Zhou also claimed Mrs Black upset her so much that on approximately 10 occasions during her employment with the Respondent, she was reduced to sobbing in the bathroom. There was, however, no evidence before me of Ms Zhou ever having made anyone aware of these things during the course of her employment with the Respondent.

[36] Mrs Black challenged assertions from Ms Zhou that she was difficult to work with and non-responsive to email, claiming to have received feedback during the investigation that the HR team had said she always responded to emails. Mrs Black asserted that there were never any issues raised with her about her impact on other staff.

[37] “Allegation 2.3” is something of a subset of “Allegation 2.1(b)” because it involves a single, specific incident on 11 October 2023. The Respondent submitted there was unprofessional and unreasonable behaviour from Mrs Black towards Ms Zhou on that day.

[38] Ms Zhou’s version of the events on 11 October 2023 was that Mrs Black became very upset and then angry as a result of an exchange between them, although she said neither of them had raised their voices or shouted.²⁸ Ms Zhou said Mrs Black accused her of always “*pushing back*”, being rude and verbally attacking her. Ms Zhou argued there was a power imbalance and asserted that Mrs Black had engaged in workplace abuse, but she also conceded:

- a) that when Mrs Black first stated that she wanted the conversation to stop, she (Mrs Black) was visibly upset;²⁹
- b) she (Ms Zhou) did not stop the conversation when asked to do so;³⁰
- c) Mrs Black became more upset when she (Ms Zhou) did not stop;³¹
- d) Mrs Black neither swore at her nor threatened her job;³²
- e) It was Mrs Black who sought to avoid the situation and get out of it; and³³

- f) In the days leading up to the 11 October 2023 incident, Mrs Black had communicated to the HR team that there would be no more ‘he said/she said’ dialogue.³⁴

[39] Mrs Black’s account of her interaction with Ms Zhou on 11 October 2023 was that Ms Zhou had become negative and unnecessarily critical of the work of a consultant engaged by the Respondent and there was then a dispute about whether Ms Zhou was to be undertaking additional ‘employment history’ duties in the role of ‘employment history champion’/ System Administrator. Mrs Black was under the impression that Ms Zhou had previously communicated to Ms McCarthy her agreement to do so, which Ms Zhou denied. Mrs Black said that she was therefore confused and decided that they should discuss the matter further upon Ms McCarthy’s return to work, but this had resulted in Ms Zhou asking, “*can’t I stand up for myself?*”

[40] Mrs Black said that drawing upon the toxic behaviour training they had recently completed, she suggested to Ms Zhou that it would be better to wait until Ms McCarthy was back in the office, but that Ms Zhou disregarded this and continued making complaints about the Human Resources team. Mrs Black stated that this prompted her to tell Ms Zhou that her behaviour was not okay. She said she also had to repeatedly ask Ms Zhou to leave the matter until the next day.³⁵ Mrs Black claims that she then returned to her office and became emotional for various reasons, including her general exhaustion, anxiety and the widespread news associated with “*the beginning of the Israel-Palestine conflict.*” When she realised she could not continue working, Mrs Black said she telephoned Ms Bolton and received Ms Bolton’s approval to go home. Mrs Black claims to have sought to speak with Ms Zhou about their exchange before she left for home but said Ms Zhou was not at her desk. Mrs Black said she was nonetheless able to apologise to Ms Darshani, who had witnessed the exchange with Ms Zhou. Mrs Black said that Ms Darshani replied by saying that she (Mrs Black) had not done anything and that the situation had only escalated as a result of Ms Zhou’s behaviour, or words to that effect.³⁶

[41] When asked what she thought had caused the incident, Mrs Black said:

“She [Danni/Ms Zhou] wanted to talk about what Neve [Ms McCarthy] had said, and a lot of it was about what Neve had said, and the day before I had mentioned that we would have no more conversations where the other person wasn't in the room. I asked for Neve to be in the room, and Danni started to object at that point about wanting to say - defend herself without Neve in the room, but telling me things that Neve had said, and it was at that that the conversation started to change, and it became uncomfortable, and it was at that point that I said, 'I have already been upset once today. I think we need to end this conversation.' And I did, and I walked to my office.”³⁷

[42] The Respondent produced a copy of the email Ms Zhou sent to Ms McCarthy and Ms Crawford on 12 October 2023³⁸ and said that this contemporaneous record was to be preferred to conflicting evidence of Mrs Black. The Respondent also submitted, however, that to the extent the evidence of either Mrs Black or Ms Zhou, or both of them, conflicted with the evidence of Ms Darshani, the evidence of Ms Darshani (who had been a witness to their exchange) was to be preferred.

[43] Ms Darshani recounted that there was a dispute about whether Ms Zhou was to be the System Administrator. She said that Mrs Black was under the impression Ms Zhou had communicated to Ms McCarthy her agreement to undertake that role, but this was denied by Ms Zhou, who indicated she wanted more information before agreeing. Ms Darshani said that Mrs Black was confused by this response and decided that the matter should be further discussed when Ms McCarthy returned to work. Ms Darshani outlined that when Mrs Black then stated that she did not want to discuss the matter further in Ms McCarthy’s absence, Ms Zhou responded by saying that all she was asking was for more information about the System Administrator position and that it would be good if this was provided to her by Mrs Black. Ms Darshani said that matters only escalated when Ms Zhou would not stop talking after she was first directed to stop.³⁹ Ms Darshani stated that this prompted an argument between Mrs Black and Ms Zhou and that they both raised their voices, although neither of them swore or abused the other.⁴⁰ She said when Mrs Black accused Ms Zhou of always asking questions for which she could not provide answers and treating her with disrespect, Ms Zhou disagreed with these propositions. Ms Darshani stated that at this point, Mrs Black declared the discussion finished, went into her office and shut the door, while a “*clearly upset*” Ms Zhou also left the open office area. At the hearing, Ms Darshani said that when Mrs Black came out from her office it was evident she had been crying and:

“...she asked, 'I do not know how the conversation went or became so bad' and I said, 'Yes, it was something we could have discussed in a very normal manner, it shouldn't have escalated'. And I said, 'Danni shouldn't have spoken with you like that', but then I was definitely scared to tell her that, 'You shouldn't have spoken to Danni the way that you did'.”⁴¹

[44] At the hearing, the Respondent also sought to rely on two further exchanges between Mrs Black and members of the Respondent’s staff, neither of whom the Respondent called as witnesses. The first, recounted by Ms Zhou, involved an exchange between Mrs Black and one of the Respondent’s IT staff. Ms Zhou characterised Mrs Black’s behaviour and comments towards the IT Staff member as having humiliated him. Mrs Black’s evidence regarding this exchange went to the nature of the working relationship she had with the IT staff member. Mrs Black said that she shared a positive working relationship with him, characterised by shared banter and humorous exchanges. She said Ms Zhou had focussed on one statement within a series of statements that passed between herself and the IT staff member on that occasion.

[45] The other incident involved a comment Mrs Black made about a colleague’s choice to drink almond milk. Ms Zhou witnessed the comment and said it was aggressive and made her feel uncomfortable. Mrs Black gave candid evidence in response. She admitted making the comment “*Why can't you get your own milk?*” and proffered that it was a “*terrible joke*”⁴² but challenged Ms Zhou’s assertion that she “*snapped*” at the colleague when delivering it. The Respondent elected not to call either the IT staff member or the colleague who consumes the almond milk. Having heard directly from Mrs Black, I accept her explanations in relation to these two incidents and I attach no weight to them in my consideration of whether there was a valid reason for Mrs Black’s dismissal relating to her conduct.

[46] In summarising its position, the Respondent submitted that each act of Mrs Black was inconsistent with its code of conduct and bullying and harassment policy and constituted misconduct and that her contract made it clear that breaching the code and policies could result

in summary termination of employment. The Respondent submitted that Mrs Black was the most senior human resources figure in the organisation, knew about those policies and appreciated their importance. The Respondent argued the misconduct was made worse by Mrs Black's lack of insight and refusal to take responsibility.

[47] In addition to the particularised submissions of the Respondent regarding Mrs Black's evidence which I have dealt with above at [22], the Respondent charged Mrs Black with being evasive and lacking candour because of qualifications she made and her reluctance to concede matters damaging to her interests. As to these generalised criticisms, I note that Mrs Black was not above making concessions. For example, Mrs Black freely admitted to her struggles at work and making attempts at humour which could be prone to misinterpretation, articulating that she used humour as a coping mechanism and conceding that her humour sometimes missed the mark.⁴³ Further, I consider that seeking to explain one's evidence does not automatically amount to a reluctance to concede matters and nor is one necessarily being evasive when attempting to understand a question or line of questioning under cross examination. I have noted these were features of Mrs Black's oral testimony. I have also noted that Mrs Black challenged Ms Crawford's testimony in a methodical and comparatively dispassionate manner, which was significantly different to the approach of Ms Crawford, who only worked with Mrs Black for 6 weeks and clearly disliked the experience. Ms Crawford made clear her lack of regard for Mrs Black as an HR professional. She took the opportunity to assert in the Marwick email that Mrs Black was unprofessional and of a mental state that was "*obviously not at the capacity of being a GM and running a team*", and that Mrs Black had no idea what she was doing.⁴⁴ Ms Crawford also included gratuitous, uncomplimentary commentary about Ms Zhou, Ms Darshani and Mr Serradi. Ms Crawford's briefing of the Chief Executive Officer of the Respondent through the Marwick email was a substandard effort from someone who has had a long career in human resources. It was a missive based on personal animosity, replete with the airing of various grievances and perceived slights, as opposed to a strategic, issues-based briefing paper. I note that Ms Crawford was promoted to Acting General Manager – Human Resources when Mrs Black was dismissed

[48] My observation of Ms Darshani was that she was a credible witness who gave an honest account to the best of her recollection. I regard her evidence as having given the most complete and fairest assessment of what occurred on 11 October 2023. I have also noted Ms Darshani's evidence in her witness statement that she would not want to go through the experiences of working at the Respondent and dealing with Mrs Black again.

[49] Ms Zhou's account of Mrs Black's actions in the workplace was almost exclusively uncorroborated. It was, however, clear that Ms Zhou also did not enjoy her time working for the Respondent and she asserted Mrs Black was a "*significant part*" of her decision to resign from her employment with the Respondent in December 2023.

[50] Both Mrs Black and Ms Crawford attested to Ms Zhou being prone to mood swings. Mrs Black said Ms Zhou was difficult to work with. Ms Crawford's testimony was that Ms Zhou lacked emotional maturity and could shut down because "*she wasn't open to being spoken to harshly or in a particular tone.*"⁴⁵ I had the following dialogue with Ms Zhou at the conclusion of her evidence at the hearing:

“What would you characterise not stopping, when your manager asks you to stop, as being?---Exasperated. I - I didn't know how to react, I was in shock when - when she was becoming upset.

You're in a workplace and you've got a manager, or you've got a director or someone and they give you a lawful and reasonable instruction, do you follow it?---Typically, yes.”⁴⁶

[51] Without wishing to be critical of Ms Zhou's interest in understanding why certain decisions might be made and/or her desire to influence them, I was not left with the impression, having observed Ms Zhou's testimony at the hearing, that she accepts that it is not unreasonable for her employers to expect that she will follow lawful and reasonable instructions without demur. Nor was I left persuaded that Ms Zhou would be the easiest of employees to manage when things do not go her way. Certainly, she seemed oblivious to the requests Mrs Black made on 11 October 2023 that their conversation cease.

[52] The Respondent's ultimate submission at the hearing in relation to “Allegation 2.1(b)” was that whether the Respondent's workplace was “*unsafe, uncomfortable or awkward*”, it was not a workplace conducive to “*working within*.”⁴⁷ As to this, no witness to this proceeding left me with the impression that they were bursting with enthusiasm about their work for the Respondent and I note that some have now left. However, there has been an appropriation of the word “unsafe” by parties in the employment context and its application can at times stretch beyond scenarios which can be objectively regarded as dangerous. This case is one of those times. Having regard to the totality of the evidence, I am satisfied that the atmosphere in the Respondent's workplace was, on occasion, uncomfortable and awkward, but I am not persuaded the Respondent's workplace was a dangerous one.

[53] Mrs Black gave an instruction to Ms Zhou on 11 October 2023. Things only started to escalate because Ms Zhou chose not to comply. Ms Zhou charged Mrs Black with having behaved aggressively and inappropriately and yet it was Ms Zhou who chose to continue the conversation in contravention of Mrs Black's lawful and reasonable direction, and she too raised her voice when doing so.

[54] The Respondent submitted the question for the Commission to consider was whether or not Mrs Black behaved in an unreasonable and unprofessional manner during the 11 October 2023 incident and whether Ms Zhou raised her voice or did not follow a lawful or reasonable direction was not particularly relevant. I disagree. That would be to consider the incident on 11 October 2023 in a vacuum. It was to neither individual's credit that voices were raised, but I do not accept the Respondent's apparent suggestion that Ms Zhou should be relieved of any level of accountability for her part in the incident on 11 October 2023. To do so would be to invite a dynamic whereby staff members are free to pick and choose which lawful and reasonable instructions they comply with. Mrs Black acted lawfully and reasonably when instructing Ms Zhou to discontinue the conversation. She had indicated the conversation would resume when Ms McCarthy was a party to it. This should have been the end of their dialogue that day.

[55] The ambit of the conduct which may fall within the phrase “harsh, unjust or unreasonable” was explained in *Byrne v Australian Airlines Ltd*⁴⁸ 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.”⁴⁹

[56] I have outlined above that I attach no weight to “Allegation 1.1(a)”, which involved the lack of an office for Ms Crawford. I have also not been satisfied that Mrs Black directed that the employment of certain staff members be terminated without reasonable cause (“Allegation 2.2(b)”). Nor have I been persuaded that Mrs Black created an unsafe environment at the Respondent’s workplace (“Allegation 2.1(b)”).

[57] On balance, however, I have concluded that it was more likely than not that Mrs Black told Ms Zhou and Ms Furnell that Ms Crawford had “*stuffed up*” the budget report and I am persuaded that her reaction in raising her voice during the exchange on 11 October 2023 fell short of the level of professionalism that should reasonably be expected of a General Manager of Human Resources. While these two matters are arguably capable of constituting misconduct, I am more inclined to the view, having regard to the circumstances of this case, that they were actions that warranted a caution and performance management. I have not been persuaded that they rise to the level of serious misconduct and, ultimately, I am not satisfied there was a valid reason for the dismissal of Mrs Black related to her conduct.

Section 387(b) – whether Mrs Black was notified of that reason

[58] Consideration of s.387(b) in this matter requires asking whether Mrs Black was notified of ‘that reason’, which is a reference to the valid reason(s) referred to in s.387(a) of the Act. While I have concluded there was no valid reason, I do not consider the fact that Mrs Black was not notified of a valid reason in this case is a factor that weighs in favour of a finding of unfairness because the Respondent notified Mrs Black of the reasons it considered were valid reasons for her dismissal.

Section 387(c) – whether Mrs Black was given an opportunity to respond to any reason related to the capacity or conduct of the person

[59] Mrs Black was given an opportunity to respond to the reasons related to conduct that the Respondent gave for her dismissal. This factor does not weigh in favour of a finding of unfairness.

Section 387(d) – whether there was any unreasonable refusal by the Respondent to allow Mrs Black to have a support person present to assist at any discussions relating to dismissal

[60] There was no refusal by the Respondent to allow Mrs Black to have a support person present to assist at the discussions relating to the dismissal. In the circumstances of this case, this factor is a neutral consideration.

Section 387(e) – if the dismissal related to unsatisfactory performance by Mrs Black—whether she had been warned about that unsatisfactory performance before the dismissal

[61] The Respondent did not dismiss Mrs Black on the basis of unsatisfactory performance, so this factor is not relevant.

Section 387(f) – Impact of the size of the employer on procedures followed and s.387(g) – absence of dedicated human resources management specialist or expertise on procedures followed

[62] Mrs Black submitted the Respondent’s size and human resource management expertise were such that deficiencies in the processes followed in effecting Mrs Black’s dismissal should have been avoided.

[63] While disclosing that it has in excess of 300 employees, the Respondent does not contend that the size of its enterprise or any absence of dedicated human resource expertise impacted procedures effecting Mrs Black’s dismissal, albeit it outlined that Professor Greenwood was inexperienced in dealing with Australian employment law at the time of Mrs Black’s dismissal.

[64] I have noted that there was no termination letter issued to Mrs Black and the first time she became aware that she had been dismissed was on 28 March 2024, when she was provided with a payslip indicating that her annual leave and long service leave entitlements had been paid out. I consider that the Respondent could and should have done better than this, given its size and access to human resource management expertise. In this case, the ss.387(f) and (g) considerations weigh in favour of a finding of unfairness, albeit not to a significant degree.

Section 387(h) – any other matters that the Commission considers relevant

[65] Mrs Black submitted that the Respondent’s allegations against her, even if established, did not constitute serious misconduct and as such, the deprivation of notice on termination that was visited upon her was harsh. Mrs Black otherwise submitted that the decision to summarily dismiss her was a disproportionate response and therefore harsh, in the circumstances where:

- a) She had a period of over seven years of exceptional service, throughout which she consistently received positive feedback about her conduct and performance and was promoted without issue;
- b) if the Respondent had taken issue with her conduct, it could have been addressed by way of feedback, further training or, at most, a written warning;

- c) the dismissal had severely impacted her personal and economic situation, in that she had lost her sole source of income, does not have any other support in Australia and her dismissal had brought on increased stress and anxiety;
- d) she had been honest and had made reasonable concessions throughout the investigation that she could have approached things differently in some instances;
- e) she had received no warnings or counselling on any of these alleged issues prior to the dismissal;
- f) the Respondent had used the independent medical examination as a means for the medico-legal examiner to question her about the allegations before they were put to her;
- g) the lack of any tangible support for her during October 2023 when she was clearly suffering from health issues; and
- h) she did not receive written notice of her termination (in breach of s.117(1) of the Act).

[66] The Respondent submitted the termination of Mrs Black’s employment was an entirely reasonable and appropriate response to her conduct and argued that Mrs Black’s personal circumstances are not remarkable because a termination of employment invariably occasions a degree of hardship and serious consequences. Further, the Respondent submitted that an employer’s decision to hold an employee accountable for their behaviour does not become unfair or harsh simply because the consequences are serious.

[67] The Respondent also submitted that 7 years was a significant period of service and demanded a high level of compliance with workplace policies. The Respondent asserted it would be absurd to suggest that a longer period of service could be used as a “*licence for misconduct*”⁵⁰ and appeared to suggest there was a real risk of its workforce further diminishing had Mrs Black stayed.

[68] As to the s.387(h) considerations, performance or conduct concerns had not previously been raised with Mrs Black. During the course of her employment, the Respondent had been promoted 3 times, including to acting, and then permanent General Manager, Human Resources and Payroll. It appears to have been the case that Mrs Black subsequently experienced some challenges and difficulties in the discharge of her duties as General Manager and was in need of extra resources. Having promoted her, and for a time having required her to cover two roles, the Respondent had an obligation to support Mrs Black’s continuing professional development and help set her up for success. If there were areas for improvement, the Respondent should have provided constructive feedback and coaching. It did not.

[69] In addition to this deficiency, the Respondent employed some other deleterious processes in managing Mrs Black’s employment. Having had little contact with Mrs Black during her period of absence, the Respondent responded to advice of Mrs Black’s imminent return to work by informing Mrs Black that she was required to attend an IME. The Respondent then advised the medico-legal examiner that Mrs Black was to be the subject of a formal

investigation in her behaviour without also having informed Mrs Black that this would be occurring.⁵¹ Mrs Black attended the IME in good faith, and answered questions about matters that, unbeknown to her, were the subject of complaint against her. Secondly, on the very day she returned from work after a 4-month absence, Mrs Black was formally notified that she was under investigation. Finally, having subjected Mrs Black to the IME, investigation and disciplinary process, the Respondent failed to formally notify Mrs Black that she had been dismissed. The first Mrs Black learned of her dismissal was when she received a payslip outlining termination payments. Mrs Black is 53 years old, held a senior leadership position in her chosen profession and, as result of her summary termination, was left to face the employment market with a charge of having engaged in serious misconduct.

[70] On balance, I consider these matters I have discussed in [68] and [69] above, together with the matters raised by Mrs Black in relation to s.387(h), outweigh the submissions of the Respondent and weigh in favour of a finding that Mrs Black's dismissal was unfair.

Conclusion

[71] I have made findings in relation to each matter specified in s.387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.⁵²

[72] In this case, Mrs Black's conduct and performance warranted review, a caution, some performance management and some coaching. I consider the decision of the Respondent to characterise Mrs Black's conduct as serious misconduct warranting summary dismissal was a disproportionate response to the matters that had arisen in the Respondent's workplace. Having regard to this and my consideration and findings in relation to each of the other matters specified in s.387 of the Act, I am satisfied that the dismissal of Mrs Black was unreasonable because there was no valid reason to dismiss her. I also consider the dismissal was harsh because the summary dismissal was a disproportionate response to the actions of Mrs Black and does not have regard to her previously unblemished record over 7 years. I am therefore satisfied that Mrs Black was unfairly dismissed within the meaning of s.385 of the Act.

[73] Section 390 of the Act provides that, if the Commission is satisfied a person was protected from unfair dismissal and determines that that they were unfairly dismissed, it may order either reinstatement or compensation. Compensation can only be ordered, however, if the Commission is satisfied that reinstatement is 'inappropriate' (s.390(3)(a)).

[74] In this case, Mrs Black does not seek reinstatement and has submitted that it is not appropriate. The Respondent agrees. In circumstances where reinstatement is not sought, I am satisfied that reinstatement is inappropriate. I must then consider whether an order for the payment of compensation is appropriate in all the circumstances of the case, and if so, what that amount should be. Taking into account my finding that the dismissal was unfair and the reasons for that conclusion I have outlined above, and being satisfied an order for reinstatement is inappropriate, I consider that an order for payment of compensation is appropriate in all the circumstances.

[75] Section 392 of the Act sets out the criteria for deciding the amount of compensation but I consider the material currently before the Commission addressing compensation should be updated so that it is possible for me to assess a level of compensation that is appropriate, having regard to all the circumstances of this case. In particular, up to date particulars addressing ss.392(2)(d), (e) and (f) are required.

[76] As such, the parties will shortly receive a Notice of Listing for a directions hearing, at which the further case management of this matter will be discussed. I also encourage the parties to engage in discussions in the meantime to see whether an agreement as to compensation might be reached, thereby negating the necessity for any further attendances and submissions, with their associated legal costs. I will facilitate making available a Member of the Commission to assist the parties if the parties so request. Such arrangements can be made by contacting my Chambers.



DEPUTY PRESIDENT

Appearances:

M Kriewaldt for Mrs H Black

N Kordos, counsel, for Baker Heart and Diabetes Institute

Hearing details:

2024.

Melbourne.

22 July.

Printed by authority of the Commonwealth Government Printer

<PR781736>

¹ Digital Court Book (DCB) p.73.

-
- ² DCB p.77.
- ³ DCB p.90.
- ⁴ DCB p.15.
- ⁵ DCB pp.24-25.
- ⁶ DCB p.29.
- ⁷ DCB p.34.
- ⁸ DCB p.140.
- ⁹ DCB p.141.
- ¹⁰ DCB p.47 at [10].
- ¹¹ DCB p.51 at [18].
- ¹² DCB p.61 at [19].
- ¹³ DCB p.169 at [32].
- ¹⁴ Transcript 22 July 2024 at PN 55, PN 58, PN 122, PN 126, PN 127 and PN 355.
- ¹⁵ Ibid at PN 1041.
- ¹⁶ Which, it may be noted, occurred only four days before the 11 October 2023 incident with Ms Zhou.
- ¹⁷ DCB 122 at [98], noting that the Respondent cross examined Mrs Black about being in a sensitive state “due to war in the Middle East” - see Transcript 22 July 2024 at PN 196.
- ¹⁸ Transcript 22 July 2024 at PN 162.
- ¹⁹ Ibid at PN 158-163.
- ²⁰ Ibid at PN 143-167.
- ²¹ DCB pp.92–93.
- ²² Transcript 22 July 2024 at PN 354.
- ²³ DCB p.238 at [49].
- ²⁴ Ibid at PN 860-878.
- ²⁵ Ibid at PN 869.
- ²⁶ DCB at p.239, noting that Professor Marwick was the (then) Chief Executive Officer of the Respondent.
- ²⁷ Transcript 22 July 2024 at PN 942-947.
- ²⁸ Ibid at PN 683.
- ²⁹ Ibid at PN 639-640.
- ³⁰ Ibid at PN 643 and PN 659.
- ³¹ Ibid at PN 645-646.
- ³² Ibid at PN 647-648.
- ³³ Ibid at PN 661-663.
- ³⁴ Ibid at PN 666.
- ³⁵ DCB pp.11–12 at [9]; DCB p.62 at [21].
- ³⁶ DCB p.62 at [23].
- ³⁷ Transcript 22 July 2024 at PN 358.
- ³⁸ Exhibit R4 – *Email from Ms Zhou dated 11 October 2023*.
- ³⁹ Transcript 22 July 2024 at PN 936-937.
- ⁴⁰ Ibid at PN 927.
- ⁴¹ Ibid at PN 934.
- ⁴² Ibid PN 360.
- ⁴³ Ibid at PN 359.
- ⁴⁴ DCB p.240.

⁴⁵ Transcript 22 July 2024 at PN 825-827.

⁴⁶ Ibid at PN 700-701.

⁴⁷ Ibid at PN 1056.

⁴⁸ [1995] HCA 24; (1995) 185 CLR 410.

⁴⁹ Ibid at [128].

⁵⁰ Transcript 22 July 2024 at PN 1071.

⁵¹ DCB p.98 at (10).

⁵² *ALH Group Pty Ltd v The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* (1999) 94 FCR 561, [1999] FCA 1836, [6]–[7].