DECISION

Fair Work Act 2009
s.604—Appeal of decision

Brock Austin

v

Sandgate Taphouse Pty Ltd T/A Sandgate Post Office Hotel
(C2023/7994)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BEAUMONT
DEPUTY PRESIDENT ROBERTS

BRISBANE, 1 AUGUST 2024

Appeal against decision [[2023] FWC 3084] of Commissioner Simpson at Brisbane on 23 November 2023 in matter number U2023/6319.

Overview

[1] Mr Brock Austin (Appellant) has brought an appeal under s. 604 of the *Fair Work Act 2009* (the Act), for which permission is required, against a Decision[1] of Commissioner Simpson issued on 23 November 2023 (Decision) dismissing his application for an unfair dismissal remedy. The Appellant was dismissed from his employment as a venue manager at the Sandgate Post Office Hotel by Sandgate Taphouse Pty Ltd (Respondent). At first instance, the Respondent alleged that the Appellant was dismissed due to poor performance and not keeping up with his duties to an adequate standard. The Appellant denied the allegation and contended that he was unfairly dismissed.[2]

[2] The Commissioner determined that the evidence established that the Appellant's work performance was unsatisfactory and that his poor performance and consistent failure to recognise ongoing performance management and adjust accordingly,[3] constituted a valid reason for the dismissal. The Commissioner also found that the dismissal was not harsh, unjust or unreasonable in all the circumstances, notwithstanding some deficiency in the Respondent's performance management process and the procedures adopted in terminating the Appellant's employment.

[3] On 14 December 2023, the Appellant lodged a Form F7 Notice of Appeal. We conducted a hearing on 12 March 2024 in relation to permission to appeal and merits of the appeal. At the hearing, Mr Thomas Allan, Solicitor, who represented the Appellant at the first instance hearing, was granted permission to appear and continued his representation of the Appellant in the appeal. The Respondent was represented by Ms Mendelson of counsel instructed by Mr H Proctor in the first instance hearing, and in the hearing of the appeal, the Respondent was represented by its manager (and former director), Mr Ian Van Der Woude. The Appellant was granted permission to be legally represented as we were satisfied that the appeal

grounds raised issues of some complexity and that we would be assisted by the legal representative who had conducted the matter for the Appellant at first instance.

The Decision

[4] The facts as set out in the Decision are that the Appellant was employed as a Venue Manager at the Sandgate Post Office Hotel (Hotel) from October 2022 until his dismissal effective 29 June 2023. As a venue manager, the Appellant held responsibilities in relation to the day-to-day operations of the Hotel, including stocktakes, staff rostering and cash control. At paragraphs [10] – [19] of the Decision, the Commissioner summarised the evidence in relation to concerns about the Appellant's performance in the period between December 2022 and May 2023. Those performance concerns included discrepancies in monthly stocktake,[4] an unexplained deficit in the petty cash balance[5] and failure to induct new staff on company policies including WHS procedures.[6] The Commissioner also set out the evidence in relation to the steps taken by Mr Van Der Woude to address those performance concerns including having discussions and one-on-one meetings with the Appellant. The Commissioner observed that the Appellant's evidence indicated a "*blanket non acceptance*" of the opinions of Mr Van Der Woude and did not respond to the concerns about his performance. [7]

[5] Next, the Commissioner summarised, at paragraphs [20] – [27], the evidence concerning the Appellant's contentions that he was not provided a specific role description and that the Respondent's business benchmarks and KPIs, which he was required to meet, were "*constantly changing and enlarged to meet weekly fluctuation*".[8] The Commissioner noted that the Appellant's letter of offer did not contain a role description for venue manager, but Mr Van Der Woude's evidence was that the duties were explained to the Appellant during his interview. As to the benchmarks and KPIs, the Commissioner noted that there were two sets of KPIs. The first set of KPIs were stipulated in the letter of offer which provided for an entitlement to an annual 10% bonus payment if those KPIs were successfully achieved by the Appellant. In addition, there were business performance benchmark targets which were discussed and purportedly varied in regular meetings. In this regard, the Commissioner said:

> "[23] Under cross examination, it became clear that the business benchmarks and KPIs were different to the Applicant's individual KPIs, however the business KPIs did not change as frequently as the Applicant had suggested, for example the labour budget KPI was sitting consistently at 33%. In response, the Applicant submitted that as it was a percentage of sales the business made, it did in fact fluctuate and was only partially under his control due to fixed labour costs of employees such as bookkeepers or other non-casual staff who had set hours. He did not appear to take any responsibility for his role in contributing to the higher than benchmarked labour costs, giving reasons such as needing to provide minimum hours and shift lengths to employees to keep them. He agreed that Mr Van Der Woude was aware of this, but not that it had been raised with him directly as a personal performance issue."

[6] In relation to stocktake and stock levels, the Commissioner observed that the discrepancies were "*fairly significant*" and the Appellant's response to the discrepancies was that the software system had not been properly set up by the Respondent and that he blamed it on invoices not being input even though this was one of the Appellant's duties. The evidence recorded in the Decision disclosed that the Appellant was required to meet a business benchmark of keeping stocktake variance to under $200 per month, but the variance in April was about $6,000 and the variance in May was $26,419. In relation to the deficit in petty cash balance, the Appellant's explanation was that Mr Van Der Woude took money from the till so it could not be properly balanced.

[7] The Appellant went on a two-week period of leave from 12 June 2023. Prior to commencing his leave, Mr Van Der Woude asked the Appellant to prepare a "*plan*" for discussion upon his return from leave. The Commissioner noted that the substance and expression of the plan was in dispute.[9] The Appellant regarded the "*plan*" that he was asked to consider during his leave as a strategy/action plan "*for the venue*", as the venue was not meeting its expected benchmarks overall. Mr Van Der Woude, in contrast, referred to the plan as a plan for the Appellant to address his own performance and areas for improvement, specifically in relation to controlling labour costs, team leadership and operational issues (stock and cash control). After observing that the parties' recollection about the "*plan*" differed and the evidence in this regard was limited, the Commissioner said:

> "[33] Having made that observation, it also appears to be the case however, that the Applicant was either wilfully blind to or unaware of his role in the business' overall success, and how his personal KPIs affected such success. His cross examination demonstrated a lack of ability to take responsibility for the areas he was in charge of as venue manager, consistently clarifying exactly where his duties ended and another's began or providing excuses for why his areas of control were not up to standard. Despite this he was strong in his belief that his performance was not an issue."

[8] At paragraph [34], the Commissioner noted that in the 12 June 2023 interaction, the Appellant understood that Mr Van Der Woude made a comment implying that he was not a good venue manager and despite being asked to rate his own performance, the Appellant did not understand the 12 June interaction to be specific to his performance. When the Appellant returned to work on 26 June 2023, Mr Van Der Woude called the Appellant to the smoking section of the Hotel and the Appellant was made aware of "*non-specific poor performance concerns*"[10] and that Mr Van Der Woude was not happy with his performance and suggested that the Appellant should resign. It was noted that the Appellant considered the interaction to be a "*performance meeting*"[11] to which the Appellant would have brought a support person, or recorded, if he had known. Mr Van Der Woude did not recall having any significant or formal discussion about the Appellant's performance on that day.

[9] On 29 June 2023, the Appellant was asked to meet Mr Van Der Woude in the bar section of the Hotel. The Commissioner stated that the evidence of the parties about how the 29 June meeting took place differed. The Appellant's evidence was that he was asked by Mr Van Der Woude whether he had given any thought to his unsatisfactory performance, that the Appellant disagreed with the assertion about his performance and referred to his consistent meeting of KPI targets, and that Mr Van Der Woude then proceeded to terminate his employment verbally. Mr Van Der Woude's evidence was that he met with the Appellant "*formally*" to discuss the "*plan*" and whether it demonstrated that the Appellant could address the key issues in his performance which had been spoken about, and that Mr Van Der Woude told the Appellant that he had no confidence in his ability to run the venue or improve and he would have to let the Appellant go.

[10] In relation to whether there was a valid reason for the dismissal related to the Appellant's capacity or conduct – s. 387(a) – the Commissioner said that the onus rests with the Respondent in cases such as this to establish that it had a valid reason for the dismissal.[12] In this regard, the Commissioner summarised the Respondent's submission as follows:

> "[45] The Respondent submitted that the Applicant was aware that he failed to meet the wage benchmarks as he regularly attended the weekly management meetings (the only exception being when

> he was on leave). The benchmarks and the venue's performance against those benchmarks were discussed every week and recorded in the meeting minutes, copies of which were emailed to the Applicant immediately after the meeting. The Respondent submitted that the benchmarks and performance documented in the minutes plainly and objectively show that the Applicant was not meeting the benchmarks nor his contractual KPI targets. Therefore, the Applicant's assertion simply cannot be true, and if his assertion represents the Applicant's genuine belief, it shows a significant lack of insight into, and understanding of, his underperformance."

[11] The Commissioner then drew a comparison with the facts in *Cai v Serco Citizen Services Pty Ltd* (*Cai*)[13] noting that the Appellant had been evasive and unable to provide evidence to justify his claims that he was not responsible for poor performance. The Commissioner also noted that while there was no formal performance management of the Applicant advising him of the need to improve his performance as there had been in *Cai*, the difficulties of the business were linked to the Applicant's failure to meet his personal KPIs, a matter to which he appeared to be "*wilfully…or otherwise blind*".[14] Next, the Commissioner considered the decision in *Ash v Chadad Institutions of Victoria Limited*[15] (*Ash*) and said that:

> "[50] …The [Appellant] in his evidence demonstrated, similar to *Ash*, an almost wilful misunderstanding of this connection, and failed to take the basic mental step of linking the business' poor performance with his failure to meet performance indicators. In his evidence, despite being taken to and it being demonstrated plainly his responsibility for and input into key financial matters, not once did he take responsibility for his actions forming part of the issues the business was facing."

[12] The Commissioner was not persuaded by the Appellant's argument that the business failing had no nexus to his performance and said that the areas at issue were directly within his control, such as "*labour rostering where the sales were not supporting the need for the boots on the ground, stock to meet the demand being unclear and poor cash control*."[16] At paragraph [53], the Commissioner said:

> "[53] In all of the circumstances I accept the Respondent's submission that the errors being made were not being corrected despite being raised multiple times with the Applicant. The consistent failure of the Applicant to recognise the ongoing performance management and adjust accordingly provide a valid reason for termination of the Applicant's employment due to this conduct. I do not consider that the Applicant's arguments of lack of role clarity, consistently shifting KPIs or ineffective software has been made out to an extent great enough to dislodge this finding, and instead consider it more indicative of further blame shifting by the Applicant."

[13] As to whether the Appellant was notified of the reason for his dismissal – s. 387(b) – the Commissioner said:

> "[54] The Respondent submitted that the Applicant had been on notice of his unsatisfactory performance for several months before his eventual dismissal, and he had been specifically advised of the various performance shortfalls and was counselled to assist him to improve his performance. The Applicant argued that he was not properly notified of the reason for his dismissal. It is my view Mr Van Der Woude was a credible witness. I found he answered questions directly and candidly and I am inclined to prefer his evidence over that of the Applicant's where there is a conflict between them concerning the extent of discussions that occurred regarding the Respondent's concerns with the Applicant's performance. I am satisfied that the Applicant had notice of the issues that led to his termination."

[14] In relation to whether the Appellant was given an opportunity to respond – s. 387(c) – the Commissioner did not accept the Appellant's contention that he had been entirely unaware of the Respondent's dissatisfaction about his performance prior to the communication on 26 June 2023.[17] In this regard, the Commissioner referred to the evidence that the Appellant

had received emails about the "*targets*" of the business, meeting minutes which demonstrated a consistent failure to meet the 33% labour cost KPI, and that the Appellant also participated in multiple meetings with Mr Van Der Woude about stocktake issues and labour costs. The Commissioner accepted that notification of the Respondent's concerns was given to the Appellant on 12 June 2023 and the Appellant was given an opportunity to address the areas of concern by creating the "*plan*". The Commissioner expressed the view that it was not appropriate for Mr Van Der Woude to require the Appellant to perform work related tasks concerning the plan while the Appellant was on leave. Noting that the Appellant only had 4 days (upon his return from leave) to create a plan to address his performance issues, the Commissioner said:

> "I consider that this is not indicative of an 'ample' opportunity, as set out in the Respondent's submission, but coupled with the Applicant's account of the 26 June 2023 'meeting' I consider it sufficient to have constituted two opportunities for the Applicant to realise he was being performance managed and demonstrate an understanding of the Respondent's requirement for improvement."[18]

[15] Next, the Commissioner found that the Respondent did not refuse to allow the Appellant a support person and s. 387(d) was a neutral consideration. As to whether the Appellant was warned about his unsatisfactory performance before his dismissal – s. 387(e) – the Commissioner concluded that the actions of the Respondent could not be considered warnings and that there was no formal process or warnings related to the conduct that the Appellant was dismissed for.[19] In relation to s. 387(f), while reference was made to the Form F3 Response which stated that the Respondent had 28 employees, the Commissioner did not express a view as to whether this consideration weighed in favour of, or against, the Appellant's case or was a neutral consideration. As to s. 387(g), the Commissioner said noted that the Respondent had no dedicated human resource management staff and that while this provided a partial explanation for the perfunctory manner in which the Respondent terminated the Appellant's employment, it was a neutral consideration.[20]

[16] In relation to s. 387(h), the Commissioner considered relevant that while there was some deficiency in the Respondent's performance management process, the evidence tended to support that the Appellant's entire employment with the Respondent was marked by poor performance and a lack of insight into his underperformance which was unlikely to improve to a satisfactory standard. On this basis, the Commissioner was of the view that the Appellant's employment would likely have ended due to poor performance regardless of any failings in procedures adopted by the Respondent. In conclusion, the Commissioner was satisfied, having weighed each of the matters in s. 387, that the Respondent had a valid reason for dismissing the Appellant despite there being some issues concerning the procedures adopted in terminating the Appellant's employment, and the dismissal was not unfair in all the circumstances. The application was accordingly dismissed.

Permission to appeal

[17] An appeal under s. 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[21] There is no right to appeal, and an appeal may only be made with the permission of the Commission. It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of an appealable error.[22] However, the fact that the Member at first

instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[23]

[18] The Decision subject to appeal was made under Part 3-2 – Unfair Dismissal of the Act. Section 400(1) of the Act provides that permission to appeal must not be granted from a decision made under Part 3-2 unless the Commission considers that it is in the public interest to do so. The public interest test in s.400(1) is not satisfied simply by the identification of error or a preference for a different result. The task of assessing whether the public interest test is met is discretionary and involves a broad value judgment.[24] The public interest might be attracted where:

- a matter raises issues of importance and general application;
- there is a diversity of decisions at first instance so that guidance from an appellate court is required;
- the decision at first instance manifests an injustice;
- the result is counter intuitive; or
- the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[25]

[19] Further, s. 400(2) provides that in unfair dismissal matters, appeals on a question of fact can only be made on the ground that the decision involved a "*significant error of fact*".[26] A significant error of fact can be characterised as an error that vitiates the ultimate exercise of discretion.[27] It is well-established that s. 400(2) of the Act manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than the threshold pertaining to appeals generally. The test has been described as "*a stringent one*".[28] As a Full Bench of the Commission observed in *Dafallah v Melbourne Health*":[29]

> "Section 400(2) modifies the *House v The King* principles by limiting any review based on mistake of fact to a significant error of fact. Section 400 clearly evinces an intention of the legislature that appeals in unfair dismissal matters are more limited than appeals with respect to other matters under the Act."[30]

Grounds of appeal and Appellant's submissions

[20] The Appellant advanced four grounds of appeal contending that the Commissioner made various errors of law and fact. The grounds of appeal as set out in an Annexure to the Notice of Appeal and his submissions in relation to those grounds of appeal, can be summarised as follows.

[21] By **ground 1** the Appellant asserts that the Commissioner made an error of law in relation to the correctness of the conclusion, and that it was not open to the Commissioner to find that the dismissal was not unfair under s. 387 in circumstances where the Respondent "*did not discharge their evidential burden under s. 387(b)*" and Mr Van Der Woude admitted under cross-examination that the Respondent did not comply with its own HR policies and procedures in terminating the Appellant's employment for unsatisfactory work performance.[31] The Appellant submitted that having regard to s. 117 of the Act in respect of the requirement for written notice of termination,[32] the Decision was incorrect "*as a matter of law*" because the Respondent did not give written notice on the day of the Appellant's termination with the result

that the "*notification of the valid reason*" for the dismissal had not been given by the Respondent in explicit, plain and clear terms, before the decision to terminate was made.

[22] By **ground 2** it is contended that the Commissioner made significant errors of fact on the basis that it was not reasonably open on the evidence for the Commissioner to make findings at paragraphs [23] that KPIs did not change as frequently as the Appellant suggested; the labour budget was sitting consistently at 33%; and the Appellant did not take responsibility for the labour budget, giving reasons such as needing to provide minimum hours and shift lengths to employees to keep them. It is also asserted that the significant error of fact arose because: the Commissioner did not accept the Appellant's evidence that failure to meet benchmarks relating to labour costs could not be attributed to him; and with respect to the Commissioner's findings that benchmarks and performance were documented in weekly minutes showing plainly and objectively that the Appellant was not meeting targets; and that his assertions that he was not aware of these matters were either untrue, or indicated lack of insight into his underperformance. Further, it was asserted that the Commissioner's findings that the business failure was linked to the Appellant's performance in relation to matters directly within his control, and that he did not take responsibility for this, were erroneous. As a result, the Commissioner wrongly concluded that the Appellant's arguments of lack of role clarity, consistently shifting KPIs and ineffective software, were not made out to the extent necessary to dislodge the finding that his failure to recognise the ongoing performance management and to adjust accordingly, provided a valid reason for his dismissal.

[23] In relation to this ground of appeal, the Appellant submitted that the Respondent bore the evidentiary onus of proving on the balance of probabilities, that it had a valid reason for dismissing the Appellant and that this possibility was "*obliviated*" by the unchallenged evidence under cross-examination of Mr Van Der Woude. It was also submitted that the Respondent likely failed to discharge its evidential burden to lead evidence sufficient that the Commission could have regard to the mandatory statutory considerations in s. 387, to find the dismissal was not harsh, unjust or unreasonable. Central to this assertion, is the Appellant's submission in relation to the process by which the Commissioner received and dealt with evidence in the hearing, articulated at paragraph 19 of the Appellant's submissions as follows:

> "To have decided this matter according to law, the Commission must decide in what manner it will inform itself. Section 590(1) of the Act confers a broad discretion on the Commission to determine this, where it may "*…inform itself in relation to any matter before it in such a manner as it considers appropriate*." By setting down for Hearing, the Commission has exercised power under s.590(2)(i) to inform itself. The Commission was required decide how it will conduct the Hearing, or, put as a question, the Commission should ask itself: "*In hearing this matter, how will it decide take evidence and determine the question of fact and law of the Proceeding?*", where it is submitted there are three potential answers: '*i) In accordance with the rules of evidence and bound by the same (**Answer 1**); ii) Dispensing with the rules of evidence (**Answer 2**); or iii) The middle ground of (i) and (ii) (**Answer 3**)*'."

[24] According to the Appellant, the Commissioner made findings on the evidence before him on the basis of "*Answer 3*". In this regard, Mr Allan for the Appellant pointed to an exchange with the Commissioner in relation to the admission into evidence of two witness statements tendered by the Appellant, in which Mr Allan questioned the Commissioner as to whether he intended to be bound by the rules of evidence in the proceeding. The Commissioner responded stating that while the Commission was not bound to follow the rules of evidence, as a general approach, it adopts the principles. Mr Allan then sought clarification from the Commissioner as to whether the Commissioner intended to decide the matter in accordance

with the rules of evidence and to raise as a preliminary matter the basis upon which evidence would be taken. Before responding, the Commissioner sought the views of Counsel for the Respondent who stated:

> "MS MENDELSON: No, there's no objection to the admission of the witness statements. We don't object on the basis that the rules of evidence aren't strictly applying. If the rules of evidence did strictly apply, there would be a number of paragraphs we would object to on the basis of submissions, hearsay, opinion but we under the understanding that the Commission is not strictly bound by the rules and there is that leniency and we propose to – that the hearing proceed on that basis.

[25] The Commissioner then provided the following response to the question posed by Mr Allan:

> "THE COMMISSIONER: Yes, look, just for your benefit, Mr Allan, to try to answer your question directly, my normal approach in the tribunal, because under section 577 we are under statutory obligation to try to deal with matters quickly, efficiently and informally, my general approach is to try and avoid lengthy submissions about interlocutory arguments in relation to whether particular parts of witness statements are admissible in terms of the rules of evidence and to indicate to the parties my approach would be to admit the statements. In your case of your witness both of them – to the extent the parties want to make a submission about the fact that they believe particular weight should apply or not apply to certain parts of it, I'll hear submissions on those points.
>
> But I don't intend to engage in a lengthy process of hearing interlocutory arguments on specific, blow-by-blow objections in relation to particular parts of statements.
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> MR ALLAN: Thank you very much, Commissioner. I thought it an opportune time prior to my learned friend commencing cross that that matter was attended to and I'm in the hands of the Commission and accept that in respect of examination in chief the witness statements will be tendered in whole.
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> THE COMMISSIONER: Yes.
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> MR ALLAN: And to the extent that evidence as to weight of evidence tendered in whole, that's a matter for submissions at the end?
>
> THE COMMISSIONER: Yes.
>
> MR ALLAN: Thank you very much, Commissioner."

[26] In relation to this exchange, the Appellant contended in submissions in the appeal that the Commissioner had not only departed from the rules of evidence with respect to the witness statements, but had also admitted other evidence, being a 7-page document comprising minutes of a management meeting. This was said to be an error on the part of the Commissioner because other than with respect to the admission of witness statements, he did not explain any other instance where he may depart from the rules of evidence and where he did depart from those rules, the basis of the departure was not clear. As a result, procedural fairness that the rules of evidence serve to achieve, was not afforded, when the Commissioner departed by failing to have proper regard to the Appellant's closing submissions as to the weight to be placed on the evidence. It was submitted that as a result, the Commissioner made findings not open on the evidence, otherwise inadmissible, but where admitted, ought to have been attributed no weight, to avoid error.[33]

[27] The transcript of the first instance hearing indicates that the Appellant was cross-examined in relation to the contents of the minutes which recorded the weekly business

benchmark targets/KPIs.[34] Mr Allan contended in oral submissions in the appeal that the minutes were objectionable because they were not appended to any witness statement and were a partial and incomplete record of those meetings.[35] Mr Allan also contended in the appeal that that the Commissioner fell into error by failing to mark the minutes for identification[36] and admitting them into evidence in circumstances where the Commissioner had failed to inform the parties as to whether the rules of evidence were or were not followed. Mr Allan contended that those minutes recording a benchmark target for the labour budget consistently at 33% "*became the key documentary evidence relied on by Commissioner Simpson to find that the targets were clear and the applicant – or appellant's conduct and work performance was unsatisfactory*."[37] To illustrate the error the Commissioner was said to have made, the Appellant's submissions in the appeal set out and refer to the following extracts from the transcript at first instance:[38]

> "MR ALLAN: I am. Thank you, Commissioner. If it please the Commission, the evidence that's been borne out today - oral evidence on the witness statements filed in the proceeding turn, effectively, on one matter, if we boil it down to its crux, and that is was there a valid reason for the dismissal of 387A. If there was, then the dismissal as a matter of law won't be unfair.
>
> The respondent bears the evidential onus, and to the extent that the decision that the Commission needs to make today in the findings of fact and in this proceeding, to the extent that there is only one question, it is does the evidence bear out and discharge the evidential burden of the respondent to show in evidence filed that there was a valid reason, the applicant's submission is no.
>
> And the reason is singular, and it is that they had a HR policy and procedure. It's been used at multiple venues. It was read into the record in cross of the respondent witness. Paragraph 9 and paragraph 11 were not complied with. Arguably, in a performance improvement process leading up to termination, the most critical steps. To the extent the proper procedure wasn't followed, the applicant wasn't afforded procedural fairness. 387(b) wasn't satisfied. 387(a) can't be satisfied, and the dismissal, as a matter of law, cannot be one that is not an unfair dismissal.
>
> To the extent that the respondent's witness where they hold the evidence in respect of *Jones v Dunkel* inferences - *Briginshaw* doesn't apply, but a *Jones v Dunkel* inference on matters put before the court or not, we've got a few occasions and references tangentially throughout the day to evidence not before the Commission to the extent that evidence was tendered on the morning and marked for identification and then admitted into evidence. We have a bundle of extracted incomplete meeting minutes where meeting minutes appear in the respondent's filed witness statement some three weeks earlier in circumstances.
>
> Where the whole document hasn't been put into evidence, that in and of itself is its own matter that goes to weight for the Commission to determine. It's already been admitted. In terms of what the evidence bears out from today, the applicant's case is this. The evidence under cross-examination of the respondent witness Mr Van Der Woude is such that we cannot be satisfied as a matter of law that his opinions - emphasis on the word 'opinions' - are a good litmus test or an indicator at all as to whether performance was good or bad."[39]

[28] At the hearing of the appeal, Mr Allan developed this argument by contending, in response to questions from the Full Bench, that the particular rule of evidence from which the Commissioner allegedly departed was the admission of "*incomplete documents*", which are inadmissible.[40] Mr Allan said this proposition is supported by High Court decision in *Walker v Walker*.[41] As to the proposition that specific advice has to be provided by the Commission before departing from the rules of evidence, Mr Allan said the authority in support of this proposition is the High Court judgment in *Hogan v Hinch*.[42] It was also submitted that the inconsistencies in the application of the rules of evidence translated to an inconsistency with

the findings and a misapplication of the statutory test and the evidence considered in relation to each of the matters in s. 387(a) – (h).

[29] By **ground 3** it is asserted that the Commissioner made errors of law by misapplying the statutory test in s. 387. This error was said to include insufficient weight being given to evidence going to the factors in s. 387 of the Act and excessive weight being placed on other factors where it was not open to the Commissioner to make "*the findings of law … so made*".[43] In the Appellant's written submissions, this ground was premised on the consideration by the Commissioner of decisions including *Cai*[44] and *Ash*[45] where dismissed employees did not accept responsibility for their conduct or work performance, and the application of the principles articulated in those cases to this case. It was submitted that the Respondent did not lead evidence that the Appellant was "*evasive*" and "*blame shifting*" and the Commissioner acted on a wrong principle by applying principles in those cases to the Appellant's case when there was no evidence before the Commission to support the resulting conclusions and a finding to that effect was not open. These findings were said to demonstrate disharmony of the kind articulated in *GlaxoSmithKline*,[46] supporting a finding that there is public interest in this matter favouring a grant of permission to appeal.

[30] By **ground 4** the Appellant asserts that the Commissioner made an error of law by failing to take into account relevant facts and failing to "*attribute proper weight to competing evidence*". In relation to this ground, the Appellant's written submissions referred to the cross-examination of Mr Van Der Woude by Mr Allan in the first instance hearing. That cross-examination was in relation to a liquidator's report concerning a separate corporate entity of which Mr Van Der Woude was a former director.[47] When this line of questioning was objected to on the ground of relevance by the Respondent's counsel at first instance, Mr Allan said that it went to the credit of Mr Van Der Woude[48] and to whether he was in a position to ascertain that the Appellant's performance was not satisfactory in respect of petty cash and stocktake.[49] The Appellant contends that the Commissioner failed to have regard to that evidence in reaching the conclusion at paragraph [54] that Mr Van Der Woude was a credible witness, and that the Commissioner could not have been satisfied on the basis of Mr Van Der Woude's evidence that the Appellant had notice of the performance issues that led to his dismissal.

Respondent's submissions

[31] The Respondent submits that the Full Bench ought to refuse permission to appeal on the basis that it is not in the public interest to grant permission and there was no material error of law or of fact in the Decision. The Decision is not affected by any error of the kind described in *House v The King*,[50] nor is it disharmonious with other decisions of the Commission. However, if the Full Bench should grant permission to appeal, the Respondent submits that the appeal should nevertheless be dismissed in its entirety.

[32] The Appellant has sought to "*cherry-pick*" from the material to support this appeal in a way that distorts the Decision. In this respect, the Commissioner who presided in a full day hearing, was in the best position to assess the competing positions of the parties based on submissions and evidence and to make findings of fact and credit of witnesses. The Commissioner was alive to the competing issues raised by the parties and the reasons given by the Commissioner for his Decision clearly indicate that the Commissioner gave correct weight to the matters that were relevant and credible. In the Respondent's view, the Commissioner

correctly and appropriately exercised his discretion in receiving evidence, conducting the hearing, and arriving at his Decision.

[33] In relation to ground 1, the Respondent submits that the Commissioner expressly addressed each of the criteria and approached this task in an orthodox way by appropriately considering and weighing the criteria based on his findings of fact and witness credibility. In particular, the Commissioner considered the operation of, and the non-compliance with, the Respondent's internal HR procedures, and Commissioner noted that there were some deficiencies which were carefully weighed against other facts and circumstances in his consideration.[51]

[34] Further, Mr Van Der Woude was extensively cross-examined on the HR policy, and he acknowledged that there were some deficiencies in the dismissal process as the Respondent did not strictly follow its HR policies. However, Mr Van Der Woude also said that there were other contributing factors and provided evidence in relation to the Appellant's history of poor work performance and communications with the Appellant. This demonstrated that there were valid reasons for the dismissal. The additional factors and evidence were ultimately weighed by the Commissioner in the Decision.[52]

[35] In addition, the Commissioner stated that he preferred the evidence of Mr Van Der Woude over that of the Appellant in his consideration of s. 387(b) and ultimately concluded that the Appellant had been notified of the reason for his dismissal. The argument that the Commissioner, after reviewing all the evidence, erred at law because he exercised his discretion in weighing the evidence in a way that is ultimately not as favourable to the Appellant, is not a basis for disturbing the Decision at first instance. The finding of the Appellant's credibility and the weighing of evidence may not have been what the Appellant had hoped for, but they do not constitute "*error of law*" or "*error of fact*".

[36] In relation to the contention concerning the requirements in s. 117 of the Act, the Respondent submitted that the Appellant has erroneously conflated the requirement under s. 117 to provide written notice of termination, with the requirement under s. 387(b) to notify the person of the reason for dismissal. There is no requirement under s. 387 that an employee be notified of the valid reason for dismissal in writing. As such, there was no error in respect of the Commissioner placing no weight on this matter.

[37] In relation to ground 2, the Respondent submits that the Commissioner did not overstep his discretionary powers under ss. 590 or 591 and made it quite clear to both parties how he wished to run proceedings, and what he would allow and admit as evidence. Further, ss. 590 and 591 do not require the Commission to explain the basis upon which it informs itself or to give reasons for why the Commission departs from the rules of evidence. Any failure on the part of the Commissioner to do so cannot be an error.

[38] It was open to the Appellant on the day of the hearing, where ample opportunity was afforded including during closing arguments, to advocate his position, particularly in circumstances where additional evidence had been provided. It was open to the Appellant to take advantage of the opportunities to challenge the evidence. There was no breach of s. 591 or procedural unfairness. Thus, the Appellant's argument that there was a significant "*error of fact*" in the way evidence was received or about procedural fairness, cannot be supported.

[39] The Respondent maintained that the KPI was consistently 33% and notes that the Commissioner made this finding. In any event, the Appellant's failure to manage the labour budget KPI was only one of four key areas of poor performance that ultimately led to his dismissal. The more concerning and egregious issues included: material discrepancies around stock control, missing and unreconciled petty cash and extremely poor team leadership, including failing to induct staff on important workplace health and safety requirements.

[40] In relation to ground 3, the Respondent submits that the Commissioner did not misapply the statutory test in s. 387 of the Act. The argument that the Commissioner gave inappropriate weight to certain evidence must fail for reasons outlined above. There was no error of law in respect of the Commissioner finding that the Appellant was "*evasive*" and "*blame shifting*". There is no requirement for the Respondent to lead evidence to prove that the Appellant was evasive and blame shifting. Rather, that was the impression the Commissioner formed about the Appellant after hearing him give evidence.

[41] In relation to ground 4, the Respondent submits that the argument raised related to the cross-examination of Mr Van Der Woude around the failure of an unrelated live music business run by Mr Van Der Woude that had failed as a result of the impact of COVID-19 restrictions. That business had nothing to do with the dismissal of the Appellant and the Commissioner correctly placed little weight on that evidence. It was simply irrelevant. In essence, the Appellant attempted to discredit Mr Van Der Woude's evidence by inviting the Commissioner to find that because of that failed business, Mr Van Der Woude was not properly placed to assess whether the Appellant's work performance was satisfactory or not.[53]

[42] Under cross-examination, Mr Van Der Woude was taken to a liquidator's report of the failed business and this line of questioning took up significant time at the hearing. The Commissioner was clearly aware of this evidence and the purpose for this line of questioning.[54] The Commissioner considered that evidence but still found Mr Van Der Woude to be a credible witness. Therefore, there is no "*error of law*" by reason of the Commissioner failing to "*take into account relevant facts*" and this ground for appeal must fail.

Consideration

Issues raised by the Appellant

[43] The Appellant's grounds of appeal raise issues in relation to the onus of proof borne by parties in unfair dismissal proceedings, particularly the evidential onus. A central contention in appeal grounds 1 and 2 (and to some extent ground 3) is that the Respondent bore the evidential burden or onus of proof in relation to some criteria in s. 387 and failed to discharge that onus. According to the Appellant's submission, because of this failure, the Commissioner's finding that the dismissal was not unfair was not open to the Commissioner on the evidence. To deal with these appeal grounds it is necessary to first consider the statutory provisions relevant to the Commission determining whether a dismissal was harsh, unjust, or unreasonable, and to then consider the extent to which the legal concept of onus or burden of proof, or something analogous, applies to the Commission exercising its jurisdiction in relation to unfair dismissal applications.

Relevant statutory provisions

[44] The meaning of the term "*unfair dismissal*" is set out in s. 385 of the Act as follows:

> "**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."

[45] Section 385 is the foundation of the statutory regime dealing with unfair dismissal and establishes the preconditions for a finding by the Commission that a dismissal was unfair. The question of whether a dismissal is or is not unfair is the ultimate question the Commission is required to decide. The matters in s. 385 are expressed cumulatively by use of the conjunction "*and"*. For the Commission to find that a dismissal was unfair, a state of satisfaction must be reached in relation to each of the matters in s. 385. The matter in s. 385(b) is always in contest in an unfair dismissal application. The matters in ss. 385(a), (c) and (d) may not be in contest, and in those circumstances, the process by which the Commission reaches a state of satisfaction in relation to them is generally straightforward. Those matters may be in contest directly (because the respondent has raised an objection based on one of them), or indirectly (for example, where there is a suggestion in the material before the Commission that the respondent is a small business). Where one of the matters is contested or there is doubt, a failure by the Commission to make a finding in relation to the contested matter, or to reach a state of satisfaction on the matter attended by doubt (including by informing itself), is an error of principle involving a failure to follow the decision-making process in the Act. This is so even when the respondent to an application has not raised a particular matter or put it in issue,[55] or where neither of the parties provides probative evidence upon which the Commission could reach the required state of satisfaction.[56]

[46] Each of the provisions in ss. 385(a) – (d) has related sections which set out matters the Commission must consider to determine whether the required state of satisfaction is reached. For s. 385(a), the meaning of "*dismissed*" is set out in s. 386. For the purposes of s. 385(b), the matters the Commission is required to take into account in considering whether a dismissal was harsh, unjust or unreasonable, are set out in s. 387. In relation to s. 385(c) the Small Business Fair Dismissal Code (Code) is a legislative instrument referred to in s. 388 and concerns dismissals on grounds of misconduct. The Commission may also be required to determine whether, at the time of dismissal or notice being given, an employer was a small business. The meaning of genuine redundancy for the purposes s. 385(d) is set out in s. 389.

[47] Section 387 provides that in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission must take into account the following matters:

> "**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.
>
> Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:
>
> (a) the person sexually harasses another person; and
>
> (b) the person does so in connection with the person's employment."

[48] The seminal discussion of the term described by a Full Bench of the Commission as the "*trilogy*" of harsh, unjust or unreasonable[57] is found in the joint judgment of McHugh and Gummow JJ in *Byrne and Frew v Australian Airlines Ltd*[58] – albeit in the context of an award clause. In relation to the term their Honours said:

> "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.[59] (citations omitted)"

[49] While the award clause being considered by the High Court in that case did not deal with the steps taken, or not taken, before termination, McHugh and Gummow JJ said in this regard:

> "That is not to say that the steps taken, or not taken, before termination may not in a given case be relevant to consideration of whether the state of affairs that was produced was harsh, unjust or unreasonable. Thus, it has been said that a decision which is the product of unfair procedures may be arbitrary, irrational or unreasonable. But the question under cl 11(a) is whether, in all the circumstances, the termination of employment disobeyed the injunction that it not be harsh, unjust or unreasonable. That is not answered by

> imposing a disjunction between procedure and substance. It is important that matters not be decided simply by looking to the first issue before there is seen to be any need to enter upon the second.[60]

[50] In *Stewart v University of Melbourne*[61] the principles in the joint judgment of McHugh and Gummow in *Byrne and Frew* were distilled into the proposition that a dismissal may be:

- *Harsh* – because of its consequences for the personal and economic situation of the employee, or because it is disproportionate to the gravity of the misconduct;
- *Unjust* – because the employee was not guilty of the misconduct on which the employer acted; and/or
- *Unreasonable* – because it was decided on inferences that could not reasonably have been drawn from the material before the employer.

[51] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take all of these matters into account and make a finding in each case that a dismissal is or is not harsh, is or is not unjust, or is or is not unreasonable, founded on a consideration of all the matters set out in s. 387(a) – (h).[62] To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors.[63]

[52] The principles applicable to the consideration required under s. 387(a) are well established. A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.[64] A valid reason for dismissal may be based on the capacity (as in the present case) or conduct of the person dismissed. Capacity is the person's ability to do the job as required by the employer and includes the person's ability to do the work they were employed to do.[65] For a person's conduct to be a valid reason for dismissal, the Commission must find that the conduct occurred and that it justified dismissal.[66] Conduct that did not occur, or occurred but was trivial and did not justify dismissal, is not a valid reason for dismissal.[67]

[53] Section 387(b) requires that, as a matter of procedural fairness, the reason for dismissal should be notified to the employee before dismissal occurs so that the employee has an opportunity to respond to the reason, before the decision is taken.[68] An opportunity to respond within the meaning in s. 387(c) is an opportunity to provide a response in relation to issues regarding capacity or conduct at all stages of the process and before the decision to dismiss has been made.[69] The process does not require formality and is to be applied in a common sense way,[70] with the objective of ensuring that the employee is aware of the precise nature of the employer's concerns about capacity or conduct and has a full opportunity to respond to those concerns.[71] For the Commission to have regard to whether an employee has been given an opportunity to respond to the reason for dismissal, there needs to be a finding that the reason is valid.[72] The presence of a support person is relevant if an employee seeks to have a support person and the employer refuses. In such circumstances the Commission must consider whether the refusal was unreasonable.[73] Section 387(e) applies in cases of dismissal for unsatisfactory performance. Although the terms "*capacity*" or "*conduct*" do not appear in s. 387(e), the term "*performance*" is more likely to relate to capacity and refers to the level at which the employee renders performance including factors such as diligence, quality and care taken.[74]

[54] In considering s. 387(e) the Commission must take into account matters including the period of time between a warning and dismissal and whether the employee had an opportunity

understand their employment was at risk and to improve.[75] A warning must identify the relevant aspect of performance which is of concern and that the employment is at risk if performance does not improve.[76] Sections 387(f) and (g) require the Commission to take into account the size of an employer's enterprise and access to dedicated human resource management expertise, on the basis that such factors might have impacted the ability of the employer to follow a fair process in effecting a dismissal. The provisions are not a shield for improper conduct in connection with a dismissal on the part of an employer.[77] Section 387(h) provides that the Commission must take into account other relevant matters including mitigating circumstances which may render a person's dismissal harsh, unjust or unreasonable, notwithstanding that the dismissal was substantively or procedurally fair, for example: differential treatment compared to other employees; personal or economic situation; whether the dismissal was summary or with notice; or whether the dismissed person has a long satisfactory work performance or history.

Burden or onus of proof in unfair dismissal cases

[55] In the context of these provisions, we now turn to consider whether, and in what circumstances, a burden or onus of proof arises in unfair dismissal cases, and the nature of such a burden. There are numerous Full Bench decisions highlighting the difficulties associated with this task, the issue having been characterised as "*somewhat vexed*"[78] and "*difficult*.[79] In *Teterin v Resource Pacific Pty Ltd t/a Ravensworth Underground Mine*[80] (*Teterin*) and *Advanced Health Invest Pty Ltd T/A Mastery Dental Clinic v Chan, Mei Kuen*[81] (*Chan*) Full Benches of the Commission discussed the implications of the requirement in s. 385 of the Act that the Commission be satisfied in respect of particular matters to determine whether a dismissal was unfair. The following observations can be drawn from those decisions:

- the principles associated with the notion of onus of proof have a useful role in any adversarial proceedings in the context that the applicant is the party who usually has the carriage of an application and bears the risk of failure;[82]
- a notion of legal onus comes into play predominantly in the sense that if the Commission is not able to make a necessary finding in relation to the case of the party invoking the jurisdiction, that party should fail in having the jurisdiction applied in the manner sought;[83] ;
- in respect to an evidentiary onus, in most cases the question of where an evidentiary onus resides will be answered by asking, in relation to each matter about which the Commission must be satisfied, which party will fail if no evidence or no further evidence about the matter were given.[84]
- a failure by the parties to adduce evidence in relation to one of the matters in s. 385 (for example, whether an employer was a small business for the purposes of s. 385(d)), does not relieve the Commission of its statutory obligation to reach the requisite satisfaction based on relevant and probative evidence.[85]

[56] We agree with those observations and are also of the view, consistent with the decisions in *Teterin* and *Chan*, that because the Commission is not bound by rules of evidence and procedure in relation to a matter before it (s. 591), the principles associated with onus of proof are most appropriately applied in Commission proceedings on the basis that they are analogous, rather than directly on point or binding.

[57] Turning further to the nature of the burden, the importance of distinguishing between a legal onus and an evidentiary onus or burden was highlighted in *Teterin*.[86] As the Full Bench in that case explained (with reference to *Cross on Evidence*) the legal onus or burden of persuasion is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved) to the requisite standard of proof. The party bearing the onus, is the party at risk of non-persuasion as to the fact in issue.[87] The Full Bench in *Teterin* also noted that in court proceedings, legal onus has a limited role as a "*tiebreaker*" affecting only the outcomes of cases in which the trier of fact thinks the plaintiff's and the defendant's positions equally probable. In those circumstances, if the trier of fact, having heard all the evidence, comes to a definite conclusion, there is no occasion to invoke a burden of persuasion.[88]

[58] The evidentiary burden is: "…*not a burden of disproof. Rather, the evidential burden is the obligation to show, if called on to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.*"[89] It can also be said that the evidentiary burden of proof includes the burden resting on the party who appears to be at risk of losing on a given issue at a particular point in the proceedings and will risk losing on that issue if evidence or further evidence is not produced. In court proceedings, a failure of a party who bears the evidentiary burden on an issue will result in the judge finding for the opposing party on that issue.

[59] Burdens of proof may be "*provisional*" or "*tactical*".[90] Provisional burdens are explained in *Cross on Evidence* as follows:

> "Assume that the proponent of an issue discharges the evidential burden which rests on that proponent by adducing evidence that is 'prima facie' in the … sense … where a party's evidence in support of an issue is sufficiently weighty to entitle but not oblige a reasonable person to decide in that party's favour. If the tribunal of fact believes the proponent's witnesses, the requisite inference may be drawn in the proponent's favour, and the chances of this happening will generally be increased by the opponent's failure to adduce evidence. Nevertheless, it is quite possible that the tribunal of fact will not draw the requisite inference, even if the opponent does not adduce any evidence. The opponent merely runs a risk of losing on the issue if the opponent remains silent, and, in such a case, when it is said that the burden of proof has shifted from the proponent to the opponent, all that is meant is that the latter should adduce some evidence as a matter of common prudence.[91]

[60] In relation to tactical considerations, the explanation is:

> "Assume that the proponent of an issue discharges the evidential burden by adducing evidence which is 'presumptive' or 'prima facie' in the … sense … where a party's evidence in support of an issue is so weighty that no reasonable person could help but decide that issue in the party's favour in the absence of further evidence. Provided the proponent's witnesses are believed, the tribunal of fact is bound to decide the issue in the proponent's favour if the opponent calls no evidence. In such a case, when it is said that the burden of proof has shifted from the proponent to the opponent, what is meant is that the latter must adduce evidence on the issue or lose. If the opponent does call evidence, and the jury are unable to come to a definite conclusion one way or the other, a proponent who bears the <u>legal burden</u> will lose."[92] (emphasis added)

[61] There is also authority for the proposition that where matters relevant to an unfair dismissal case are peculiarly within the knowledge of the employer, or about which the employer has superior knowledge, the employer bears the onus of establishing those matters. This approach has been applied in relation to the reason for dismissal and whether it was a valid reason based on the conduct or capacity of the employee for the purposes of considering the matter in s. 387(a) and the elements of genuine redundancy within the meaning in s. 389.[93] It is

analogous to the principle in court proceedings that a defence or exception advanced based on matters that are peculiarly within the knowledge of a defendant or about which it has superior knowledge, is a strong indication that the defendant bears the onus of proof in relation to the defence or exception.[94]

[62] The following propositions can be drawn from the cases relating to the allocation of onus of proof in unfair dismissal proceedings. *First*, to the extent there is a legal onus or something analogous to it, that onus is borne by an applicant for an unfair dismissal remedy and operates in relation to the matters in s. 385. The Full Bench in *Teterin* made an observation in relation to s. 385(d) that the Commission must be satisfied that the dismissal was not a case of genuine redundancy, and an applicant for an unfair dismissal remedy bears the risk of failure if the state of satisfaction required by that section cannot be reached.[95] Failure in relation to any of the s. 385 matters results in the applicant for an unfair dismissal remedy failing on the ultimate issue rather than one of the matters the Commission is required to balance to reach a conclusion. Where an applicant fails on any of the issues dealt with in each of the provisions in s. 385, the result is that the applicant fails on the ultimate issue of whether the dismissal was unfair, and the application for an unfair dismissal remedy must be dismissed.[96]

[63] *Second*, to the extent that there is an onus of proof in relation to the matters in sections 386 – 389, that onus is analogous to an evidentiary onus. In this regard (as we have noted above) the Full Bench in *Chan* said:

> "As to evidentiary onus, plainly a party seeking to establish a fact bears onus of adducing evidence necessary to establish that fact. In a practical sense, in most cases the question of where an evidentiary onus resides will be answered by asking: in relation to each matter about which the Commission must be satisfied, which party will fail if no evidence or no further evidence about the matter were given?"[97] (emphasis added)

[64] *Third*, the matters in sections 386 – 389 may also involve evidential burdens of proof akin to provisional or tactical burdens. In this regard, each of these sections is related to the matters in s. 385 about which the Commission is required to be satisfied to find that a dismissal is unfair, and each has multiple limbs. It can be said of those sections, that throughout the course of the hearing of an application for an unfair dismissal remedy, one or other of the parties may seek to adduce evidence to make out or negative a conclusion about a particular matter. The evidence adduced by one party will raise a provisional or tactical burden for the other party which will make it prudent or necessary for the latter party to adduce evidence in response.

[65] This can be illustrated by reference to the matters in s. 387 and the exercise the Commission is required to undertake to weigh those matters to decide whether a dismissal was harsh, unjust or unreasonable. In terms of which party will fail if the Commission finds that there was no valid reason for the dismissal, it is difficult to envisage an employer succeeding in establishing that a dismissal was not unfair, where the reason advanced by the employer for the dismissal, is found not to be a valid reason. Conversely, a dismissal for a valid reason may be found to be unfair where the applicant establishes failure of the respondent to provide procedural fairness in accordance with the matters in ss. 387(b) – (e) and/or a matter raised under s. 387(h) in relation to harshness. If an applicant loses on the issue of whether there was a valid reason for dismissal, the applicant may still succeed in establishing that the dismissal was unfair, based on failure to afford procedural fairness (ss. 387(b) – (e)) and/or a matter raised under s. 387(h).

[66] Ultimately, the Commission must weigh the evidence in relation to each of the s. 387 matters and make a finding as to whether it is satisfied that a dismissal was harsh, unjust or unreasonable. If the Commission finds that a dismissal was not harsh, unjust or unreasonable, the application for an unfair dismissal remedy must be dismissed. We now turn to consider the grounds of appeal.

Ground 1

[67] The Appellant asserted at first instance that he was not notified of the reason for his dismissal before the decision to dismiss was made, and that the Respondent did not provide him with written notice "*of the day of termination, where the dismissal was verbal and summary*".[98] The Commissioner concluded that the Appellant was notified of the reasons for his dismissal, notwithstanding some procedural issues. On appeal, the Appellant contends that having regard to s. 117 of the Act, the Commissioner's finding in relation to s. 387(b) is incorrect as a matter of law. This is said to be because the failure of the Respondent to give written notice on the day of termination, meant that the notification of a valid reason required by s. 387(b) had not been given before the decision to terminate was made. This is a different argument to that which the Appellant ran at first instance, and in any event, is misconceived.

[68] As we have noted, the purpose of s. 387(b) is to require that the Commission take into account whether a person facing dismissal has been notified of the reason for dismissal related to conduct or capacity, with sufficient particularity to enable the person to respond to that reason. There is no requirement for a reason for dismissal to be provided in writing for the purposes of answering the question posed by s. 387(b). Section 117 of the Act requires that an employee be given written notice of the day of termination. That section does not require that the reasons for termination of employment are also provided in the written notice.

[69] Our decision in this regard is consistent with the decision of a Full Bench of the Commission in *Metropolitan Fire and Emergency Services Board v Duggan*[99] which dealt with an argument about whether a notice of dismissal for the purposes s. 383(a)(i) of the Act regarding minimum employment period, must also meet the requirements in s. 117. The Full Bench in that case concluded that s. 383(a)(i) is not to be read and construed as incorporating the requirements for notice in s. 117 and that the two sections have different purposes.[100] This conclusion is also applicable to s. 387(b).

[70] The Appellant further pressed that the Respondent had not discharged its evidential burden under s. 387(b). We do not accept that the Respondent necessarily bore an evidentiary burden to establish that the Appellant was notified of the reason for his dismissal as provided in s. 387(b). Nor do we accept that a finding that the Respondent did not notify the Appellant of the reasons for dismissal in a manner that conformed with the intent of s. 387(b) would, of itself, have been a sufficient basis for a conclusion that the Appellant's dismissal was unfair.

[71] For reasons we set out above, the Appellant bore a legal onus under s. 385(b) of the Act, to show that his dismissal was harsh, unjust or unreasonable, by reference to the matters in s. 387. All those matters are required to be taken into account, and no single matter is determinative. The Appellant asserted that he was not notified of the reason for dismissal in the manner required by s. 387(b). The Respondent provided evidence to the contrary, which was

accepted and weighed in the balance by the Commissioner in reaching his overall finding that the Appellant's dismissal was not unfair.

[72] We are also of the view that to the extent that the Respondent bore an evidentiary burden in relation to s. 387(b) (including on a provisional or tactical basis) the Respondent discharged the burden of establishing that the Appellant was notified of the reasons for dismissal before he was dismissed, and with sufficient particularity to provide him with an opportunity to respond. In this regard, the Respondent called evidence sufficient to establish on the balance of probabilities, that Mr Van Der Woude had advised the Appellant about the issues with his performance in discussions and one-on-one meetings. In relation to this finding, the Commissioner relied on the evidence of Mr Van Der Woude, who he found to be a credible witness and whose evidence the Commissioner preferred over that of the Appellant. The Commissioner's assessment of Mr Van Der Woude's credibility, is a matter to which we will return.

[73] In short, we discern no error in relation to this finding, based on s. 117 of the Act or on any other basis, and reject ground 1 of the appeal.

Ground 2

[74] Appeal ground 2 concerns the process by which the Commissioner received and dealt with evidence during the hearing. The following propositions may be distilled from the Appellant's submissions in support of ground 2:

1. In respect of each proceeding it conducts, the Commission is required to decide (presumably in advance) how it will inform itself in relation to the matter.
2. When the Commissioner decided in the present case to conduct a hearing, he was also required to decide (presumably in advance of the hearing) how he would decide to take evidence and determine questions of fact and law, including the extent to which it would apply the rules of evidence, whether in whole, in part, or not at all.
3. In relation to each issue with which the Commissioner dealt in the hearing, he was required to inform the parties during the hearing, of the approach he would take to applying the rules of evidence and of any departure from the approach or approaches he adopted with each issue as it arose.

[75] When requested by the Full Bench at the hearing of the appeal, to identify what the Commissioner did, or did not do, during the hearing, to deny the Appellant procedural fairness, Mr Allen pointed to the admission of an incomplete document, being an extract of minutes of a management meeting and asserted that this was contrary to the rules of evidence and that the document was inadmissible. It is further contended in the appeal that reliance on this bundle of minutes was central to the finding that there was a valid reason for the dismissal and was an error of law. Before considering this submission, it is necessary to understand how the disputed bundle of documents was tendered.

[76] As set out above, the transcript of the hearing before the Commissioner indicates that there was a discussion about the application of the rules of evidence at the commencement of the Appellant's evidence. The discussion took place at the initiative of Mr Allen for the Appellant, when he sought to tender two witness statements made by the Appellant. While the

question posed by Mr Allen about whether the Commissioner would be bound by the rules of evidence was asked at the time the statements were tendered, the question was directed to the entire proceeding, and was answered by the Commissioner on that basis.[101] Counsel for the Respondent at the hearing agreed to the Appellant's witness statements being admitted on the basis that if the rules of evidence strictly applied, the statements contained material that was objectionable, but that as the Commission was not bound by the rules of evidence the hearing should proceed on the basis that there would be "*leniency*".[102] The Commissioner went on to explain the normal approach of the Commission with respect to witness statements, and to deal with objections in relation to hearsay, by allowing the parties to make submissions in relation to weight.[103] Mr Allen accepted in respect of examination in chief, that the witness statements would be tendered in whole, and that weight would be a matter for submissions. While the discussion at this point related to the Appellant's witness statements, there was nothing to suggest that the same approach would not be adopted in relation to other material sought to be tendered.

[77] The circumstances in which the documents the Appellant complains about in appeal ground 2 were tendered were unremarkable. The Appellant was cross-examined about his duties and responsibilities as the venue manager. Matters that were the subject of cross-examination included a document appended to Mr Van Der Woude's witness statement headed "*SPOH Management Meeting 16/02/23*", being minutes of that meeting. The document included under the heading "*Total Venue Labour Guidelines*" percentages of sales to labour cost and indicated that where sales were $65 - $70k, labour should be 33% of that amount, decreasing as the amount of sales increased. A note at the bottom of the 16/02/2023 minutes states: "*Sales forecast for this week 69k- Labour total should be circa $22.7k – Tanda forecast $23.5K*".[104] The Appellant agreed that on 26 February 2023, the total percentage of labour that was his benchmark was 33%.[105] The Appellant was also shown SPOH Management Meeting minutes for 02/03/2023, 25/05/2023, 1/06/2023, 8/06/2023, 20/06/2023 and 27/06/2023 appended to Mr Van Der Woude's witness statement. The minutes indicate that the labour total budget was 33% of sales for each week and that in the week of 8 June and 20 June 2023, the Appellant was on leave.

[78] Ms Mendelson for the Respondent then sought to show the Appellant a bundle of documents comprising 7 additional pages of minutes not attached to a witness statement.[106] Mr Allan for the Appellant reserved his objection in relation to this material the end of the evidence, and subject to the documents being provided to his email address to allow him to review them and formulate any objections.[107] The Commissioner stood the hearing down while the documents were forwarded to Mr Allen. Upon resumption of the hearing, Mr Allan confirmed that he had received the documents and in response to a question from the Commissioner as to whether he wanted to raise any issues with the documents being received into evidence, Mr Allan said:

> "MR ALLAN: Just one or two, it can be better, Commissioner, if I may. The applicant objects on the basis that - or conditionally on the basis and, you know, subject to the advice of counsel, my learned friends, these documents obviously aren't prepared by us nor in our possession or control. To the extent that these are complete documents or incomplete documents, if they be incomplete, the applicant objects to their tendering into evidence on the basis of not being a complete document and then irrelevant and attributed no weight.[108]

[79] The transcript indicates that Ms Mendelson for the Respondent explained that the missing pages of the minutes comprised Google reviews and other irrelevant information and that the Respondent was relying on the documents only to show what the total labour was for particular weeks, and what the relevant benchmark was.[109] The Commissioner allowed the documents to be shown to the Appellant. The documents were not admitted into evidence at that time, but the Appellant was cross-examined in relation to them. The documents are in essentially the same format as the documents appended to Mr Van Der Woude's witness statement and the Appellant agreed that they were typical of the meetings he attended during his employment.[110] Other than noting that the minutes were not complete documents, the Appellant agreed that minutes of management meetings on 15/12/2022 and 22/12/2022 state that the benchmark of total wages as a percentage of sales is set out in the minutes as "*TBC 33%*", indicating that it was to be confirmed. The Appellant also agreed that minutes of the management meeting on 05/01/2023 state that the benchmark had been set at 33% by that time, and that this continued to be the case as recorded in the minutes of meetings on 12/01/2023 and 01/05/2023.[111] One of the documents – the minutes relating to the Management meeting on 01/06/2023 – was already in evidence as an appendix to Mr Van Der Woude's witness statement.[112]

[80] Mr Allan is recorded in the transcript as objecting to the documents being admitted and to questions about the documents being put to the Appellant in cross-examination, and maintaining the objection after the Commissioner ruled that he would allow the question. In relation to his objection, Mr Allan said:

> "MR ALLAN: I maintain my objection on the basis that the specific documents that could have been and are within the possession and control of the respondent tendered incomplete - as complete documents for every week for the duration since the commencement of these management meetings of the applicant's employment could have been in evidence. They're not.
>
> The assumed fact not in evidence is that the turnover target on a weekly basis forecast in advance never changed and so the percentage of 33 per cent is also unchanging. To the extent that forecast revenue a week in advance changes from week to week, so too does what the monetary amount of what 33 per cent comes to as a dollar figure.
>
> To the extent that those documents that exist and we know they exist, are not in evidence, we cannot say and it assumes those facts that the 33 per cent is of some significance that we cannot know because it turns on the consistency and continuity of that being equivalent every week to the same dollar figure for that percentage number and we just don't know that and on that basis, the objection is maintained."[113]

[81] After noting the objection, the Commissioner allowed the cross-examination of the Appellant with reference to the minutes to continue, stating that there would be an opportunity to make submissions in closing about what weight should attach to any evidence in relation to the issue.[114] In further cross-examination, the Appellant agreed that in all the minutes he had reviewed, the total labour cost benchmark was 33% each week, but maintained that the quantum of total labour cost was ambiguous as he was not privy to what was encompassed within that amount.[115] The transcript indicates that the Appellant continued to contest the base upon which the 33% benchmark applied and to raise matters such as the extent to which he had responsibility for rostering and IT systems impacting rostering and stocktake. The Appellant also responded to questions concerning the 33% benchmark with statements about his personal KPIs.

[82] The fact that the seven pages of minutes were not admitted into evidence when the Appellant was cross-examined in relation to them was later raised by Mr Allan for the Appellant, at the point Mr Van Der Woude's witness statement was tendered, and the Commissioner was marking it as an exhibit. In this regard, Mr Allan had the following exchange with the Commissioner:

> "MR ALLAN: It was my understanding that we were in Commission exhibit number 4, with the first two being the two witness statements of the applicant, the third being the seven bundle additional meeting minutes that were marked for identification and admitted in the cross-examination of the applicant.
>
> THE COMMISSIONER: Yes, that might be right. All right. I'm content to mark it as exhibit 4. Thank you. Thanks for bringing that to my attention, Mr Allan."[116]

[83] It is well established that the Commission is required to afford procedural fairness to parties. The provision of procedural fairness includes the provision of a fair hearing, which involves an opportunity for all parties to put their case and to have it determined impartially and according to law. By s. 577, the Commission is required to perform its functions and exercise powers in a manner that is "*fair and just*". Section 578(b) requires that in performing functions and exercising powers, the Commission take into account equity, good conscience and the substantial merits of the case.

[84] In *Re Refugee Review Tribunal; Ex parte Aala*,[117] the High Court (Gaudon and Gummow JJ) said that the conditioning of a statutory power so as to require the provision of procedural fairness is concerned with the observance of fair decision-making procedures rather than the character of the decision which emerges from the observance of those procedures.[118] Their honours also said that:

> "…it is trite that, where the obligation to afford procedural fairness exists, its precise or practical content is controlled by any relevant statutory provisions and, within the relevant legislative framework, this will vary according to the circumstances of the particular case."[119]

[85] To this we add that s. 591 of the Act provides that the Commission is not bound by the rules of evidence and procedure in relation to a matter before it, whether or not the Commission conducts a hearing in relation to the matter. Pursuant to s. 590, the Commission "*may inform itself in relation to any matter before it in such manner as it considers appropriate*". It has been held in relation to these provisions and their predecessors, that:

- the rules of evidence are not irrelevant and provide general guidance in relation to the manner in which the Commission chooses to inform itself;[120]
- this is not a licence to ignore the rules of evidence which provide a method of enquiry formulated to elicit truth and to prevent error;
- the common law requirement that the Commission must not in its reception of evidence deny natural justice to any party acts as a powerful control over a tribunal not bound by the rules of evidence;
- the rules of evidence are founded in experience, logic and common sense;
- not to be bound by the rules of evidence does not mean that the acceptance of evidence is thereby unrestrained;[121] and
- while rules of evidence and procedure are not to be completely ignored, Members of the Commission will likely be more flexible about the strict adherence to such rules when an inexperienced representative is appearing.[122]

[86] Considered in the context of these principles, we see no error in the approach the Commissioner adopted to applying the rules of evidence and no denial of procedural fairness to the Appellant in relation to the way the Commissioner dealt with the admission of the bundle of minutes. The first proposition advanced by the Appellant, that the Commission is required to decide in advance how it will inform itself in each proceeding, is contrary to the broad discretion in s. 590 which allows the Commission, except as otherwise provided by the Act, to inform itself in relation to any matter before it in such a way as it considers appropriate. Relevantly in the present case, s. 397 provides an exception to the broad discretion in s. 590 by requiring that the Commission conduct a conference or hold a hearing in relation to a matter arising under the Part dealing with unfair dismissal, if, and to the extent that, the matter involves facts, the existence of which is in dispute. The present case was such a matter, and the Commissioner held a hearing. There is no indication in other provisions of the Act to support the first proposition advanced by the Appellant. Further, there is no requirement for the Commission to form a view in advance of dealing with a matter in relation to how it will inform itself, and affording procedural fairness to a party does not require this.

[87] There is no basis in the Act or the principles relevant to the application of the rules of evidence in proceedings before the Commission to support the second proposition advanced by the Appellant. Affording procedural fairness to parties does not require the Commission to determine in advance of a hearing how it will decide to take evidence and determine questions of fact and law. Such an approach is also not required to afford a fair hearing. Implicitly, this approach would require the Commission to inform the parties at the point it makes such a determination. To adopt the approach contended for by the Appellant would be inconsistent with the requirement in s. 577 that the Commission perform its functions and exercise its powers in a manner that is: fair and just; quick and informal and avoids unnecessary technicalities; open and transparent; and promotes harmonious and cooperative workplace relations. For the same reasons we do not accept that to afford a fair hearing, the Commission is required to inform parties in advance or during the course of a hearing, when, and in what circumstances it intends to apply a particular rule of evidence or how those rules will be applied generally. That approach is also contrary to the case law relating to procedural fairness which establishes that the requirements are not fixed but depend on the circumstances in a particular case.

[88] Relevant to the third proposition advanced by the Appellant, is the contention that the Commissioner erred by admitting incomplete copies of minutes of management meetings, without informing the parties as to whether he was dispensing with the rules of evidence in doing so. This document was said to have been the key evidence relied on by the Commissioner as a basis for finding that KPIs were clear, and that the Appellant's work performance was not satisfactory. The Appellant contends that this constituted a denial of procedural fairness.

[89] We know of no rule relating to procedural fairness requiring that the Commission announce during a hearing that it intends to apply, or depart from, the rules of evidence. The cases cited in the Appellant's submission in the appeal[123] do not stand for any such proposition and the part of the written submission referred to by Mr Allen in oral submissions at the hearing of the appeal refers to public interest rather than the rules of evidence or procedural fairness. As the cases discussed above establish, the Commission is required to afford procedural fairness and a fair hearing, which may or may not involve applying the rules of evidence. While the Commission may be required to explain some procedural matters during a hearing, particularly

where parties are unrepresented, affording procedural fairness does not require the provision of a running commentary in relation to how this will be done.

[90] There is no principle prohibiting the admission into evidence of partial documents. In support of a contention to the contrary, Mr Allen pointed to the decision of the High Court in *Walker v Walker*.[124] That case concerned an application for maintenance of the wife and children of the appellant (husband). During proceedings before a magistrate, a letter between two persons not party to the proceedings, was sought to be tendered by the wife as evidence of her husband's means. The letter was not an "*incomplete*" document but contained statements that were hearsay. Counsel for the appellant called for the letter and read it. The husband argued that the letter was inadmissible.

[91] The Court held that a document called for, and read by counsel, may become evidence of the facts stated in it, at the option of the party thus obliged to produce it, although the rule against hearsay would have prevented the party from relying on the document for this purpose. That rule had little if anything to do with whether the documents were complete or partial. In any event, the rule in *Walker v Walker* was abolished by s. 35 of the *Uniform Evidence Acts*[125] which is in the following terms:

> 35. Effect of calling for production of documents
>
> (1) A party is not to be required to tender a document only because the party, whether under this Act or otherwise:
> (a) called for the document to be produced to the party, or
> (b) inspected it when it was so produced.
> (2) The party who produces a document is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it.

[92] Section 35 of the *Uniform Evidence Acts* does not preclude the admission of partial documents and neither requires, nor prevents, the admission into evidence of documents called for and read by Counsel during proceedings. It is clear from the transcript that while Mr Allen read the documents, he did not call for them. Nor did Mr Allen request that full copies of the minutes be shown to him. *Walker v Walker* has no relevance in the present case.

[93] We can see no denial of procedural fairness in relation to the documents being admitted or the manner in which this occurred. While the documents were not appended to a witness statement as was required by the Directions issued by the Commissioner, they were not inadmissible on that basis. It is not unusual in proceedings before the Commission for documents sought to be tendered during proceedings in a manner that does not accord with directions issued by the Member hearing the case, to be admitted into evidence. As we have noted, the Commission is not bound by legal form or technicalities and may inform itself in such manner as it considers appropriate. Further, it is contrary to the principles of fairness and justice and to the injunction that in exercising powers the Commission take into account equity, good conscience and the substantial merits of the case, that relevant and probative material be excluded because of a technicality. An important proviso is that before receiving such material, the Commission considers unfairness which may arise and takes steps to mitigate the effects of unfairness if the documents are received.

[94] In the present case, the Commissioner did take such steps. The hearing was adjourned, and the Appellant's legal representative was given an opportunity to read and consider the

documents and to be heard in opposition to them being admitted. There were other documents already in evidence that were in an identical format to the documents sought to be tendered. Further, one of the documents the Appellant disputes was already in evidence by virtue of being appended to Mr Van Der Woude's statement. Those documents already in evidence included reference to the Appellant's labour cost benchmark being 33% of total sales, as did the evidence of Mr Van Der Woude. It can hardly be said that the evidence about this matter came as a surprise to the Appellant. Further, contrary to the Appellant's submissions, the Commissioner did inform the parties about how the minutes would be considered at the point he received them and marked them as an exhibit. We also note that despite the earlier objection to the bundle of minutes being admitted, the Appellant's legal representative pointed out that the Commissioner had overlooked marking them as an exhibit when they were shown to the Appellant in cross-examination and took no objection to them being admitted at that point.

[95] The transcript of submissions made by the parties at the conclusion of the first instance hearing indicates that Mr Allan for the Appellant made submissions about the weight that should be placed on the bundle of minutes on the basis that they were incomplete and said that this was a matter for the Commission to determine[126]. By making submissions about the weight that should be placed on these documents, the Appellant's representative applied the approach he had been informed that the Commission would follow with respect to the witness statements of the Appellant. Further we note that the Appellant did not take issue with the authenticity of the minutes either at first instance or in the appeal, but rather criticises their admission on the ground that they are "*incomplete*". If the Appellant's representative had concerns in this respect, he could have called for complete versions of the documents during the hearing before the Commissioner and did not do so. In our view the explanation provided by the Respondent's representative at first instance, that the material which was not provided with the seven pages of minutes was irrelevant and included material such as Google reviews of the venue, is consistent with the complete minutes appended to Mr Van Der Woude's statement and we accept that any omitted material is not relevant to the issues in dispute before the Commissioner and in the appeal.

[96] In relation to the other complaints made by the Appellant about the admission of the seven-page bundle of minutes, we note that the Appellant's representative did not request that the documents be marked for identification and even if the Commissioner had marked the documents in this way, the Appellant identified the documents during cross-examination so that they were admissible on that basis. Even without the additional minutes, there was evidence sufficient to support the Commissioner's finding about the 33% benchmark and that the Appellant's performance in relation to it and other benchmarks, was unsatisfactory. In our view, the Appellant's complaint about the admission of the documents is little more than disagreement with non-acceptance by the Commissioner of the Appellant's submissions about the weight that should be placed on the evidence and the conclusions reached by the Commissioner. It was open to the Commissioner to receive and rely on the documents and the approach he adopted in this regard discloses no error of principle. The conclusions reached by the Commissioner about the 33% benchmark were reasonably open to the Commissioner and disclose no error of fact, much less a significant error.

[97] We do not accept that there were inconsistencies in the Commissioner's application of the rules of evidence or that the Commissioner misapplied the statutory test in relation to his findings with respect to the matters in s. 387(a) – (h). While we accept that the Respondent bore

an evidentiary onus to establish that there was a valid reason for dismissal, we do not agree with the Appellant's submission that this possibility was "*obliviated*" by the unchallenged evidence under cross-examination of Mr Van Der Woude. The cross-examination of Mr Van Der Woude established at best, that the Respondent did not properly apply its own procedures in relation to issuing warnings to the Appellant. The Commissioner properly found that this matter weighed in favour of a finding that the Appellant was unfairly dismissed, but in weighing the matters in s. 387, found that the dismissal was not unfair. We see no error in the Commissioner's approach to considering and weighing the matters in s. 387. As we have noted, a finding that a dismissal is attended with procedural unfairness does not automatically result in a finding that it was harsh, unjust or unreasonable, when all the matters in s. 387 are considered and weighed. We reject appeal ground 2.

Ground 3

[98] In relation to appeal ground 3, we do not accept the assertion that the Commissioner made errors of law by misapplying the statutory test in s. 387. Nor do we accept that the Commissioner gave insufficient weight to evidence going to the matters in s. 387 and placed excessive weight on other factors. While the Commissioner referred to case law to illustrate his findings, those references do not amount to misapplication of the principles in those cases, to the Appellant's case. The Respondent was not required to lead evidence of blame shifting and evasiveness on the part of the Appellant. Those conclusions were open to the Commissioner on the Appellant's own evidence and on the basis of the case advanced by the Respondent. Ms Mendelson for the Respondent submitted that the Appellant had sought in his evidence to apportion blame for the shortcomings in his own performance by blaming the system, colleagues, lack of time and what Ms Mendelson described as "*a whole host of other reasons as to why his stocktakes were out so frequently.*"[127] We have read the transcript of the Appellant's evidence in the proceedings before the Commissioner and in our view the Commissioner's conclusions in this regard were open to him. We also note that the Commissioner had the benefit of observing the Appellant give his evidence. We reject ground 3.

Ground 4

[99] Ground 4 can be dealt with in short compass. Mr Van Der Woude was cross-examined about a company owned by Mr Van Der Woude and his wife. That business was a live music venue and Mr Van Der Woude said that it had traded successfully until the impact of the COVID-19 virus. Mr Van Der Woude and his wife had called in administrators to close the business down and the result was bankruptcy for Mr Van Der Woude and his wife. The Appellant, through Mr Allan, also sought to impugn Mr Van Der Woude's credit, and his ability to assess the capacity of the Appellant to undertake his role, on the grounds that Mr Van Der Woude's performance was subject to adverse findings in the creditors report in relation to that company.

[100] In cross-examination the Appellant also questioned Mr Van Der Woude about his qualifications and experience, establishing that Mr Van Der Woude held a Bachelor's Degree in Commerce, a Master's Degree in Business Administration and a qualification as a Chartered Accountant. Mr Van Der Woude was also questioned about his experience in the hospitality industry and agreed that he had a high level and in-depth skill set relevant to that industry. In

oral submissions in the first instance hearing, set out in the Appellant's written submissions in the appeal, an argument was advanced to the effect that Mr Van Der Woude's evidence went beyond "lay evidence" and that the Commission was required to consider whether Mr Van Der Woude's evidence should be treated as expert evidence.

[101] The Commissioner allowed the questioning of Mr Van Der Woude over the objections of Counsel for the Respondent, in relation to his ability to assess the performance of the Appellant, in circumstances where Mr Van Der Woude had issues with his prior role as a director of a business that had significant issues as reflected in the creditors report. The Commissioner did not address this matter in the Decision and did not indicate what if any consideration he gave to it. We do not accept that by not referring in the Decision to the evidence on this point, the Commissioner made a significant error of fact, that vitiates the outcome of the Commissioner's decision. In our view, the issues associated with another Company of which Mr Van Der Woude was a director were a distraction and not relevant to the question of whether the Appellant had been unfairly dismissed.

[102] We are also of the view that the issue sought to be advanced at first instance and in the appeal, about whether Mr Van Der Woude should have been considered an expert witness, is a distraction. Mr Van Der Woude gave evidence in his capacity as the manager of the venue at which the Appellant worked and not as an expert witness. Supervisors or managers who give evidence about the capacity of employees to perform work within their position description are not giving expert evidence notwithstanding that they hold academic qualifications in management. Mr Van Der Woude's evidence about the capacity of the Appellant to undertake rostering, stocktake and other tasks was not expert evidence and nor was Mr Van Der Woude giving that evidence as an impartial person expressing an opinion.

[103] We also note that that it is counter-intuitive for the Appellant to seek to impugn Mr Van Der Woude's credit on the one hand, and to assert error on the part of the Commissioner for not treating him as an expert witness, on the other hand. As the Commissioner correctly told Mr Allan in relation to this line of questioning, at the end of the day, the question was whether the dismissal of the Appellant was unfair taking into account the matters in s. 387, and questions about Mr Van Der Woude's past business activities or qualifications would not assist with that inquiry.[128] Appeal ground 4 discloses no error and we reject it.

Conclusion and Order

[104] For these reasons, we do not consider that any of the grounds of appeal justify the grant of permission to appeal in the public interest or otherwise. There is no error of principle in the approach the Commissioner took to receiving evidence and the Appellant was not denied procedural fairness. The Commissioner weighed the evidence and considered each of the matters in s. 387, in an orthodox manner. There are no errors of law or fact, much less significant errors of fact in the Commissioner's considerations and the conclusions he reached in relation to the s. 387 matters were open to him on the evidence.

[105] Permission to appeal is refused.

VICE PRESIDENT

Appearances:

Mr T Allan, for the Appellant.
Mr I Van Der Woude, for the Respondent.

Hearing details:

2024.
Sydney (by Microsoft Teams):
12 March.

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[1] [2023] FWC 3084 (Decision).

[2] Decision at [9].

[3] Decision at [53].

[4] Decision at [12].

[5] Decision at [16].

[6] Decision at [17].

[7] Decision at [19].

[8] Decision at [22].

[9] Decision at [29].

[10] Decision at [36].

[11] Decision at [36].

[12] Citing *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371.

[13] [2023] FWCFB 144.

[14] Ibid at [48].

[15] [2020] FWCFB 4448.

[16] Decision at [51].

[17] Decision at [58].

[18] Decision at [59].

[19] Decision at [64], [67].

[20] Decision at [69].

[21] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[22] *Wan v AIRC* (2001) 116 FCR 481 at [30].

[23] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28].

[24] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177 at [44]-[46].

[25] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

[26] *Fair Work Act 2009* (Cth) s.400(2).

[27] *Gelagotis v Esso Australia Pty Ltd T/A Esso* [2018] FWCFB 6092 at [43].

[28] *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177 at [43] per Buchanan J (with whom Marshall and Cowdroy JJ agreed).

[29] [2012] FWAFB 3540.

[30] Ibid at [25].

[31] Appellant's outline of submission at footnote 10; Transcript of first instance hearing at PN1069 – PN1081.

[32] Appellant's outline of submission at footnote 11 made reference to *Fair Work Act 2009* s. 117.

[33] Appellant's written submissions in the Appeal at [21].

[34] Appellant's outline of submissions at footnote 18; Transcript of first instance hearing at PN163 – PN175.

[35] Transcript of appeal hearing at PN57 – PN60.

[36] Transcript of appeal hearing at PN96.

[37] Transcript of appeal hearing at PN97.

[38] Appellant's written submissions in the appeal at [21].

[39] Appeal Book at p 580; Transcript of first instance hearing at PN169 – PN171.

[40] Transcript of appeal hearing at PN113.

[41] [1937] 57 CLR 630; Transcript of the appeal hearing at PN127.

[42] [2011] HCA 4, (2011) 243 CLR 506, (2011) 85 ALJR 398; Transcript of appeal hearing at PN139.

[43] Appellant's Outline of Submissions at [23].

[44] Op. cit. [2023] FWCFB 144.

[45] Op. cit. [2020] FWCFB 4448.

[46] [2010] FWAFB 5343.

[47] Transcript of first instance hearing at PN1094 – PN1137, PN1172 – PN1174.

[48] Ibid at PN1095 – PN1096.

[49] Ibid at PN1120.

[50] [1936] HCA 40, (1936) 55 CLR 499.

[51] Decision at [64], [70] and [73].

[52] Decision at [50] and [53].

[53] Transcript of first instance hearing at PN1120.

[54] Ibid at PN1129.

[55] *John Pinawan T/A RoseVi.Hair.Face.Body v Mr Edwin Domingo* [2012] FWAFB 1359; *Pecker Maroo Verano Pty Ltd v Stevens* [2024] FWCFB 147.

[56] *Chan* op. cit. at [42] – [43].

[57] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373 at [24].

[58] (1995) 185 CLR 410.

[59] Ibid 465-466.

[60] Ibid at 466.

[61]*Stewart v University of Melbourne* (U No 30073 of 1999 Print S2535) per Ross VP.

[62] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373 at [24].

[63] *Nestle Australia Ltd v Federal Commissioner of Taxation* (1987) 16 FCR 167 at 184; *He v Minister for Immigration and Border Protection* [2017] FCAFC 206, 255 FCR 41 at [52] – [53] cited in *Application by HSU and Ors* [2024] FWCFB 150 at [14].

[64] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

[65] *Crozier v AIRC* [2001] FCA 1031 cited in *Jurisic v ABB Australia Pty Limited* [2014] FWCFB 5835 at [74] and *Reseigh v Stegbar Pty Ltd T/A Jeld-wen Glass Australia* [2020] FWCFB 533 at [42].

[66] *Edwards v Giudice* [1999] FCA 1836 cited in *Titan Plant Hire v Van Malsen* [2016] FWCFB 5520 at [28]; *Sydney Trains v Hilder* [2020] FWCFB 1373 at [26].

[67] Ibid.

[68] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151; *Barlett v Ingleburn Bus Services Pty Ltd T/A Interline Bus Services* [2020] FWCFB 6429 at [19].

[69] *Swain v Ramsay Food Packaging Pty Ltd* (1999); *Crozier v Palazzo* op. cit; *Barlett v Ingleburn Bus Services Pty Ltd T/A Interline Bus Services* op. cit.

[70] *RMIT v Asher* (2010) 194 IR 1 at [14] citing *Gibson v Bosmac Pty Ltd* (1995) 50 IR 1 at [7] per Wilcox CJ.

[71] Ibid at 14.

[72] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at para. 41.

[73] *Victorian Association for the Teaching of English Inc v De Laps* [2014] FWCFB 613; *Richardson v MBP (WA) Pty Ltd as Trustee for the Sun Laundry Services Unit Trust* [2020] FWCFB 2219 at [41] – [43].

[74] *Annetta v Ansett Australia Ltd* at [16] Dec 643/00 M Print S6824 cited in *Abarra v Toyota Motor Corporation Australia Ltd* [2018] FWCFB 7566 at [92] – [93].

[75] *Johnston v Woodpile Investments Pty Ltd T/A Hog's Breath Café* [2012] FWA 2 at [58].

[76] Ibid.

[77] *Sykes v Heatly Pty Ltd t/a Heatly Sports*, PR914149 (AIRC, Grainger C, 6 February 2002) at [20] and *Williams v The Chuang Family Trust t/a Top Hair Design* [2012] FWA 9517 cited in *Pecker Maroo Verano Pty Ltd v Stevens* [2024] FWCFB 147.

[78] *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 at [81]

[79] *Teterin v Resources Pacific Pty Limited T/A Ravensworth Underground Mine* [2014] FWCFB 4125 at [23]; *Advanced Health Invest Pty Ltd T/A Mastery Dental Clinic v Mei Chan* [2013] FWC 7908; *NSW Trains T/A NSW Trainlink v Wael Al-Buseri* [2023] FWCFB 165 at [21].

[80] [2014] FWCFB 4125 [24].

[81] [2019] FWCFB 5104.

[82]*Teterin* op. cit. at [23] citing a decision of a Full Bench of the AIRC in *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (1997) 73 IR 311 at 317.

[83] *Teterin* op. cit. at [24] citing *Re Chamber of South Australian Employers Inc. (No 2)* (1991) 43 IR

[84] *Chan* [2019] FWCFB 5104 [43].

[85] Op. cit. at [42].

[86] [2014] FWCFB 4125 [24].

[87] Ibid at [24] citing *Cross on Evidence*, Australian Edition, May 2023 at [7010].

[88] Ibid at [7010].

[89] *Cross on Evidence*, Australian Edition, May 2023 at [7015].

[90] Ibid at [7005].

[91] Ibid at [7210].

[92] Ibid at [7220].

[93] *Roy Morgan Research Ltd v K Baker* [2013] FWCFB 2009; *TAFE NSW v Pykett* [2014] FWCFB 714.

[94] *Chugg v Pacific Dunlop Pty Ltd* (1990) 170 CLR 249 at 258, 259; *R v Hunt* [1987] AC 352 at 375; *R v Edwards* [1975] 1 QB 27 at 39 – 40.

[95] Op. cit. at [32](2).

[96] Op. cit. at [43].

[97] Ibid at [43].

[98] Appellant's submissions at first instance – appeal book p. 30 – 31.

[99] [2017] FWCFB 4878.

[100] Ibid at [31].

[101] Transcript of first instance hearing at PN35 – 42.

[102] Ibid at PN43.

[103] Ibid at PN44.

[104] Appeal Book p. 405.

[105] Transcript of first instance hearing at PN123.

[106] Ibid at PN138.

[107] Ibid at PN139.

[108] Ibid at PN151.

[109] Ibid at PN153.

[110] Ibid at PN165.

[111] Ibid at PN157 – 161.

[112] Ibid at PN162.

[113] Ibid at PN 182 – 184.

[114] Ibid at PN185.

[115] Ibid at PN187.

[116] Ibid at PN887 – 888.

[117] [2000] HCA 57.

[118] Ibid at [59].

[119] Ibid at [60].

[120] *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 at [35].

[121] *King v Freshmore* Dec 283/00 M Print S4213 citing *WA Meat Commission v Australasian Meat Industry Employees Union, Industrial Union of Workers WA Branch* Matter No. 890 of 1993, 5 August 1993 WAIRC per Sharkey P, Coleman C and Gregor C at p.7 per Sharkey P; *PDS Rural Products Ltd v Corthorn* (1987) 19 IR 153 at 155.

[122] *Smith v AWH* [2017] FWCFB 1981 at [39].

[123] *Hogan v Hinch* (2011) ALJR 398; *O'Sullivan v Farrer* (1989) 168 CLR 210.

[124] (1937) 57 CLR 630.

[125] *Cross on Evidence*, Australian Edition, May 2023 at [17575].

[126] Transcript of first instance hearing at PN1170 – 1171.

[127] Ibid PN1191.

[128] Ibid PN1124 – 1129.