DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Liam Hawken
v
Patrick Stevedores Holdings Pty Limited
(C2024/4605)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT HAMPTON

SYDNEY, 18 DECEMBER 2024

Appeal against decision [2024] FWC 1595 of Commissioner Cirkovic at Melbourne on 19 June 2024 in matter U2023/11593 – Employer's compliance with policies and procedures – Repeated breaches of drug and alcohol policies – Permission to appeal granted – No appealable error in construction of drug and alcohol procedure – Commissioner appropriately weighed s 387 considerations – Appeal dismissed.

Introduction

[1] Mr Liam Hawken has lodged an appeal, for which permission is required, against a decision of Commissioner Cirkovic issued on 19 June 2024.[1] The decision concerns Mr Hawken's application for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (Cth) (the **Act**) in respect of the termination of his employment with Patrick Stevedores Holdings Pty Limited (the **Respondent**). In the decision, the Commissioner determined that Mr Hawken's dismissal was not unfair and dismissed his application. Mr Hawken contends in his appeal that the decision is attended by appealable error in a number of respects.

Relevant background

[2] Mr Hawken was employed by the Respondent as a stevedore from 7 February 2022 to 6 November 2023. Mr Hawken's duties involved operating a straddle carrier (a 13-metre-high specialist vehicle designed to move containers around the terminal yard, accessed via a 35-rung ladder) and lashing (action to secure or permit removal of containers on ships, which may vary in weight from approximately three tonnes to forty tonnes).[2] Mr Hawken's duties were performed within an environment that he acknowledged involved "obviously hazardous conditions."[3]

[3] On 14 October 2022, Mr Hawken returned an on-site non-negative test for amphetamine and methamphetamine, which was confirmed following confirmatory laboratory testing on 18

October 2022. Mr Hawken was issued with a formal written warning in relation to this incident on 26 October 2022. The warning advised Mr Hawken that any repetition of a positive drug and alcohol test, further breach of the Respondent's *Fitness for Work (Drug and Alcohol) Procedure* (the **D&A Procedure**), or other unacceptable conduct may result in further disciplinary action up to and including termination of employment. Mr Hawken was further advised that he would be required to undergo subsequent routine drug and alcohol tests over a 12 month period during his rostered shifts in order to monitor his ongoing compliance with the D&A Procedure.

[4] On 24 October 2022, Mr Hawken returned a further on-site non-negative test for amphetamine and methamphetamine, which was confirmed following confirmatory laboratory testing on 27 October 2022. Mr Hawken was issued with a final warning in relation to this conduct on 10 November 2022. The final warning letter advised Mr Hawken that a decision had been made to issue him with a final warning, and repeated the sentiment that any repetition of a positive drug and alcohol test, further breach of the D&A Procedure, or any other unacceptable conduct may result in further disciplinary action, including dismissal. The letter again informed Mr Hawken that he would be subject to subsequent routine drug and alcohol tests over a 12 month period during his rostered shifts to monitor ongoing compliance.

[5] On 23 October 2023, Mr Hawken was directed to take an on-site drug and alcohol test in accordance with the terms of his second warning letter. This sample recorded a negative result. Mr Hawken's negative sample was sent for confirmatory laboratory testing and on 25 October 2024, a positive result for amphetamine and methamphetamine was returned. There was no dispute as to the accuracy of that test. Mr Hawken conceded that he took "a pill" on the morning of 23 October 2023, prior to commencing work on night shift at 11:00pm that same day. Mr Hawken was informed of the positive test result on 25 October 2023. A meeting was scheduled to take place on 27 October 2023 but was deferred to 30 October 2023 at Mr Hawken's request.

[6] At the 30 October 2023 meeting, Mr Hawken was informed by the Respondent that it was considering terminating his employment. Mr Hawken was issued with a show cause letter, to which he provided a written response. Following a telephone discussion with Mr Hawken to obtain additional material, a further meeting was held on 6 November 2023. Mr Hawken was informed that the Respondent had considered his written show cause response and accompanying material, together with the additional information advanced, but had determined to terminate his employment with immediate effect. The termination letter issued to Mr Hawken referred to the "repeated and serious nature" of his conduct.[4]

[7] Mr Hawken filed his application for an unfair dismissal remedy on 22 November 2023.

The decision

[8] In the decision, the Commissioner comprehensively set out the background to Mr Hawken's application including the relevant terms of the D&A Procedure, in addition to aspects of the Respondent's *Code of Conduct* and its *Life Saving Commitments* document. The Commissioner then turned to consider whether Mr Hawken's dismissal was harsh, unjust or unreasonable and, in doing so, addressed the matters required to be taken into account under s 387 of the Act.

[9] As to s 387(a), Mr Hawken's position at first instance was that the Respondent did not have a valid reason for his dismissal because it erroneously initiated a show cause process under the terms of clause 4.6.3 of the D&A Procedure. Mr Hawken contended that a show cause process is limited to occasions where a person has committed three breaches of the D&A Procedure and been issued with three warnings within a twelve-month period. Mr Hawken says that he did not act in breach of the D&A Procedure three times in a twelve-month period, nor did he receive three warnings in a twelve-month period in circumstances where:

(a) the first breach of the D&A Procedure occurred on 14 October 2022;
(b) the second breach of the D&A Procedure occurred on 24 October 2022; and
(c) the third breach of the D&A Procedure occurred on 25 October 2023 (being one year and 11 days after the first breach).

[10] The Commissioner considered this contention, having regard to the terms of clause 4.6 of the D&A Procedure, which provides as follows:

4.6 Breach Procedure

4.6.1 First Breach

A documented discussion shall occur with the relevant manager using *Patrick –Discussion Record Template*.

- A record of the discussion shall be retained in employees personal file.
- An offer of counselling shall be provided.
- A First Written Warning shall be issued using Form - Warning Letter (AOD Breach)
- Employee shall be stood down off pay but with access to leave.
- A Return to Work Plan is to be developed if required.

4.6.2 Second Breach

A documented discussion shall occur with the relevant manager using *Patrick –Discussion Record Template.*

- A record of the discussion shall be retained in employees personal file.
- A Second Written Warning shall be issued using Form - Warning Letter (AOD Breach)
- Employee shall be stood down off pay but with access to leave.
- Employee required to attend counselling and provide evidence of attendance prior to returning to work, failure to provide such evidence within 2 weeks (unless mutually agreed) shall constitute a further breach.
- A Return to Work Plan is to be developed if required.
- Employee to be routinely tested for next 12 months.

4.6.3 Third Breach

A documented discussion shall occur with the relevant manager using *Patrick –Discussion Record Template.*

- A record of the discussion shall be retained in employee's personal file.
- A Third Written Warning shall be issued using Form - Warning Letter (AOD Breach).
- Employee shall be stood down off pay but with access to leave.
- A show-cause meeting shall be held between the employee and management.

4.6.4 Serious Misconduct

A documented discussion shall occur with the relevant manager using Patrick –Discussion Record Template immediately following the incident.

- A record of the discussion shall be retained in employees personal file.
- Employee shall be stood down off pay but with access to leave.
- A show-cause meeting shall be held between the employee and management.

4.6.5 General

A breach has occurred when (but is not limited to):

- where an employee fails to follow the requirements of an agreed 'Return to Work Plan' following a returned "non-negative" result.
- Where an employee has/is refusing to cooperate with the authorised testing representative or submit to an alcohol test by providing a sample, or
- a positive Drug or Alcohol Test is returned.
- The following shall be considered as examples of serious misconduct which may lead to loss of employment and will result in a show-cause meeting being held:
- avoidance, adulteration or falsification, any breath or urine sample including substitution of another person's sample, or arranges or is involved in any such substitution,
- aiding or abetting any person in respect of the above matters, or any attempt to do any of the above actions.
- A warning shall remain on file and current for a period of 12 months from the date of issue such that a second warning shall remain in force for 12 months after the date of issue regardless of the date of issue of the first warning (except that the second warning must have been issued no longer than 12 months after the first warning).

[11] In respect of what the Commissioner framed as a dispute as to the proper interpretation of clause 4.6.5 of the D&A Procedure, the Commissioner relevantly said as follows (citations omitted):

> [45] Clause 4.6 of the D&A Procedure headed "*Breach Procedure*" sets out a process for dealing with a "*breach*". It does so under a series of dot points that appear below the headings "*First Breach*", "*Second Breach*" and "*Third Breach*". In each case of a "*breach*" of the D&A Procedure, a warning "*shall*" be issued. Clause 4.6.5 headed "*General*" sets out when a "*breach*" has occurred and the duration a warning "*shall remain on file and current*". A "*breach*" has occurred when "*a positive drug or alcohol test is returned*".
>
> [46] In the case of a third breach, Clause 4.6.3 provides that "*a Third Written Warning shall be issued using Form - Warning Letter (AOD Breach)*" and in the final dot point that "*a show cause meeting shall be held between the employee and management*".
>
> [47] There is contention as to when a warning properly lapses and is thus to be disregarded for the purposes of initiating a show cause meeting that "*shall*" occur following a third breach.
>
> [48] I have reviewed the D&A Procedure. In my view, the warning given to Mr Hawken on 26 October 2022 had not lapsed as at the date of the confirmatory test on 25 October 2023 nor the date of the show cause letter of 30 October 2023. Clause 4.6.5 of the D&A Procedure sets out the process for dealing with a "*breach*" and the duration and currency of a warning issued

> following a "*breach*". Relevantly, it provides that "*a warning shall remain on file and current for a period of 12 months from the date of issue such that a second warning shall remain in force for 12 months after the date of issue regardless of the date of the issue of the first warning (except that the second warning must have been issued no longer than 12 months after the first warning).*"
>
> (emphasis in original)

[12] Being satisfied that the second warning, which was issued to Mr Hawken 14 days after his first warning, remained in force for a 12-month period from 10 November 2022, the Commissioner turned to consider whether the Respondent had a valid reason to dismiss Mr Hawken and concluded that it did. The Commissioner gave consideration to the content of the second warning letter (which advised Mr Hawken that a further breach of the D&A Procedure may result in his employment being terminated), the hazardous working environment, and the terms of the D&A Procedure which had been communicated to Mr Hawken, and concluded as follows:

> [52] Having considered the material before me, I consider that the Respondent had a valid reason to dismiss Mr Hawken. I have found that the Respondent operates in a hazardous environment and there is no dispute that the D&A Procedure was lawful and reasonable. There is also no dispute that the contents of the D&A Procedure were communicated to Mr Hawken, and he was aware of its contents.
>
> [53] I have found above that Mr Hawken attended work with levels of amphetamine and methamphetamine in his system above the pre-determined allowable limit on three occasions in the period of 14 October 2022 to 23 October 2023. I have found above at paragraphs [47]-[52] that Mr Hawken was in breach of the D&A Procedure on three occasions such as to justify the initiation of a show cause meeting and the termination of his employment.
> …
>
> [60] I have found at paragraphs [52]-[53] that there was a valid reason for Mr Hawken's dismissal. This weighs in favour of a finding that the dismissal was not harsh, unjust or unreasonable.

[13] Noting they are not the subject of challenge in the appeal, we briefly record that for the purposes of ss 387(b) and 387(c), the Commissioner was satisfied that Mr Hawken was provided with notification of the reasons for his dismissal and an opportunity to respond to them through the show cause process. Mr Hawken attended the relevant meeting with a support person and, accordingly, there was no unreasonable denial of a support person for the purposes of s 387(d). The consideration in s 387(e) was not relevant, noting that Mr Hawken's dismissal was not performance-related, and the matters in ss 387(f) and 387(g) were neutral considerations.

[14] As to other relevant matters in s 387(h) of the Act, the Commissioner considered and made findings in relation to seven contentions advanced by Mr Hawken: *first*, that the Respondent had failed to comply with its own policies and the D&A procedure; *second*, that the Respondent had disregarded a Recommendation issued by the Commission in respect of another matter on 5 October 2023; *third*, that Mr Hawken was not impaired when he attended work on 23 October 2023; *fourth*, that Mr Hawken had an unblemished work history (other than his positive drug tests); *fifth*, Mr Hawken had cooperated with the show cause process, demonstrated remorse and accepted responsibility for his actions; *sixth*, the Respondent's mind

was closed in the disciplinary process; and *seventh*, the dismissal had a deleterious effect on Mr Hawken's mental health.

[15] As to the first matter, the Commissioner noted that subclause 4.6.3 of the D&A Procedure provides that in the event of a third breach, "a Third Written Warning shall be issued using Form - Warning Letter (AOD Breach)" and "a show-cause meeting shall be held between the employee and management." Being satisfied that there was no evidence that a third written warning had been issued to Mr Hawken before the show cause meeting on 30 October 2023, the Commissioner considered the language of the D&A Procedure, concluding as follows:

> [78] It is clear that each dot point of clause 4.6.3 of the D&A Procedure uses mandatory language in the word "*shall*" and that it applies in the event of a third breach. What is not necessarily apparent is whether each disciplinary step outlined in the dot points is mandatory or optional. If they are each mandatory steps leading to the final dot point that "*a show cause meeting shall be held between the employee and management*", there is an obvious incompatibility in the process.
>
> [79] By its very nature, a "*third written warning*" would require the Respondent to caution Mr Hawken to the real possibility that he risks being dismissed if there is a reoccurrence of his conduct, while a "*show cause meeting*" requires Mr Hawken to show cause as to why his employment should not be dismissed. These disciplinary steps cannot be applied in parallel. As such, I have formed the view that the sensible interpretation is that the matters set out in clause 4.6.3 are optional.

[16] It was not in dispute that the usual practice adopted under the D&A Procedure (outside of the process for dealing with non-negative results) typically involved AusHealth Work, the external testing provider, randomly collecting 10 percent of all samples to be subject to confirmatory laboratory testing.[5] In the present case, the evidence of the Respondent's Terminal Manager, Mr Christopher Brewster, was that he directed that Mr Hawken's 23 October 2023 on-site negative sample be sent to the laboratory,[6] noting his view that the terms of the D&A Procedure did not limit the manner in which on-site samples could be sent for confirmatory testing.[7] The Commissioner recorded the evidence of Mr Brewster that he had "deviated" from "the norm" by directing that Mr Hawken's 23 October 2023 on-site negative sample be sent for confirmatory testing and had regard to this matter in her overall assessment.

[17] Further, the Commissioner accepted Mr Hawken's contention that the terms of the D&A Procedure were inconsistent with a zero-tolerance approach at the workplace but noted that Mr Hawken had not been dismissed for a single contravention of the D&A Procedure.

[18] In relation to the second matter, the Commissioner extracted the relevant content of a Recommendation regarding the D&A Procedure, issued by the Commission on 5 October 2023 in the context of an unrelated proceeding. Relevantly, the Recommendation proposed the inclusion of a supplementary sentence at the conclusion of the definition of "confirmatory testing" as follows:[8]

> Any positive result from confirmatory testing may result in the breach procedure of this document being applied.

[19] The Recommendation also recorded the agreement reached during that proceeding as follows:

> …Patricks have agreed that any warning that has been given to any employee over the last 12 months as a result of their negative swab test being reversed in the laboratory, will have that warning removed from their file. However, the arrangements that were put in place for any of these employees to return to work after their positive result will continue, including the requirement for additional testing.

[20] The Commissioner noted that it was not in dispute that the Respondent did not take steps to notify its employees about the updated D&A Procedure until 26 October 2023, at the earliest.[9] As to how these matters related to Mr Hawken's application, the Commissioner observed as follows:

> [86] I observe that the warnings issued to Mr Hawken prior to 5 October 2023 were not the result of a negative on-site sample being reversed in a laboratory confirmatory test. As such, on its face the Recommendation would have little, if any, bearing on those warnings. As to the 25 October 2023 Confirmatory Test which I have found at paragraph [47]-[53] permitted the Respondent to initiate a show case meeting, I do not consider the Recommendation to result in a reversal of Mr Hawken's third breach as "*the agreement was to remove warnings that have been given at certain points in time. That agreement must necessarily be contemporaneous with or pre date the date of the recommendation*". Given that the Recommendation was issued on 5 October 2023, and Mr Hawken's third breach was on 25 October 2023, I consider the Recommendation largely immaterial to the matter before me. Further, I note the limited evidence before me as to the context surrounding the issuing of the Recommendation.

[21] As to the third matter, while the Commissioner noted that there was no evidence before her as to whether Mr Hawken was impaired or otherwise when he attended work on 23 October 2023, Mr Hawken accepted in cross examination that he did not know the contents of the pill he had taken, nor how long it would last. In any event, the Commissioner concluded that in light of her valid reason finding, the issue of whether Mr Hawken was impaired was not a relevant matter.

[22] In relation to the fourth, fifth and seventh matters, the Commissioner took into account Mr Hawken's otherwise unblemished work history in which he had incurred no safety breaches over his period of one year and nine months of service. The Commissioner also had regard to Mr Hawken's acceptance of responsibility and remorse, and Mr Hawken's submission that the dismissal had a deleterious effect on his mental health. As to the sixth matter, the Commissioner considered that she had dealt with the contention that the Respondent's mind was "closed" in her consideration of the matters at s 387(b) to (g) of the decision.

[23] The Commissioner was not persuaded that any of the matters advanced by Mr Hawken outweighed the seriousness of his conduct in the context of his employment with the Respondent in a safety critical environment, despite finding that the Respondent deviated from its D&A Procedure in sending Mr Hawken's 23 October 2023 on-site negative sample for confirmatory testing. Accordingly, the Commissioner concluded that Mr Hawken's dismissal was not harsh, unjust or unreasonable.

Appeal grounds

[24] Mr Hawken's Notice of Appeal contains six paragraphs, which are said to challenge the Commissioner's findings in respect of s 387(a) of the Act – being the Commissioner's valid

reason finding, and s 387(h) – being the additional considerations advanced by Mr Hawken to mitigate his conduct. In his written outline of submissions, Mr Hawken summarised these matters into four appeal grounds as follows:

(1) The Commissioner erred in her assessment of whether there was a valid reason for the dismissal by failing to consider the reason given by the Respondent for the dismissal, being a third breach of the D&A Procedure in 12 months. Rather, the Commissioner concluded that the valid reason arose from a breach of the D&A Procedure and non-compliance with the *Code of Conduct*, which was unreasonable given the Commissioner's conclusion at paragraph [58] of the decision.[10]

(2) The Commissioner's interpretation of the D&A Procedure at paragraph [79] of the decision was erroneous as a third written warning should have been issued before a show cause meeting was convened.[11]

(3) The Commissioner erred by not considering the Respondent's failure to comply with its own policies and the D&A Procedure in the assessment of whether the dismissal was fair, including by:[12]

    (a) not issuing a third written warning; and

    (b) applying differential treatment to Mr Hawken by sending his result for confirmatory testing, contrary to the "norm" of "random selection" for confirmatory testing.

(4) The Commissioner erred by failing to take into account the Recommendation issued by the Commission on 5 October 2023 which, while issued in relation to an unrelated matter,[13] is relevant to the issues at hand.[14]

[25] Mr Hawken's written submissions characterise the appeal as one which raises questions of general significance in relation to the requirement that employers follow their own policies and procedures. Further, Mr Hawken contends that the Respondent, in effect, retrospectively applied the D&A Procedure by failing to implement or notify employees until 27 October 2023 of a change to the D&A Procedure by way of the Recommendation issued by the Commission. In addition, Mr Hawken says that there is a public interest in ensuring that the approach taken by the Commission to the interpretation of an employer's policy is not to the detriment of employees.[15]

Applicable appeal principles

[26] Section 604(1) of the Act makes it clear that there is no right to appeal, and an appeal may only be made with the permission of the Commission. Other than with respect to certain decisions of a delegate, or the General Manager of the Commission, the question of permission to appeal must be decided by a Full Bench.[16] Generally, the Full Bench must grant permission to appeal if satisfied that is in the public interest to do so.[17] Otherwise, the Full Bench has a broad discretion as to whether permission to appeal should be granted.[18]

[27] The discretion of the Commission to grant permission is more confined in the case of an application for permission to appeal from a decision of the Commission made in unfair dismissal proceedings under Part 3-2 of the Act. Section 400 of the Act provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[28] Both subsections (1) and (2) of s 400 of the Act demonstrate an intention that the avenue to appeal a decision in unfair dismissal proceedings is to be limited. Section 400(1) manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than that pertaining to appeals generally.[19] Permission to appeal can only be granted if the Full Bench is satisfied it is in the public interest to do so and no general or residual discretion exists if that threshold is not met. Section 400(2) imposes a particular constraint with respect to revisiting factual findings made in unfair dismissal proceedings by limiting review on appeal based on an alleged mistake of fact to one that involves a significant error of fact. Section 400(2) represents a basal pre-condition to an exercise of power by the Full Bench to correct an error of fact.[20]

[29] The task of assessing whether it is in the public interest to grant permission to appeal is a discretionary one involving a broad value judgment.[21] The public interest is not satisfied simply by the identification of error or a preference for a different result.[22] The Full Bench of the Commission, in *GlaxoSmithKline Australia Pty Ltd v Makin*, identified some of the considerations that may attract the public interest:[23]

> ...the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.

[30] Further, 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 appealable error.[24] 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.

[31] Because the appeal before us raises issues of general application concerning an employer's compliance with its own policies and procedures in the context of repeated drug and alcohol breaches, we consider that the grant of permission would be in the public interest for the purposes of s 400(1) of the Act. Accordingly, permission to appeal is granted. However, for the reasons that follow, the appeal is dismissed.

Consideration

[32] Grounds (1) and (2) of Mr Hawken's appeal challenge the Commissioner's conclusion that there was a valid reason for his dismissal for the purposes of s 387(a) of the Act. It is well established that a reason for dismissal based on an employee's conduct would be valid if the conduct in fact occurred and justified termination; conversely, the reason might not be found to

be valid if the conduct did not occur, or it did occur but did not justify termination.[25] It is not in contest before us that the relevant conduct occurred, as Mr Hawken conceded that he took "a pill" on the morning of 23 October 2023 and returned a positive result to a drug and alcohol test as a result of the confirmatory test that was conducted on the sample he provided.

[33] It is convenient to commence our analysis with appeal ground (2). In summary, Mr Hawken contends that the Commissioner erred in concluding that the Respondent was permitted to proceed to a show cause process pursuant to the D&A Procedure, without first issuing him with a third written warning. Mr Hawken submits that the Commissioner erred at paragraph [79] of the decision when she concluded that a third written warning cannot be applied in parallel with a show cause process and that the matters set out in clause 4.6.3 are "optional." Mr Hawken says that the D&A Procedure requires the Respondent to take sequential steps such that a show cause process cannot proceed absent a third written warning.

[34] We have earlier set out the terms of clause 4.6 of the D&A Procedure. A "breach" of the D&A Procedure is defined by clause 4.6.5 to include, amongst other things, the return of a positive drug or alcohol test. In the event of a "First Breach," clause 4.6.1 provides that a documented discussion will occur, and a first written warning "shall" be issued. Specified steps are to be taken in relation to the employee's return to work and the employee will be routinely tested for the next 12 months. Clause 4.6.2 is titled "Second Breach." It similarly refers to a documented discussion occurring, a second written warning being issued and the taking of specified steps in relation to the employee's return to work, including the requirement for routine testing for a 12 month period.

[35] Clause 4.6.3 is titled "Third Breach" and relevantly provides:

> "A Third Written Warning shall be issued using Form – Warning Letter (AOD Breach)."

[36] The clause proceeds by stating:

> "A show-cause meeting shall be held between the employee and management."

[37] On one view, the terms of the D&A Procedure appear to mandate both a "Third Written Warning" and a "show-cause meeting" in response to a "Third Breach." As the Commissioner observed, the use of the term "shall" would ordinarily be read as imposing a mandatory requirement that each of these steps be taken.[26] However, even in a case involving statutory construction, the word "shall" can sometimes be used to confer a power or the obligatory force of the word "shall" in one provision may be qualified by other provisions or its context or purpose.[27] In this matter, moreover, we are dealing with a policy which is of a type that will not always be drafted with precision.

[38] We consider that, in respect of a "Third Breach," the issuance of a written warning (which assumes the preservation of the employment relationship) and the commencement of a show cause process (which may conceivably, but not always, result in the termination of employment) represent potentially inconsistent outcomes. While the Commissioner framed these responses to the "Third Breach" as "optional," we regard them as representing the limited courses of action available to the Respondent in response to an employee's "Third Breach." That is, the effect of clause 4.6.3 is to set out the courses of action that are available in the event

of a "Third Breach", rather than a requirement that each step be followed in every case. In our opinion, that is the only way the D&A Procedure can sensibly be understood.

[39] Support for this construction of clause 4.6.3 may be derived from the terms of the D&A Procedure itself. By reason of clause 4.6.5, a warning remains on an employee's file and current for a period of 12 months from the date of *issue* (not from the date of the on-site test or confirmatory test result, as appears to be apprehended by the dates relied upon by Mr Hawken and set out at paragraph [9](a)-(c) above). It is conceivable that there may not be any further incidents within the 12-month period from the date of issue of the second warning, such that the second warning is no longer regarded as "in force." In such a case, any later incident may not give rise to a dismissal as an outcome of the show cause process under clause 4.6.3 of the D&A Procedure, but "shall" result in the issuance of a third warning. The language recognises that the Respondent holds a residual discretion to determine the outcome of the show cause process in this way.

[40] Alternatively, the outcome of the show cause process may, as in Mr Hawken's case, result in a dismissal. In those circumstances, the absence of a third written warning has no bearing on that outcome in circumstances where the terms of the D&A Procedure do not require the each of the steps set out in clause 4.6.3 to be taken sequentially. We do not consider that the D&A Procedure requires that a third written warning be issued in each case in circumstances in which it is also contemplated that a "Third Breach" can immediately result in a show cause meeting and, potentially, dismissal.

[41] We understand Mr Hawken to contend by appeal ground (2) that the Commissioner erred in interpreting the D&A Procedure in order to "do away" with the requirement that a third written warning be issued *before* the show cause meeting. However, for the reasons given, we do not agree that the Commissioner's construction of the D&A Procedure was erroneous. The Commissioner's interpretation was available, having regard to the plain – albeit infelicitously drafted – terms of clause 4.6.3 of the D&A Procedure. Further, even if the Respondent had been required to issue Mr Hawken with a third written warning before proceeding to a show cause process, which the terms of the D&A Procedure do not prescribe, the procedure nonetheless mandates a show cause meeting be held in response to the "Third Breach," which accords with the process adopted by the Respondent in the case before us.

[42] Had the Commissioner misconstrued the terms of the D&A Procedure, a matter about which we are not persuaded, this of itself would not have resulted in error in the Commissioner's finding that there was a valid reason for Mr Hawken's dismissal. It was, in our opinion, open to the Commissioner to find that there was valid reason for dismissal by reason of Mr Hawken returning a positive drug and alcohol test in the circumstances of this case even if the Respondent had failed to comply with the D&A Procedure in relation to the process adopted prior to dismissal. The question of whether the Respondent complied with the terms of the D&A Procedure is a matter relevant to the considerations in s 387(h) of the Act, as the Commissioner correctly recorded at paragraph [56] of the decision. It is not a matter that would have dictated a finding that there was no valid reason for dismissal.

[43] Against this context, we turn to appeal ground (1) which, in summary, challenges the Commissioner's finding that there was a valid reason for Mr Hawken's dismissal. Mr Hawken submits that the 6 November 2023 termination letter refers to Mr Hawken's "third breach" of

the D&A Procedure in 12 months. However, Mr Hawken contends that a "breach" is not – in isolation – grounds for dismissal in circumstances where the Respondent does not have a zero-tolerance approach under the D&A Procedure to drugs and alcohol in the workplace. To this end, Mr Hawken relies upon the Commissioner's conclusion at paragraph [58] of the decision in which the Commissioner notes the "absurdity" of the Respondent's "incompatible regime for the administration of drug and alcohol infringements" and concludes that Mr Hawken was "entitled to the benefit of the more generous policy" being clause 4.6 of the D&A Procedure, in lieu of the terms of the more stringent *Life Saving Commitments*, which specifies that an employee "will be drug and alcohol free at all times."[28]

[44] Mr Hawken submits that in light of the Commissioner's conclusion at paragraph [58] of the decision, it would be similarly unreasonable to require employees to comply with the Respondent's *Code of Conduct* with respect to the use of drugs and alcohol at the workplace. Accordingly, it is said that the Commissioner erred when she concluded that there was a valid reason for Mr Hawken's dismissal, including on the basis that by his breach of the D&A Procedure, Mr Hawken did not comply with the *Code of Conduct*. Mr Hawken submits that the Commissioner ought to have asked herself whether the dismissal was fair in accordance with the Respondent's D&A Procedure, taking into account the three breaches, the timeframe between warnings, the Respondent's non-compliance with the D&A Procedure and the Recommendation of the Commission.

[45] The decision records the aspects of the *Code of Conduct* which the Commissioner regarded to be relevant. The *Code of Conduct* requires that the Respondent's people, directors, and contractors must "comply" with the Respondent's health and safety policies, and "relevant legislation." In this case, there was no dispute that Mr Hawken "took a pill" on the morning of 23 October 2023 and presented for night shift the same day. Notwithstanding Mr Hawken's position that the 23 October 2023 on-site negative sample should not have been sent for confirmatory testing (a matter to which we will return in our consideration of appeal ground (3)), the confirmatory test returned a positive result for amphetamines and methamphetamines. There was no dispute as to the accuracy of that test and Mr Hawken has not challenged any of the Commissioner's factual findings about this matter in the appeal.

[46] Mr Hawken's contention that the Commissioner erred by failing to consider the reason relied upon by the Respondent in the termination letter (being the "third breach" of the D&A Procedure in 12 months) cannot be sustained. That is precisely what the Commissioner concluded constituted a valid reason for Mr Hawken's dismissal at [52] and [53] of the decision. The Commissioner's conclusion is to be understood in the context of her finding that the second warning issued to Mr Hawken 14 days after the issuance of the first warning remained "in force" for the purpose of identifying whether the third breach occurred within a 12 month period.[29] Even if that were not the case, s 387(a) of the Act requires the Commission to be satisfied that there is "a" valid reason for the dismissal, which need not be the reason relied upon by the employer.[30]

[47] As to the contention that the Commissioner unreasonably concluded that the valid reason arose from a breach of the D&A Procedure as well as Mr Hawken's non-compliance with the *Code of Conduct*, we are satisfied that no appealable error is disclosed for two reasons. *First*, Mr Hawken has not established any error in the Commissioner's conclusion that Mr Hawken did not comply with the Respondent's *Code of Conduct*. There was a clear evidentiary

foundation for the Commissioner's finding, noting that the *Code of Conduct* establishes a broad obligation to adhere to the Respondent's health and safety policies, of which the D&A Procedure is plainly part. *Second,* and in any event, the Commissioner did not rely upon Mr Hawken's contravention of the *Code of Conduct* to inform her conclusion that there was a valid reason for the dismissal. So much is clear from the Commissioner's conclusion at paragraph [60] of the decision in which the Commissioner expressly identified that her valid reason conclusion was that set out in paragraphs [52] to [53] of the decision.

[48] Mr Hawken has not established that the Commissioner erred in concluding that there was a valid reason for Mr Hawken's dismissal. It follows that appeal grounds (1) and (2) fail.

[49] By appeal ground (3), Mr Hawken contends that the Commissioner erred by not considering the Respondent's failure to adhere to its own policies and the D&A Procedure by (a) not issuing Mr Hawken with a third written warning before commencing a show cause process, and (b) applying differential treatment to Mr Hawken by sending his result for confirmatory testing, contrary to the "norm" of "random selection" for confirmatory testing. Mr Hawken submits that the Commissioner failed to address this in the decision, and erred when she concluded at paragraph [100] that Mr Hawken's conduct outweighed the Respondent's failure to comply with its own policies and the D&A Procedure.

[50] We do not accept Mr Hawken's contention that the Commissioner did not have regard to any alleged contravention by the Respondent of the D&A procedure. Mr Hawken's submissions about this matter at first instance were summarised by the Commissioner at [55] of the decision as follows:

> [55] Mr Hawken further raises a number of matters in support of a submission that the Respondent was in breach of its D&A Procedure and was therefore "*not entitled to initiate a show cause process*". First, he submits Mr Brewster was not entitled to send his on-site negative sample for confirmatory testing as the definition of "confirmatory testing" in clause 3 of the D&A Procedure provides that negative samples can only be sent for confirmatory testing to "*verify accuracy of testing processes and equipment*". Second, Mr Hawken submits that pursuant to clause 4.6.3 of the D&A Procedure, the Respondent was required to issue Mr Hawken with a third written warning before initiating a show-cause process. Mr Hawken submits that he was not issued a third written warning following the 25 October 2023 Confirmatory Test in breach of the D&A Procedure and consequently the Respondent was "*not entitled to initiate a show cause process*". Third, Mr Hawken points to a Fair Work Commission Recommendation (Recommendation) issued by Commissioner Riordan on 5 October 2023 in support of his submission that the Respondent did not comply with the D&A Procedure.
>
> (citations omitted)

[51] The Commissioner's third point concerning the Recommendation is the subject of appeal ground (4) and is addressed later in this decision. However, the first and second matters identified by the Commissioner at paragraph [55] of the decision form the subject of appeal ground (3). The Commissioner proceeded by stating as follows:

> [56] The three submissions referred to above at [55] are matters I shall consider further below in the context of s.387(h) as these matters do not concern Mr Hawken's conduct but rather the Respondent's procedural and substantive disciplinary response to that conduct.
>
> (citations omitted)

[52] While not the subject of challenge in the appeal, we record briefly our view that the Commissioner's approach to considering these matters in the context of s 387(h) was correct. As noted by the Full Bench in *Sydney Trains v Gary Hilder* [2020] FWCFB 1373, a case involving the dismissal of an employee who returned a positive result for cannabis metabolites who was dismissed for breaching his employer's drug and alcohol policy:

> [29] …The only question to be resolved therefore was whether the breach of the Policy was a matter of sufficient gravity to constitute a sound, defensible, well-founded and therefore valid reason for dismissal. This required an assessment of the importance of the Policy in the context of Sydney Trains' operations and Mr Hilder's work duties.
>
> [30] This matter was not addressed in the decision in relation to s 387(a). Instead, the Deputy President erroneously focused on Sydney Trains' "zero tolerance" approach to breaches of the Policy and its apparent inconsistency with Sydney Trains' position that it would take into account any relevant mitigating circumstances before deciding on its disciplinary response. We do not consider that these were matters relevant to whether there was a valid reason for the dismissal, since they did not concern Mr Hilder's conduct but rather Sydney Trains procedural and substantive disciplinary response to that conduct. If the consequence of Sydney Trains' "zero tolerance" was that it would not give any consideration to any mitigating circumstances advanced by any employee who has been found to have breached the Policy, that may be relevant to s 387(c) since it would arguably constitute a denial of a real opportunity to respond to the reason for the putative dismissal. If dismissal was a disproportionate response to the conduct in question because Sydney Trains had failed to take into account mitigating circumstances, that would be a matter relevant to s 387(h). But in the context of s 387(a), they were simply distractions.

[53] Consistent with this approach, the Commissioner considered Mr Hawken's contentions as to the Respondent's failure to adhere to its procedure in her assessment of relevant matters under s 387(h). The Commissioner accepted that the Respondent had not issued Mr Hawken with a third written warning before the show cause meeting was convened. But, in light of the Commissioner's conclusion as to the correct interpretation of the D&A Procedure to which we earlier referred, the Commissioner concluded that the provision of a warning was incompatible with the show cause process that was adopted, where that process resulted in Mr Hawken's dismissal.

[54] Having regard to the Commissioner's detailed examination of this issue in the context of her consideration under s 387(h), the contention that the Commissioner erred by "not considering" the Respondent's failure to issue a third written warning cannot be accepted. Nor are we persuaded that the Commissioner failed to consider Mr Hawken's contention that he was treated differently when his 23 October 2023 on-site negative sample was sent for confirmatory testing, contrary to the usual random selection process. The Commissioner addressed this issue at paragraph [80] of the decision and was satisfied, as paragraphs [100] and [103] of the decision make sufficiently clear, that the Respondent had deviated from its D&A Procedure by sending Mr Hawken's sample for confirmatory testing. The contention that the Commissioner failed to consider this issue is not made out.

[55] Having found that the Respondent had "deviated" from its procedure in the manner described, the Commissioner was required to consider and give due weight to this matter, and each of her findings in relation to the matters specified in s 387 of the Act, as a fundamental element in determining whether Mr Hawken's dismissal was harsh, unjust or unreasonable.[31]

That is so because it was a matter the Commissioner considered relevant for the purposes of s 387(h) of the Act. This is precisely what the Commissioner did, noting at paragraphs [99]-[100] as follows:

> [99] I have made findings at paragraphs [76]-[82] in regard to the Respondent's failure to comply with its own policies and D&A Procedure. Whether or not the Respondent has failed to comply with its own policies and procedures is indeed a relevant consideration when considering other relevant factors and will ultimately have some bearing on whether or not the dismissal is unfair.
>
> [100] However, in my view, a failure of an employer to comply with its own policies and procedure has to be considered in the particular circumstances of each case and weighed against all of the other factors. In this case, the seriousness of Mr Hawken's conduct outweighs the Respondent's failure to comply with its own policies and D&A Procedure.

[56] While the Commissioner regarded the Respondent's deviation to be a mitigating factor in Mr Hawken's favour, it was open to the Commissioner to conclude that the dismissal was not unfair when all the circumstances were taken into account. The weight to be assigned to the conclusions that the Commissioner reached in respect of the matters specified in s 387 of the Act was a matter for the Commissioner.[32] Any disagreement about the weight attributed to these relevant matters, where they were otherwise the subject of proper consideration in the decision, is not a sustainable ground of appeal. In this case, the mitigating factor was balanced by the Commissioner against the fact that Mr Hawken had received two prior written warnings, the second of which remained "in force," and the safety critical nature of the Respondent's workplace.[33] Ultimately, the Commissioner was not persuaded that the mitigating circumstances raised by Mr Hawken made his dismissal a "disproportionate response,"[34] and the Commissioner reached an overall conclusion that the dismissal was fair, notwithstanding the Respondent's deviation from compliance with the D&A Procedure.[35] In the circumstances, we do not consider that the Commissioner's conclusion at paragraph [100] of the decision is attended by appealable error.

[57] We note that Mr Hawken submits that the Commissioner's "personal view" of the conduct should not be the "deciding factor in this matter." The impugned "personal views" of the Commissioner are not apparent from Mr Hawken's submissions. Nor is it explained how such personal views affected the Commissioner's dispositive reasons. In the absence of material that fairly articulates the nature of Mr Hawken's concerns, we consider it unnecessary to say anything more about this contention. The Commissioner was called upon to make an overall assessment as to whether the dismissal was harsh, unjust or unreasonable based on the facts as she found them. The Commissioner did so.

[58] For these reasons, ground (3) fails.

[59] As to appeal ground (4), Mr Hawken submits that the Commissioner erred by failing to have regard to the Recommendation issued by another member of the Commission on 5 October 2023. Mr Hawken says that the Recommendation is of direct relevance to the matters arising in his application. Mr Hawken says that it is not "immaterial" as the Commissioner concluded, in circumstances where the Respondent did not inform its employees of the matters in the

Recommendation until two days after Mr Hawken's confirmatory test results were received, with the result that the disciplinary action taken by the Respondent was contrary to the advice of the Commission.

[60] Contrary to Mr Hawken's contention, the Commissioner considered the Recommendation in the decision, in the context of her assessment of relevant matters under s 387(h) of the Act. In doing so, the Commissioner extracted elements of the Recommendation, which was issued on 5 October 2023. As earlier stated, the Recommendation relevantly recommended the amendment emphasised below to the terms of the D&A Procedure:[36]

Confirmatory Testing	*A procedure that uses calibrated specialised equipment in a laboratory to identify and quantify the presence of a specific drug or metabolite against the limits in the Australian Standards.* *Confirmatory Testing is conducted on all samples that are "Non Negative" and on 10% of the total number of samples. The purpose of Confirmatory Testing is to verify accuracy of testing processes and equipment.* ***Any Positive Result from Confirmatory Testing may result in the Breach Procedure in this document being applied.***

[61] As earlier stated, the Recommendation went on to state that the Respondent had agreed that any warning given to any employee "over the last 12 months" as a result of a negative swab test being reversed in the laboratory would have that warning removed from their employee file.[37]

[62] The genesis of the Recommendation appears to have been a private conciliation conference in an unrelated application before the Commission. We accept the Respondent's submission that the Recommendation itself discloses little about the circumstances that informed its content. Noting that the Recommendation was the product of a conciliation conference in another matter, there was (appropriately) no evidence led about it before the Commissioner at first instance.

[63] The decision records the undisputed evidence that the Respondent did not notify its employees about the change to the terms of the D&A Procedure identified in the Recommendation until at least 26 October 2023.[38] Mr Hawken contends that this was detrimental to his interests as the effect of the Recommendation was to change the way in which confirmatory testing applied from 5 October 2023, being the date that it was issued. The Respondent's notification to its employees of the change occurred after the confirmatory test results were returned in relation to Mr Hawken's negative 23 October 2023 on-site sample.

[64] We have earlier rejected Mr Hawken's contention that the Commissioner erred by not having regard to the Recommendation, which she plainly did at paragraphs [83] to [86] of the decision. As to Mr Hawken's contention that it was unreasonable for the Commissioner to determine the Recommendation was "largely immaterial" to the application, we note as follows.

[65] *First*, as the Recommendation makes clear, "any negative test which tests positive in the laboratory must be processed in accordance with the Procedure. To do otherwise would be contrary to the ambition and focus of the parties in relation to ensuring a safe workplace for all."[39] The amendment to the definition of "confirmatory testing," set out in the final sentence of the definition of that term in the Recommendation, contemplates that any positive result from confirmatory testing may result in disciplinary action.[40] As Mr Hawken's negative on-site test returned a positive result following confirmatory testing, the approach taken by the Respondent to address Mr Hawken's conduct was available to it under the terms of the D&A Procedure.

[66] *Second*, the Recommendation records the Respondent's agreement to remove any warnings from employee files issued in the preceding 12-month period as a result of a negative swab being reversed in the laboratory. As the Commissioner correctly recorded at paragraph [86] of the decision, the evidence demonstrates that Mr Hawken's first two tests followed on-site "non-negative" results (as opposed to negative results). It follows that the Recommendation had no material relevance to either the first written warning or the second written warning issued to Mr Hawken. Those warnings would not have been removed from Mr Hawken's file as a consequence of the Recommendation as they were not the result of a negative swab being reversed in the laboratory.

[67] *Third*, the Recommendation was dated 5 October 2023, and it dealt with the Respondent's agreement for the recission of warnings in the 12 month period prior to its issuance. Mr Hawken's negative on-site sample returned a positive confirmatory result on 25 October 2023, after the agreement recorded in the Recommendation had been reached. Noting that the Recommendation is, of its nature, non-binding, there is no basis, in the terms of the Recommendation or otherwise, for concluding that the Respondent's agreement to rescind certain historical warnings was tied in a temporal sense to an unspecified later date or upon another event occurring (including the date it was communicated to employees).

[68] *Fourth*, it therefore remains the case that Mr Hawken's conduct on 23 October 2023 constituted a "Third Breach" of the D&A Procedure. Consistent with our view as set out in relation to appeal ground (2) earlier in this decision, a "Third Breach" permitted the Respondent to conduct a show cause meeting, a consequence of which could be termination of employment. The Recommendation did not bear upon any of these matters.

[69] It follows that we do not consider that Mr Hawken's contention that it was unreasonable for the Commissioner to determine the Recommendation was "largely immaterial" to the matter discloses appealable error. While the lapse in communicating the terms of the Recommendation to employees was a relevant matter for the purpose of s 387(h) of the Act, as our analysis has borne out, it did not have any material bearing upon Mr Hawken's application. We therefore reject the contention that the Commissioner erred in her consideration of this matter and appeal ground (4) fails.

Orders and disposition

[70] For the reasons given, the Full Bench makes the following orders:

(a) Permission to appeal is granted;
(b) The appeal is dismissed.

VICE PRESIDENT

Appearances:

L Hawken, representing himself.
M Minnuci, counsel, instructed by Seyfarth Shaw for the Respondent.

Hearing details:

Melbourne.
2024 (in-person):
18 October.

Printed by authority of the Commonwealth Government Printer

<PR782572>

---

[1] *Hawken v Patrick Stevedores Holdings Pty Ltd* [2024] FWC 1595.

[2] Appeal Book (**AB**) 111 at [28]-[30].

[3] AB 54 at [12].

[4] AB 18, AB 389.

[5] AB 108-109 at [22].

[6] AB 116 at [53].

[7] AB 650 at [555]

[8] AB 65 (D&A Procedure as at 21 March 2022), cf AB 62 (D&A Procedure correspondence to employees dated 26 October 2023); AB 52 at [3].

[9] AB 62, cf AB 63 which demonstrates notification to employees on 27 October 2024.

[10] Notice of appeal, 2.1 at [1]-[5]; Appellant's outline of submissions at [4]-[9].

[11] Notice of appeal, 2.1 at [5a]; Appellant's outline of submissions at [10]-[11].

[12] Notice of appeal, 2.1 at [5b] and [6]; Appellant's outline of submissions at [12]-[16].

[13] [2023] FWC 2596.

[14] Notice of appeal, 2.1 at [5c]; Appellant's outline of submissions at [17].

[15] Notice of appeal at 3.1; Appellant's outline of submissions at [18].

[16] *Fair Work Act 2009* (Cth), s 613(1)(a).

[17] *Fair Work Act 2009* (Cth), s 604(2).

[18] *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30] (Spender, Kiefel, Dowsett JJ); *Ferrymen Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8025; (2013) 238 IR 258 at [9]-[12].

[19] *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54; (2011) 192 FCR 78 at [34] (Buchanan J); *Workpac Pty Ltd v Bambach* [2012] FWAFC 3206; (2012) 220 IR 313 at [14]; *Barwon Health – Geelong Hospital v Colson* [2013] FWCFB 4515; (2013) 233 IR 364 at [6]; *Illawarra Coal Holdings Pty Ltd (t/as South32) v Sleiman* [2024] FWCFB 364 at [36].

[20] *BP Refinery (Kwinana) Pty Ltd v Tracey* [2020] FCAFC 89; (2020) 276 FCR 9 at [22] (Besanko, Perram and Jagot JJ)

[21] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in H*ogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54; (2011) 192 FCR 78 at [44]-[46]; *Australian Postal Corporation v D'Rozario [*2014] FCAFC 89; (2014) 222 FCR 303 at [102] (Bromberg J).

[22] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/ Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review; *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54; (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28].

[23] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343; (2010) IR 297 at [27].

[24] *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30].

[25] *Edwards v Giudice* [1999] FCA 1836; (1999) 94 FCR 561 at [6]-[7]; *Titan Plant Hire v Van Malsen* [2016] FWCFB 5520; (2016) 263 IR 1 at [28].

[26] *Coffs Harbour and District Local Aboriginal Land Council v Lynwood* [2017] NSWCA 317 at [8]-[9] (Basten JA).

[27] See, for example, *Re Davis* (1947) 75 CLR 409 at 418 (Starke J) and 424-425 (Dixon J); *Wiedenhofer v Commonwealth* (1970) 122 CLR 172 at 174 (Gibbs J).

[28] AB 319-AB 324.

[29] Decision at [49], AB 713

[30] *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [2016] FWCFB 4185; (2016) 261 IR 176 at [45] citing *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 377-378.

[31] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, PR919205, at [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [92] and, in the context of the *Fair Work Act 2009* (Cth), *Tham v Hertz Australia Pty Limited* [2018] FWCFB 5972 at [45].

[32] *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 53 ALJR 552 at 556 (Murphy J) cited in *Chubb Security Australia Pty Ltd v Thomas*, Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at [37]. See also observations in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

[33] Decision at [101], AB 723

[34] Decision at [102], AB 723

[35] Decision at [103], AB 723

[36] AB 78 at [6]

[37] AB 79 at [7]

[38] AB 62, or 27 October 2024 (AB 63)

[39] AB 78 at [5]

[40] AB 78 at [6]