DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Opal Packaging Australia Pty Ltd
v
Pece Calovski
(C2024/4878)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT WRIGHT

SYDNEY, 30 JANUARY 2025

Appeal against decision [2024] FWC 1717 of Commissioner Matheson at Sydney on 28 June 2024 in matter number U2023/10560 - Application for an unfair dismissal remedy – Employee reinstated with backpay – Employee involved in forklift accident – Whether Commissioner erred in not being satisfied the employee was at fault – Whether finding made without evidence – Whether Commissioner required employer to disproved speculative theory Application of principle in Briginshaw v Briginshaw – Commissioner's approach orthodox – Necessary for decision-maker to feel actual persuasion of the facts in issue – No arguable error in factual findings – Not in the public interest for the Full Bench to revisit detailed factual findings made at first instance – Permission to appeal refused.

Introduction and outcome

[1] Pece Calovski is an experienced forklift operator. He has worked as a forklift operator for 25 years, most recently for Opal Packaging Australia Pty Ltd (**Opal Packaging**) performing work at its facility in Revesby in New South Wales.

[2] On 27 June 2023, he was assigned to drive what is known as a grab forklift. The forklift has a loaded weight of over 11 tonnes. When he was maneuvering the forklift intending to park near a boiler, Mr Calovski said he applied the brake but it went all the way to the floor and had no resistance. Mr Calovksi was able to steer away from the boiler. However, the forklift collided with an orange and blue drum causing it to bend around a bollard. The forklift continued travelling forward through a pedestrian zone before colliding with other items of plant and equipment, including the gas feed line to the boiler. The forklift eventually made contact with a roller door and fire safety door and came to a stop.

[3] Mr Calovski was subsequently dismissed as a result of the incident. The reasons given for his dismissal were that he failed to operate the grab forklift in a safe manner causing extensive damage and creating a safety incident that could have resulted in injury and loss of life and that he failed to accept any responsibility for the incident.

[4] Mr Calovski applied to the Fair Work Commission (the **Commission**) under s 394 of the *Fair Work Act 2009* (Cth) (the **Act**) for an unfair dismissal remedy. The application was heard by Commissioner Matheson. In a decision issued on 28 Jun 2024, the Commissioner found that Mr Calovski's dismissal was unfair and ordered that he be reinstated, that continuity of his employment be maintained and that an order be made with respect to remuneration lost as a result of the dismissal.[1] In short, the Commissioner was not satisfied that the incident occurred as a result of Mr Calovski operating the forklift in an unsafe manner so as to provide a valid reason for dismissal and, taking into account the other matters in s 387 of the Act, found that the dismissal was harsh and unreasonable.

[5] Opal Packaging has sought permission to appeal, and to appeal, the decision of the Commission under s 604(1) of the Act. The grounds advanced by Opal Packaging allege that the Commissioner erred by finding that she could not be satisfied that between two contending theories about what caused the incident, namely, whether it was error on the part of Mr Calovski or whether the brake pedal went soft as he claimed. Opal Packaging further alleged that the Commissioner erred by reversing the onus of proof and misapplying the principles in *Briginshaw v Briginshaw*.

[6] For the reasons that follow, we have decided to refuse permission to appeal.

Factual background

[7] Mr Calovski was employed by Opal Packaging from 10 December 2020 until his dismissal on 19 October 2023.[2] Opal Packaging manufactures cardboard boxes. Mr Calovski was initially employed as a machine operator then moved into the role of corrugator floater on 13 October 2021.[3] In his role of corrugator floater, Mr Calovski was required to perform various tasks including driving forklifts and working on a cardboard stacker.[4] Mr Calovski's usual starting time was 6.50am. As a floater he could be required to work in different areas of the business.[5]

[8] As we have recorded, on 27 June 2023, Mr Calovski was using a grab forklift to transport reels of paper so the machine operators could run the paper through the machine to create cardboard. A grab forklift is different to a regular forklift in that, rather than having flat tines that can be loaded and unloaded, the grab of a grab forklift has a semi-circular shape which is typically used to pick up cylindrical reels of paper. The unloaded weight of the forklift is 11.33 tonnes which is significantly heavier than a standard forklift.[6]

[9] As Mr Calovski was rotating a clamp on the grab forklift, a red metal plate fell from the clamp to the ground. Mr Calovski turned off the grab forklift and inspected the metal plate with Mr Adam Williams, a 'floater' and an elected Health and Safety Representative. Mr Calovski and Mr Williams agreed that they should notify the supervisor that the plate had fallen off the forklift and that Adapt-A-Lift (the company contracted by Opal Packaging to service its forklifts) should be contacted to fix the forklift.[7]

[10] Mr Calovski got back in the forklift, reversed the forklift for approximately one or two metres to put the 'butt reel' (referring to what is left over from a full reel of paper which can be used for another job) down safely and out of the way and then went to park the forklift near a boiler. Mr Calovski said that as he was driving, he pushed down on the brake approximately

two metres away from where he had intended to park but it went all the way to the floor and had no resistance.[8]

[11] The forklift continued to move forward. Mr Calovski said that he was aware that the boiler was on his left and that the forklift was going to hit something, so he intentionally steered the forklift as straight as possible to ensure he went between the boiler and starch kitchen to minimise damage. As he steered the forklift straight, it collided with an orange and blue cylinder causing it to bend around a yellow bollard. The forklift then continued straight before eventually colliding with the roller door, among other items of plant and equipment (including the gas feed line to the boiler which led to the release of gas), and stopping.[9]

[12] The time between Mr Calovski pressing on the brakes to when the forklift collided with the roller door was estimated to be a few seconds. He estimated the distance between where the forklift was initially parked when the plate fell off the clamp to the roller door to be 15 to 20 metres and he estimated the distance between where he pressed the brakes to the roller door to be eight to 10 metres.[10] Mr Calovski said that he did not press the accelerator. He said the forklift continued but decreased in speed, particularly after colliding with plant and equipment. He was not driving anywhere near full speed.[11] Mr Williams said Mr Calovski was driving less than 10km an hour and that he was not driving fast or erratically.[12]

[13] After the incident, Mr Calovski underwent a drug and alcohol test which returned a negative result. He returned to work the next day after first going to hospital to treat a minor injury to his shoulder.[13] Mr Calovski has operated forklifts and grab forklifts for approximately 25 years. He indicated that this was the first occasion in his career that he had ever been involved in a forklift accident.[14]

[14] There are three grab forklifts at the site where Mr Calovski worked, one of which was out of operation and had not been used for approximately four to six months prior to the time of the incident. This forklift stopped working while Mr Calovski was in the middle of driving it. The grab forklift involved in the incident had been used on the day, afternoon and night shift five days per week for the entire period the other forklift had been out of service.[15]

[15] Mr Calovski returned to work on 28 June 2023, the day following the incident. That day, he attended a meeting with his union representative, Mr Ahmet Sayan, a Corrugator Operator and Mr Alastair Conway, the Day Shift Manager at approximately 10.30am and explained his version of events.[16]

[16] Mr Conway called Adapt-A-Lift on the day of the incident. Adapt-A-Lift was the company that leases and services the forklifts used by Opal Packaging. Mr Conway was aware when he called Adapt-A-Lift that Mr Calovski was attributing the incident to the forklift's brakes. When Mr Conway called Adapt-A-Lift he explained that the forklift had been involved in a significant incident and needed to be inspected but could not recall whether he advised the person on the phone that the brakes had allegedly failed.[17] After the inspection, the Service Technician, Mr Tom Paraskevopoulos said that there was nothing wrong with the brakes.[18]

[17] The service history and the manual of the forklift was in evidence in the proceedings before the Commissioner. The history showed that a 4000 hour service which was due to be carried out on 2 February 2023 was delayed until 9 March 2023.[19]

[18] Mr Todd Brennan is an employee of Forkpro Australia Pty Ltd and was engaged by Opal Packaging to give expert evidence during the proceedings about the service history of the forklift and other matters. Mr Brennan said that the 4000 hour service entails service of the brakes and prior to this service (according to the Forklift Manual) technicians must "Perform the 8-hour, 250-hour, 500-hour, 1000-hour and 2000-hour checks…" all of which entail a service of the brakes.[20] Mr Brennan said that even if the brakes had not been serviced in the 12 months prior to the accident, with the forklift's type of braking system, if the brakes failed he would not expect a 'soft pedal'.[21] In reviewing the Adapt-A-Lift service history provided, Mr Brennan said that it was not possible to state whether it was deficient or not but said that there appeared to be some anomalies in the Service History in that certain parts or lubricants required by the schedule set out in the periodic maintenance table in the Manual are not listed in the Service History maintenance table in the Manual are not listed in the Service History.[22]

[19] The forklift manual referred to small amounts of water in the brake system causing reduced braking performance.[23] Mr Paraskevopoulos confirmed during cross examination that he did not test to see if the brakes were contaminated by water, only conducted a visual inspection and did not think that taking a sample to confirm whether there was water in the fluid was required.[24] During cross-examination, Mr Brennan was asked about the presence of water in the braking system causing soft pedal and agreed that this was possible.[25] Mr Brennan also agreed that if the list of items that must be done as a part of a 4000 hour service were not performed this would increase the risk of brake failure.[26] Mr Brennan gave evidence that if water is introduced to the system the indicator light on the forklift's dash would be on but agreed that this statement would be dependent on the make and model of the forklift and that he had not seen the particular forklift the subject of the incident.[27]

[20] Mr Derek Sporl was Opal Packaging's Health and Safety Business Partner at the time of the incident and led Opal Packaging's investigation into the incident.[28] Mr Conway interviewed the employees involved in or within the immediate vicinity of the incident including Mr Calovski, Mr Williams, Mr Rajiv Deo, a grab driver, and Mr Feng Li, a machine operator and provided Mr Sporl with copies of the records of those interviews.[29]

[21] Mr Sporl's investigation report noted that the forklift was tested after the incident to determine stopping distance at full speed and the distance was approximately 7 metres. The distance between the impacted bollard and fire safety door is 9 metres. Mr Sporl believed the forklift would have been travelling at full speed at the time it hit the bollard and that the impact to the I-beam indicates that it was not a slow and progressive stop. Mr Sporl said even if there was a total brake failure or the forklift cut out, the forklift would decelerate at the same speed as if it were powered and, in these circumstances, he believed that if the forklift's brakes failed it would not have travelled far enough and with enough velocity to hit the I-beam and impact it to the degree that it did.[30] Mr Sporl concluded that it was more likely than not that the brakes had not failed and that the accelerator may have been used by Mr Calovski instead of the brake, resulting in the incident.[31] Mr Sporl said even if the accelerator was not used by Mr Calovski instead of the brake, based on the findings of the post-inspection assessment of the forklift's brakes he considered it was very unlikely that the forklift's brakes had failed as Mr Calovski had claimed.[32]

[22] Mr Calovski gave evidence that after the incident he was directed not to work on the grab forklift but continued to work on the cardboard stacker, including working the same shifts and regular overtime, until he was suspended from duties on 11 October 2023.[33]

[23] On 4 July 2023 a meeting was held between Mr Calovski, Mr Sayan, Mr Conway and Michael Kenny, Quality Assurance Manager. During the meeting, Mr Conway said that he thought that the incident involving the forklift on 27 June 2023 had been an accident and that he did not consider Mr Calovski had intentionally caused it.[34]

[24] On 18 July 2023, Inspector Emma Afeaki and Corey Myers of SafeWork NSW attended Opal Packaging to conduct an inspection in relation to the incident.[35] On 20 July 2023, Safework NSW sought information from Adapt-A-Lift about its inspection of the forklift on 27 June 2023 which Adapt-A-Lift responded to on 25 July 2023.[36] On 26 July 2023 Ms Afeaki emailed the investigation team attaching the SafeWork Inspection Report which included a notation that the Adapt-A-Lift report stated that no fault was found with the forklift or its brake system.[37]

[25] Mr Ibrahim-Elgarhy instructed Opal Packaging's General Manager Health and Safety to prepare a Government Information Public Access (GIPA) application to obtain a copy of the Adapt-A-Lift materials referred to in the SafeWork Inspection Report.[38]

[26] On 3 October 2023 a further meeting was held between Mr Calovski, Mr Sayan, Mr Conway and Mat Wilmore, Opal Packaging's Workplace Relations Specialist. At this meeting Mr Calovski was provided with a letter containing allegations of misconduct in relation to the forklift incident and was requested to attend a meeting on 5 October 2023.[39] The letter stated that Opal Packaging had received reports from Adapt-A-Lift and SafeWork NSW regarding the incident and that the reports 'confirm that there was not fault in the braking system on the grab forklift'.[40]

[27] The meeting scheduled was postponed until 10 October 2023 at the request of Mr Sayan as Mr Calovski did not have the forklift's service records. In the meeting of 10 October 2023, Mr Calovski provided his initial written response to the allegations. Mr Sayan said that the serial number on the service records provided did not match the serial number of the forklift provided to SafeWork. Mr Conway obtained the correct service records and provided these to Mr Sayan on 11 October 2023.[41]

[28] On 11 October 2023 another meeting was held between Mr Calovski, Mr Sayan, Mr Wilmore and Mr Ahmad Ibrahim-Elgarhy, Site Manager.[42] The following morning Mr Sayan requested a copy of the service manual for the forklift and a copy of Opal Packaging's Incident Report.[43] On 13 October 2023 another meeting took place between Mr Calovski, Mr Sayan, Mr Wilmore and Mr Ibrahim-Elgarhy in which Mr Calovski responded further to the allegations.[44]

[29] On 18 October 2023 another meeting took place between Mr Calovski, Mr Sayan, Mr Ibrahim-Elgarhy and 'Sveto'.[45] On 19 October 2023 a meeting took place between Mr Calovski, Mr Sayan, Mr Wilmore and Mr Ibrahim-Elgarhy in which Mr Calovski was provided with a letter notifying him of the termination of his employment (Letter of Termination).[46]

[30] The Letter of Termination, signed by Mr Ibrahim-Elgarhy, relevantly said:

> The reason for the termination of your employment is misconduct. Specifically:
>
> 1. On 27 June 2023, you failed to operate the grab forklift in a safe manner. This caused extensive damage and created a safety incident that could have resulted in injury and loss of life.
> 2. Despite being informed that the reports from the forklift manufacturer, Adapt-ALift, found that the braking system for the grab forklift was in perfect working order, you have had not been willing to accept any responsibility for the incident despite being given the opportunity to do so.[47]

[31] Mr Calovski's employment was terminated with immediate effect on 19 October 2023 and Mr Calovski was paid in lieu of notice.[48]

[32] Mr Ibrahim-Elgarhy said the delay between the date of the incident and the date of Mr Calovski's termination of employment was due to the delay between the incident and SafeWork NSW's site visit and the time it took Opal Packaging to receive the materials it requested in response to the GIPA application.[49]

[33] Mr Ibrahim-Elgarhy was the ultimate decision maker in relation to Mr Calovski's dismissal.[50] Mr Ibrahim-Elgarhy believed it was more likely that Mr Calovski accidentally hit the accelerator on the forklift, rather than the brake.[51] Mr Ibrahim-Elgarhy said Mr Calovski was adamant that the brakes were defective and that this caused the incident however he considered that all of the objective evidence pointed to Mr Calovski being untruthful in providing this explanation.[52] Mr Ibrahim-Elgarhy was disappointed that Mr Calovski did not accept responsibility and if Mr Calovski had told Mr Ibrahim-Elgarhy what Mr Ibrahim-Elgarhy believed to be the correct version of events there may have been an alternative option to dismissal.[53] Mr Ibrahim-Elgarhy accepted that Mr Calovski did not have a history of dishonesty and that there were no issues with Mr Calovski's performance between the period of the incident and Mr Calovski's suspension on 11 October 2023.[54]

The Commissioner's Decision

[34] In considering whether there was a valid reason for dismissal under s.387(a) of the Act, the Commissioner noted Opal Packaging's submissions that it has work health and safety obligations, there are serious risks associated with contraventions of these obligations, forklift driving is considered high-risk, Mr Calovski was driving the forklift involved in the incident, his 'actions were inherently dangerous' and in putting forward that the brakes failed Mr Calovski lied and this showed his untrustworthiness. Opal Packaging alleged this constituted serious misconduct. Opal Packaging contended that either the inherent dangerousness of Mr Calovski's actions or the fact that he lied about the brakes not working provided a valid reason for dismissal.[55]

[35] The Commissioner recorded that she was satisfied that the forklift incident resulted in extensive damage, that it was of a serious nature and that it may have resulted in injury and loss of life.[56]

[36] The Commissioner noted that Opal Packaging did not suggest that the incident itself was a deliberate act and that Mr Ibrahim-Elgarhy believed the incident was an accident. The

Commissioner accepted that Mr Calovski did not deliberately drive a forklift in a manner that was unsafe.[57] The Commissioner accepted that conduct that causes serious and imminent risk to the health and safety of a person may constitute a valid reason for dismissal even if not wilful or deliberate.[58] The Commissioner said that if it was established that the incident was Mr Calovski's fault and he lied about it, she would be satisfied that this constitutes serious misconduct on the part of Mr Calovski.[59]

[37] The Commissioner found that while it is not possible to determine the precise speed at which the forklift was travelling, she accepted that it would have been possible for the forklift to reach its maximum speed of 10km before it made contact with the first object, being the blue and orange drum that wrapped around the bollard.[60] The Commissioner was satisfied there is no evidence of the forklift actually braking and that Mr Calovski said the brakes went soft. This raises the question of whether the brake was either not applied or whether braking failed.[61]

[38] After considering all of the evidence, the Commissioner found that the total distance travelled by the forklift was at least 19 metres.[62] The Commissioner was not persuaded that the evidence established that 7 metres is the precise distance within which the forklift should have stopped before hitting the roller door.[63] The Commissioner accepted that hitting various objects should have slowed the trajectory of the forklift down to some degree.[64] The Commissioner was not satisfied, based on the evidence before the Commission, that the moving forklift weighing in excess of 11 tonnes should have slowed enough between the bollard and roller door to stop or cause lesser damage in the event of brake failure.[65]

[39] The Commissioner acknowledged that the forklift was returned to operation the same night of the incident and the absence of any issues with the forklift since the incident, at face value, weighs in favour of Opal Packaging's theory that the cause of the incident was operator error.[66]

[40] The Commissioner considered the evidence of Mr Paraskevopoulos and Mr Rod Harris, National Operations Manager of Adapt-A-Lift in relation to whether it was possible that soft pedal occurred, and the brakes could have worked again because they had not heated sufficiently. The Commissioner observed that their evidence did not directly address the possibility of contamination.[67]

[41] The Commissioner noted that during cross-examination, Mr Brennan accepted that if the brake system was contaminated by water, this could create soft pedal when water turned into a gas. However, when the system cooled down, the gas could return to a liquid form and if the brake is applied again it would appear to work normally. If Mr Paraskevopoulos tested for contamination, he could have identified whether the oil was contaminated with water. If there was a time between when the crash occurred and when the technician inspected the forklift, it could have sufficiently cooled so when he went to test the forklift it would be working normally again.[68] Mr Brennan assessed the likelihood of water being in the brake system and then turning into gas and then back into water occurring as being in the 2 to 3 out of 10 range. The Commissioner concluded that while a 2 or 3 out of 10 does not indicate a high degree of likelihood, this scenario is more than a remote possibility and it should not be considered in isolation from other relevant factors when identifying the likely cause of the incident on the balance of probabilities.[69]

[42] The Commissioner noted that the report written by Mr Brennan states that if low brake fluid levels or water is introduced to the system, the likelihood of soft pedal or non-existent pedal pressure is high. The Commissioner noted that Mr Paraskevopoulos confirmed during cross examination that he did not test to see if the brakes were contaminated by water and only conducted a visual inspection and accepted that a visual inspection may be able to detect if brake fluid levels were low.[70] The Commissioner accepted that it was unlikely that the brake fluids were low but said she was satisfied that water contamination is also a cause of soft pedal and no testing of the brake fluids was undertaken to rule out contamination.[71] The Commissioner said that she was unable to draw a conclusion that if contamination occurred the indicator light would have been on or that Mr Calovski would have seen it.[72]

[43] The Commissioner said that she could not be satisfied as to whether Adapt-A-Lift, in servicing the forklift, carried out all of the elements of a service as prescribed by the Forklift Manual. The Commissioner said there was evidence of anomalies, including evidence suggesting that the brake fluids may not have been changed in accordance with the Forklift Manual and this would likely increase the likelihood of brake failure.[73] The Commissioner noted that there were three grab forklifts provided by Adapt-A-Lift to Opal Packaging and at the time of the incident one of these was out of service as it had stopped working while Mr Calovski was driving it. This indicates that the grab forklifts, despite being serviced by Adapt-A-Lift, are not immune to unexpected breakdown and the fact that the forklift involved in the incident did not have any reported brake issues prior to the incident does not mean issues could not have arisen.[74]

[44] The Commissioner found that Opal Packaging had established the following factors that weighed in favour of a finding on the balance of probabilities that the accident was Mr Calovski's fault:

(a) the incident occurred while Mr Calovski was driving the forklift;
(b) there is no evidence of effective braking;
(c) the brakes worked when Adapt-A-Lift tested them post incident;
(d) Adapt-A-Lift did not find any faults with the forklift's brakes (although it did not test for water contamination);
(e) the forklift was returned to service the night of the incident and no issues arose with the forklift's brakes once this happened.[75]

[45] The Commissioner found that Opal Packaging had not established that:

(a) the forklift should have stopped or slowed so as to cause lesser damage if the brakes failed;
(b) the failure of Mr Calovski to engage the handbrake or actions otherwise taken were a valid reason for dismissal if the brakes did in fact fail.[76]

[46] The Commissioner found that the evidence established that:

(a) Mr Calovski had 25 years' experience driving forklifts;
(b) Mr Calovski was not under the influence of drugs or alcohol or otherwise observed to be impaired or driving erratically prior to the incident;

(c) there had been increased reliance on the forklift the subject of the incident in circumstances where one of the three grab forklifts was out of service;

(d) the servicing of the forklift had been delayed from February to March as a result of the increased reliance on the forklift;

(e) the forklift travelled approximately 10 metres between where it was parked and where it hit the first object and would have been able to reach its full speed of 10 kilometres per hour across that distance;

(f) upon hitting the first object there was no evidence of braking but rather, the forklift travelled a further 9 metres, hitting multiple other objects along the way, into a pedestrian zone and roller door without stopping in circumstances where the forklift should brake within 2 metres if the operator applies a working brake;

(g) the forklift weighs in excess of 11 tonnes and Mr Brennan's evidence was that if the brakes were not used and Mr Calovski was travelling at 10km per hour the forklift would be able to travel well beyond 6 metres;

(h) no precise measurements were taken of any of the distances that the forklift travelled during the course of the investigation and the Commissioner was not satisfied that a forklift, weighing in excess of 11 tonnes, would have slowed to a stop before hitting the roller door in circumstances of brake failure, despite hitting objects along the way;

(i) Opal Packaging called Adapt-A-Lift to inspect the forklift post accident and it was that entity that reported that it had found no issues with the forklift;

(j) Opal Packaging interviewed Mr Calovski to get his full account of events after Adapt A-Lift had inspected the forklift;

(k) the Adapt-A-Lift representative was not told that Mr Calovski had alleged soft pedal and did not test for water contamination, which creates a high risk of soft pedal if it occurs;

(l) Mr Calovski has been consistent in his account that the brake went soft;

(m) while the service history states a 4000-hour service was completed on 9 March 2023, there are anomalies in the forklift's service history including evidence suggesting that:

- no brake oil has been charged for, with the Manual requiring use of a certain product for the brake oil change;
- while wet brake drive axle oil is required to be changed in five separate chambers of the wet brake system, requiring 25 litres in total, only 12 litres of HP GEAR OIL 80W/90 $L (PER LITRE) is shown in the forklift's service history and this is a lower viscosity to the oils required in the left and right side wet brakes;

(n) Mr Brennan acknowledged that there were numerous requirements he could not identify in the forklift history as being completed because they did not appear in the history and that if these had not been carried out, the cumulative effect would significantly increase the risk of brake failure, including a temporary failure;

(o) the forklift's history was only obtained on 10 October 2023 (after the wrong service history was provided by Adapt-A-Lift to Opal Packaging) and it does not appear that the anomalies identified by Mr Brennan in the service history were identified at that time or investigated;

(p) it is possible that in the time between when the incident occurred and when the technician inspected the forklift, the system could have cooled down, the gas

could have returned to a liquid state and if so the forklift would appear to work normally.[77]

[47] The Commissioner expressed the view that the seriousness of the allegation warranted a more thorough investigation. In the opinion of the Commissioner, Opal Packaging should have obtained Mr Calovski's account before the forklift was returned to service and, upon learning that soft pedal was alleged, it should have arranged for testing to conclusively rule out water contamination and given more careful consideration to the forklift's service history.[78]

[48] The Commissioner found that Mr Calovski has operated forklifts and grab forklifts for approximately 25 years and accepted Mr Calovski's evidence that this incident was the first time in his career that he had ever had a forklift accident. In the Commissioner's view, this reduced the likelihood of Mr Calovski making such a serious error, whether it be applying the accelerator instead of the brake or otherwise.[79]

[49] The Commissioner noted that Mr Brennan and SafeWork NSW placed reliance on Adapt-A-Lift's findings in arriving at their findings. The Commissioner observed that, in circumstances where a very serious and potentially life-threatening safety incident occurred, Mr Calovski had indicated that the incident was caused by braking failure and Adapt-A-Lift provided and serviced the forklift involved, it would have been prudent to engage an expert independent of Adapt-A-Lift to inspect the forklift.[80]

[50] The Commissioner concluded that there were two possible explanations for the incident:

(a) Mr Calovski failed to brake in time before hitting the first object and he panicked or went into a state of shock such that he did not brake at all or continued to accelerate causing the forklift to travel for a distance of 9 metres into the pedestrian zone and the roller door, hitting multiple objects along the way; or

(b) Mr Calovski tried to apply the brake of a forklift that had been heavily used since its last service in March and had anomalies in its service history, the pedal went soft when he went to apply it and he was unable to brake effectively. In circumstances where he had the boiler to his left and starch room to his right, he steered the forklift down a pathway that would result in the forklift causing what he considered to be the least amount of damage.[81]

[51] The Commissioner believed that the first theory was not more plausible than the second, given Mr Calovski's 25 years' experience as a forklift driver, that he was not under the influence of drugs, alcohol or otherwise observed to be impaired, that Mr Calovski's account was consistent, and that Mr Calovski did not have a history of being untruthful during his employment.[82] The Commissioner concluded that in all the circumstances and taking into account the flaws in the investigation, and the failure to undertake testing to rule out contamination, which creates a high risk of soft pedal, she was unable to be satisfied, on the balance of probabilities, about which of these two theories caused the incident.[83]

[52] The Commissioner stated that the allegations made by Opal Packaging about Mr Calovski's conduct are serious and it bears the onus of proving that the conduct on which it relied took place. The Commissioner observed that there needs to be sound evidence upon which a firm finding may be made, on the balance of probabilities, that Mr Calovski failed to

operate the grab forklift in a safe manner, causing extensive damage and creating a safety incident that could have resulted in injury and loss of life; and that he lied or was dishonest about this. The Commissioner said that she was unable to determine the cause of the incident and could not be satisfied that Mr Calovski was dishonest or untruthful. Even if there was error on the part of Mr Calovski, the Commissioner could not be satisfied, based on the evidence before her and on the balance of probabilities, that Mr Calovski was dishonest or lied during the investigation and disciplinary process.[84] For these reasons, the Commissioner found that there was no valid reason for the dismissal related to Mr Calovski's conduct.

[53] The Commissioner made findings as were relevant to her consideration of the factors in ss 387(b)-(h) and concluded that Mr Calovski's dismissal was harsh and unreasonable because Opal Packaging had not established that there was a valid reason for the dismissal, the forklift's service history records sought by Mr Sayan on behalf of Mr Calovski should have been provided sooner and Mr Calovski's account of the cause of the incident (being soft pedal) should have been properly investigated and there were deficiencies in this regard.[85]

[54] The Commissioner ordered Opal Packaging to reinstate Mr Calovski, maintain Mr Calovski's continuity of employment and continuous service and pay to Mr Calovski the amount that he would have earned in the period between his dismissal and the date of his reinstatement less the notice paid on termination and income earned since the time of his dismissal.

Grounds of Appeal

[55] The grounds of appeal relied upon by Opal Packaging are as follows:

Appeal Ground 1

[56] The first ground of appeal is that the Commissioner erred by finding that she was unable to determine between two possible causes of the crash of the forklift being driven by the applicant, being either:

(a) applicant error; or
(b) soft pedal being a form of brake failure;

in circumstances where:

(a) there was no evidence of effective braking of the forklift;
(b) there was no evidence of water contamination of the forklift brake;
(c) the likelihood of water introduction to the system unnoticed is extremely low;
(d) there was evidence that the forklift had been examined by a forklift maintenance company;
(e) there was unchallenged evidence that the forklift was returned to service and no issue arose with the forklift's brakes once this happened; and
(f) there was unchallenged expert evidence that the chances of brake failure were 1 out of 10 on a scale of 1 - 10 even if the brakes had not been serviced in the previous 12 months.

[57] Opal Packaging contends that to the extent that the finding referred to in Ground 1 involves an error of fact, the error of fact is a substantial one and one that was inconsistent with facts incontrovertibly established by the evidence. To the extent that the finding involved a conclusion made without evidence, the error was an error of law. As a result of making the finding set out at Ground 1, Opal Packaging submits that the Commissioner made consequential findings in favour of Mr Calovski as to the misconduct alleged against Mr Calovski in lying to the investigator and in failing to use the handbrake.

Appeal Ground 2

[58] The second ground of appeal is that the Commissioner misapplied the principles established in *Briginshaw v Briginshaw* by finding that she was unable to be satisfied, on the balance of probabilities, that the incident was caused by Mr Calovski's error, as:

(a) The Commissioner applied a standard of proof beyond that set out in *Briginshaw v Briginshaw* by finding that the unlikely scenario of "soft pedal" had to be ruled out in order to make a finding of employee error; and

(b) The Commissioner took into account matters unrelated to the question of fact (that being whether the incident was caused by Mr Calovski's error or not) by considering procedural effects as relevant to the factual determination, being "taking into account the flaws in the investigation, and the failure to undertake testing to rule out contamination".

Public Interest

[59] The public interest issues raised by Opal Packaging in the notice of appeal to support its submission that permission to appeal should be granted are as follows:

(a) It is a matter of public interest that employers are entitled to take disciplinary action against employees who act unsafely and/or who lie during investigations into safety incidents.

(b) The decision has attracted media attention as an authority for the standard to which an employer must conduct its investigations.

(c) The Full Bench therefore has an opportunity to provide clarity in this important area of law, which will be of particular interest to Australian employers.

(d) The grounds upon which the applicant for leave appeals represent errors of the type identified in *House v The King* in that the Commissioner acted on a wrong principle, made a significant error of fact, and failed to take into account a significant material consideration. This is a manifestation of injustice.

(e) The decision runs against the grain of other unfair dismissal decisions in the Commission which generally support the employer's prerogative to dismiss employees for unsafe work practices based on sufficient investigations to satisfy the balance of probabilities.

[60] In its submissions, Opal Packaging also said that it is in the public interest that the proper standard for determining an unfair dismissal case should be clarified and that, if the decision is left uncorrected, employers will be required to conclusively disprove speculative alternative theories about machinery failure in serious breaches of WHS legislation. It submits that

establishing and enforcing safety rules is an important obligation, a breach of which can lead to serious consequences and that the inability of an employer to prove such a case sends a message to the workforce that safety breaches can occur with impunity.

Submissions

Opal Packaging

[61] Opal Packaging submitted that the Commission was faced with a strong case in favour of operator failure being the cause of the incident, including because of the following matters:

(a) there was no evidence of effective braking of the forklift;
(b) there was no evidence of water contamination of the forklift brake;
(c) there was no evidence of brake fluid leakage;
(d) there was no evidence that the brake indicator light was on;
(e) if Mr Calovski had taken his foot off the brake, the forklift would have slowed down to an almost complete stop. Further, that slowing of the forklift in such circumstances was accepted by Mr Calovski;
(f) hitting various objects should have slowed the trajectory of the forklift down to some degree;
(g) the likelihood of water introduction to the system unnoticed is extremely low;
(h) there was evidence that the forklift had been examined by a forklift maintenance company who found no fault with the brake;
(i) there was unchallenged evidence that the forklift was returned to service and no issue arose with the forklift's brakes once this happened;
(j) Mr Calovski gave evidence that he had driven a forklift on thousands of occasions, and he had never known the brakes to stop working and start working again afterwards;
(k) there was unchallenged expert evidence from Mr Brennan that the chances of brake failure were 1 out of 10 on a scale of 1 to 10 of likelihood even if the brakes had not been serviced in the previous 12 months;
(l) there was expert evidence by Mr Brennan that the damage could not have been caused by brake failure. The Commissioner rejected that evidence. The reason is not clear but appears to be that the forklift could have been travelling at 10 kilometres per hour. That conditional finding is not a sufficient basis to reject the expert's conclusion.

[62] Opal Packaging submits that, in dealing with the case, the Commissioner specifically referred to two matters being the flaws in the investigation and the failure to undertake testing of the brake fluid to rule out contamination. Opal Packaging noted that the Commissioner found that given the seriousness of the incident, Opal Packaging should have arranged for testing to conclusively rule out water contamination and have given more careful consideration to the forklift's service history. Opal Packaging submitted that in formulating the test in that way, the Commissioner adopted a standard in excess of the standard of proof in civil cases and, in effect, adopted a position that Opal Packaging was required to conclusively rule out any inconsistent circumstantial cases, no matter how remote or unlikely.

[63] Opal Packaging submits that the case put forward by Mr Calovski was a circumstantial one. In such a situation, the Commissioner was required to weigh up the evidence for both theories and determine whether the circumstantial evidence gave rise to a more probable inference, however, the Commissioner did not do so. Opal Packaging submits that an employer is required to prove an allegation of misconduct on the balance of probabilities. The employer is not required to conclusively rule out every competing allegation.

[64] Opal Packaging submits that the Commissioner did not distinguish between the likelihood of water in brake fluid causing soft brakes with the likelihood of water being in the brake fluid. The fact that water in brake fluid will almost certainly cause soft brakes, does not elevate the likelihood of there being water in the brake fluid. If it is accepted that the brakes did not fail, it follows that there was a valid reason for dismissal.

[65] Opal Packaging submits that the Commissioner inverted the usual reasoning process from one based on determining the most likely scenario to one where Opal Packaging was effectively asked to conclusively disprove a speculative theory. It alleges that this led to the Commissioner making the following errors:

(a) An error in relation to the process of reasoning;
(b) To the extent that the finding made involved a finding of fact being that the evidence as to which of these two theories caused the incident was evenly balanced, it was a substantial error in that the entire decision relied upon that finding; and
(c) To the extent that the error involved making a finding without evidence, being that there was no evidence as to the existence of water in the brakes, the error was one of law.

Mr Calovski

[66] Mr Calovski submits 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". The threshold for grant of permission to appeal is higher in respect of unfair dismissal appeals than the threshold pertaining to appeals generally. The test modifies the *House v The King* principles and is described as "a stringent one".

[67] Mr Calovski submits that the factual error must vitiate the ultimate exercise of discretion to be characterised as 'significant'. The Commissioner had the advantage of seeing and hearing the witnesses, evaluating their credibility and the overall 'feeling' of the case. Mr Calovski submits that the findings of fact made by a member at first instance should stand unless it can be shown that the member 'has failed to use or has palpably misused [their] advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable' or 'contrary to compelling inferences'. Mr Calovski submits that it is not enough that an appeal bench considers that, if they had been in the position of the member below, they might have taken a different course. It must appear that some error has been made in exercising the discretion. Further, the public interest test in s 400(1) of the Act is not satisfied simply by the identification of error or a preference for a different result.

[68] In relation to Appeal Ground 1, Mr Calovski submits that the twelve matters relied upon by Opal Packaging to assert that it had a strong case oversimplify or misstate the evidence before the Commission. The Commissioner dealt with each of these matters, amongst others, in granular detail. The Commissioner simply was unable to be satisfied that Opal had made out its evidentiary onus.

[69] In relation to Appeal Ground 2, Mr Calovski submits that Opal Packaging's argument that it was required to "disprove" Mr Calovski's version of events is plainly wrong. The Commissioner simply found that Opal Packaging did not make out its evidentiary onus, as it failed to investigate whether "soft pedal" had occurred. This became problematic when the evidence of Mr Paraskevopolous and Mr Brennan revealed it was plausible.

[70] Mr Calovski submits that as Opal Packaging alleged that he failed to apply the brakes, Opal Packaging bore the evidentiary onus to prove this allegation. The Commissioner was simply unable to be satisfied that the misconduct, as alleged by Opal Packaging, had occurred. Unsurprisingly, she was then critical of the investigation process. This was not, contrary to Opal Packaging's submissions, a finding that required Opal Packaging to "disprove" Mr Calovski's version of events.

[71] Mr Calovski submits that there was no investigation of his account at all, in circumstances where Opal Packaging alleged that Mr Calovski lied and failed to apply the brakes. Those were serious allegations in respect of which Opal Packaging accepted the Briginshaw standard applied. Opal Packaging could have made these inquiries about whether the incident was caused by "soft pedal" before the dismissal occurred. It refused to do so. The Commissioner's findings that Opal should have taken at least some step to consider Mr Calovski's version of events was an entirely orthodox approach.

Consideration

[72] An appeal under s 604(1) 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.[86] There is no right to appeal, and an appeal may only be made with the permission of the Commission.

[73] This appeal is one to which s. 400 of the Act applies. Section 400 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.

[74] In *Coal & Allied Mining Services Pty Ltd v Lawler*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the public interest test imposed by s 400 as "a stringent one".[87] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[88] The public interest might be attracted, for example, where a matter raises issues of importance and general application, where there is a diversity of

decisions at first instance so that guidance from an appellate court is required, where the decision at first instance manifests an injustice or the result is counter intuitive, or because the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[89] 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.[90] 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.[91]

[75] It is significant, in the present appeal, that the intention of s 400 of the Act is to constrain the potential for appeals to be brought with respect to decisions in unfair dismissal proceedings. In *Illawarra Coal Holdings Pty Ltd (t/as South32) v Sleiman* [2024] FWCFB 364, the Full Bench recently described the statutory purpose lying behind the provision and its consequences in the following way:[92]

> The statutory purpose of restricting the avenue of appeal with respect to a decision in unfair dismissal proceedings, and constraining the grounds on which such an appeal can be made, is not difficult to discern. The apparent objective is to limit the time, costs and inconvenience associated with unfair dismissal proceedings. The object of Part 3-2 of the Act includes to establish procedures for dealing with unfair dismissal that are "quick, flexible and informal", including that the procedures and remedies provided for ensure a "fair go all round" is accorded to both the employer and employee concerned.[11] An unconstrained right of appeal, or a threshold for permission to appeal being granted which is too low, would hinder the achievement of the object of the Part.
>
> …
>
> It is not possible, or appropriate, to attempt to confine or fetter the broad discretionary assessment required to be made in each case as to whether it is in the public interest to grant permission to appeal. However, the statutory context to which we have referred does suggest that it will commonly not be in the public interest to grant permission to appeal where the grounds of appeal, in substance, seek to relitigate the factual findings made at first instance. There may, of course, be cases in which it can be demonstrated that something has gone seriously wrong in the decision-making at first instance which demands reconsideration of the evidentiary material and the factual findings on appeal. It will often not be in the public interest, though, for a Full Bench of the Commission to engage in a detailed analysis of the primary factual material simply because an appellant alleges that different conclusions should have been drawn from the evidence.

[76] This is a matter in which those observations are pertinent. The Commissioner was faced with a complex and voluminous evidentiary case. The evidence included direct accounts given by a number of witnesses as to what occurred during and following the incident on 27 June 2023, evidence concerning the service history of the particular forklift involved in the incident and expert evidence in relation to the operation and maintenance of that type of forklift more generally. A number of witnesses were called to give evidence and cross-examined and the Commissioner was called upon to make findings in relation to their evidence, including in relation to matters which required an assessment of the reliability and credibility of the evidence given. The Commissioner was invited to find that Mr Calovski was dishonest in the account of the incident which he provided to his employer and in the proceedings before the Commission. In considering those submissions, the Commissioner had the advantage of assessing the

demeanour of the witnesses. In considering the question of permission to appeal, it is relevant that the factual findings made at first instance that are likely to have been influenced by the decision-maker having directly seen and heard the evidence should be set aside only where they are "glaringly improbable".[93]

[77] The grounds of appeal do not, in our opinion, raise issues of importance or general application to the jurisdiction of the Commission under Part 3-2 of the Act or the manner in which the Commission should approach the determination of questions of fact raised in unfair dismissal proceedings. The decision of the Commissioner contains a careful and thorough consideration of all the evidence put forward in the proceedings. The factual findings made by the Commissioner and her decision to award an unfair dismissal remedy demonstrate an orthodox approach to the fact-finding task and the determination of whether an unfair dismissal remedy should be awarded. We have set out in some detail the Commissioner's reasons and the basis upon which Opal Packaging seeks permission to appeal. The grounds of appeal are, in substance, little more than an attempt to have the Full Bench reconsider factual findings made by the Commissioner in circumstances in which those findings were made by a member of the Commission who had the considerable benefit of directly seeing and hearing the evidence given. In our opinion and having regard to the statutory context to which we have referred, it is not in the public interest for permission to be granted to revisit the factual findings made by the Commissioner in this matter.

[78] In any event, we are not satisfied that the grounds of appeal advanced by Opal Packaging demonstrate an arguable case of appealable error which might lead us to consider that it is in the public interest to grant permission to appeal.

Appeal Ground 1

[79] Appeal ground 1 is that the Commissioner erred by finding that she was unable to determine between two possible causes of the accident involving the forklift being driven by Mr Calovski. Opal Packaging contends that this finding was inconsistent with facts incontrovertibly established by the evidence or alternatively involved a conclusion made without evidence. In support of this appeal ground, Opal Packaging relies on there being insufficient evidence to support Mr Calovski's version of events that soft pedal occurred. Further, Opal Packaging contends that the evidence it relied upon with respect to the extent of the damage and actions which would have slowed down the forklift supported its case that the incident could not have been caused by brake failure.

[80] In relation to evidence about soft pedal, Opal Packaging submits that there was no evidence of effective braking, of water contamination or of brake fluid leakage, the likelihood of water introduction to the system unnoticed is extremely low, the forklift was examined by a forklift maintenance company then returned to service and there was unchallenged expert evidence that the chances of brake failure were 1 out of 10 even if the brakes had not been serviced in the previous 12 months. In relation to the extent of the damage and actions which would have slowed down the forklift, Opal Packaging submits that hitting various objects should have slowed the trajectory of the forklift down to some degree, there was expert evidence by Mr Brennan that the damage could not have been caused by brake failure and that Mr Calovski accepted that, if he had taken his foot off the brake,[94] the forklift would have slowed down to an almost complete stop.

[81] The Commissioner accepted that the incident occurred while Mr Calovski was driving the forklift, there was no evidence of effective braking, the brakes worked when Adapt-A-Lift tested them post incident, Adapt-A-Lift did not find any faults with the forklift's brakes and the forklift was returned to service the night of the incident and no issues arose with the forklift's brakes once this happened.[95] The Commissioner found that these matters weighed in favour of a finding on the balance of probabilities that the accident was Mr Calovski's fault.[96] Further, the Commissioner accepted that hitting various objects should have slowed the trajectory of the forklift down to some degree[97] and that it was unlikely that the brake fluids were low.[98] As to whether the forklift would have slowed down to an almost complete stop if Mr Calovski had taken his foot off the brake, Mr Calovski's evidence during cross-examination was that when a person takes their foot off the accelerator the forklift still rolls but would slow down. The brake must be pressed for the forklift to stop.[99]

[82] As to there being no evidence of water contamination of the forklift brakes, the Commissioner noted that the forklift manual referred to small amounts of water in the brake system causing reduced braking performance,[100] that Mr Paraskevopoulos confirmed during cross examination that he did not test to see if the brakes were contaminated by water and that if Mr Paraskevopoulos tested for contamination, he could have identified whether the oil was contaminated with water. The Commissioner was satisfied that water contamination is a cause of soft pedal and no testing of the brake fluids was undertaken to rule contamination out.[101] In other words, being on notice that Mr Calovski said the brakes had failed and that water reduced brake performance, Opal Packaging could have undertaken testing to confirm that there was no water contamination of the forklift brakes but did not do so.

[83] As to the likelihood of water introduction to the system unnoticed being extremely low, Mr Brennan expressed this opinion in his Expert Report based upon there being no indication from Mr Calovski that the indicator light was on.[102] Mr Brennan clarified in cross examination that whether the indicator light on the dash would be lit if water is in the system would be dependent on the forklift make and model.[103] Mr Brennan was taken to the forklift manual cited in his report which relevantly stated:[104]

> There's an indicator light on the display switch cluster for the brake oil. See figure 24. The red light is on when the key switch is in the start position on the power - or the power on/off is pressed and must go off when the engine is running.
>
> …
>
> If the light is on when the engine is running the brake fluid oil in the reservoir is too low.

[84] Mr Brennan stated that he was not able to correctly answer a question which posited that the indicator light in the particular forklift would show that the brake fluid was too low but not necessarily whether it was contaminated with water.[105] The Commissioner said that she was unable to draw a conclusion that if contamination occurred the indicator light would have been on or that Mr Calovski would have seen it.[106] In our view this finding was available to the Commissioner on the evidence before her.

[85] As to there being unchallenged expert evidence that the chances of brake failure were 1 out of 10 on a scale of 1 to 10 even if the brakes had not been serviced in the previous 12

months, we note that the opinion expressed in Mr Brennan's Expert Report was in relation to brake failure occurring where the brakes had not been serviced in the 12 months prior to the accident.[107] However, in a different section of the report, Mr Brennan recorded that if there was water contamination there was a high likelihood of brakes failing.[108] During re-examination, Mr Brennan's evidence was that the likelihood of water being in the brake system and then turning into gas and then back into water occurring as being in the 2 to 3 out of 10 range.[109] Further, during cross-examination, Mr Brennan acknowledged that there were numerous requirements he could not identify in the forklift history as being completed because they did not appear in the history and that if these had not been carried out, the cumulative effect would significantly increase the risk of brake failure, including a temporary failure.[110] The Commissioner concluded that while a 2 or 3 out of 10 does not indicate a high degree of likelihood, this scenario is more than a remote possibility and it should not be considered in isolation from other relevant factors when identifying the likely cause of the incident on the balance of probabilities.[111] In our view, this finding was available to the Commissioner on the evidence before her.

[86] As to Mr Brennan's expert evidence that the damage could not have been caused by brake failure, the Commissioner found that the total distance travelled by the forklift was 19 metres. The Commissioner noted that the assumption made by Mr Brennan regarding total distance travelled was 10 to 12 metres from the commencement of forward travel to the final position of the broken door which was materially different to her finding especially considering her earlier finding that the forklift could have been travelling at its maximum speed of 10km per hour when it hit the orange and blue drum. As Mr Brennan's report stated "[s]should these assumptions be materially different, this may in turn affect the content of the Report, and conclusions therein", the Commissioner considered that Mr Brennan's evidence about whether damage could have resulted in the event of brake failure could not be relied upon.[112] In our view this finding was available to the Commissioner on the evidence before her.

[87] For the reasons above, we do not agree that the facts asserted by Opal Packaging to be incontrovertible were so or that the Commissioner made conclusions without evidence. The Commissioner accepted that the evidence established some but not all of the facts advanced by Opal Packaging in appeal ground 1. Those findings were made by the Commissioner based on the evidence before her and we find no arguable error in her approach. The Commissioner had the benefit of directly seeing and hearing the evidence. The Commissioner took into account her findings in relation to these matters and had regard to the flaws in the investigation, Mr Calovski's 25 years' experience as a forklift driver, that he was not impaired, that Mr Calovski's account was consistent, and that Mr Calovski did not have a history of being untruthful during his employment in concluding that it was not more plausible that the accident was caused by Mr Calovski rather than soft pedal[113] and that she was unable to be satisfied, on the balance of probabilities, about which of these two theories caused the incident.[114]

[88] The submission advanced by Opal Packaging was, in substance, that the possibility of soft pedal having been caused by water contamination was so low, particularly when the forklift was returned to service following the incident and apparently performed normally, that the Commissioner should have found that it was not the cause of the incident. Whilst the evidence indicated that the chances of water contaminating the brakes of the forklift was low, the reasons of the Commissioner demonstrate that it was more than a remote possibility and had not been

excluded because appropriate testing was not undertaken. It was open on the evidence for the Commissioner to make that finding.

[89] Opal Packaging's submissions ignore that its alternative explanation of the incident would itself have constituted an extremely unlikely event. The Commissioner aptly described the alternative scenario of the incident involving Mr Calovski driving the forklift unsafely in the following manner:

> **[315]** While it is a combination of factors that make the explanation about soft pedal plausible and it appears that the incident happened within a matter of seconds, I consider it is no more likely that a forklift driver with 25 years' experience and who was not under the influence of drugs, alcohol or otherwise observed to be impaired, could make a combination of errors that would see him:
>
> - apply the accelerator to move a forklift from its parked position toward the boiler for around 8 metres and then either brake late or accidentally accelerate into the first object, being the blue and orange drum; and
>
> - then fail to brake, continue to accelerate or accidentally accelerate such that the forklift travelled a further nine metres into a pedestrian zone, hitting multiple other objects along the way, in circumstances where the forklift should have stopped within 2 metres had a working brake been applied.

[90] Furthermore, it is quite wrong for Opal Packaging to characterise Mr Calovski's case as relying on circumstantial evidence. Opal Packaging's submissions leave entirely out of the equation that Mr Calovksi gave direct evidence of what occurred in the incident on 27 June 2023. Mr Calovksi gave the same account immediately after the incident, in the course of the investigation of the incident and in the proceedings before the Commissioner. It was appropriate, in the circumstance of this matter, for the Commissioner to consider whether there was a sufficient basis to reject the direct evidence given by Mr Calovski.[115]

[91] Finally, in relation to the Commissioner's findings about Mr Calovski failing to use the handbrake, the Commissioner noted that measures that should have been taken by Mr Calovski in the event of brake failure were not a feature of Opal Packaging's investigation or the proceedings. On this basis, the Commissioner said she was not able to conclude that Mr Calovski's failure to apply the handbrake would justify his dismissal. In our view this finding was available to the Commissioner on the evidence before her.

[92] In our view, no arguable error arises with respect to the Commissioner's finding that she was unable to determine between two possible causes of the crash of the forklift being driven by Mr Calovski and her consequential findings about the handbrake and Mr Calovski's truthfulness. To put it another way, it was open to the Commissioner to conclude that she was not satisfied the incident had occurred because Mr Calovski had operated the forklift in an unsafe manner. We reject this ground of appeal.

Appeal Ground 2

[93] The second ground of appeal is that at the Commissioner misapplied the principles established in *Briginshaw v Briginshaw*. Opal Packaging contends that the Commissioner inverted the usual reasoning process from one based on determining the most likely scenario to

one where Opal Packaging was effectively asked to conclusively disprove a speculative theory. Opal Packaging also submitted that the Commissioner erred in taking into account procedural errors as relevant to the factual determination.

[94] Mr Calovski was terminated on the grounds of misconduct because it was alleged that he failed to operate the grab forklift in a safe manner and was not willing to accept any responsibility for the incident. Implicit in Opal Packaging's reasons for termination is an allegation that Mr Calovski failed to apply the brakes. Opal Packaging accepted, in its submissions, that when an employer alleges misconduct, it must establish, on the balance of probabilities, that the misconduct occurred.

[95] Opal Packaging further accepted that the principles explained in *Briginshaw v Briginshaw* (1938) 60 CLR 336 apply in a case such as the present, although it emphasised that the standard of proof never changes, and it is an error to apply a higher level of satisfaction in relation to findings of fact involved than the civil onus of the balance of probabilities.[116] Where a fact must be proved, the application of the civil standard nonetheless requires that the fact finder feel actual persuasion of the occurrence of the fact in issue. In *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369, Lee J explained the reference to the "balance of probabilities" in the context of s 140(1) of the *Evidence Act 1995* (Cth) as follows:[117]

> The concept used in subsection (1), being the "balance of probabilities", is often misunderstood. It does not mean a simple estimate of probabilities; it requires a subjective belief in a state of facts on the part of the tribunal of fact. A party bearing the onus will not succeed unless the whole of the evidence establishes a "reasonable satisfaction" on the preponderance of probabilities such as to sustain the relevant issue: *Axon v Axon* (1937) 59 CLR 395 (at 403 per Dixon J). The "facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied": *Jones v Dunkel* (1959) 101 CLR 298 (at 305 per Dixon CJ). Put another way, as Sir Owen Dixon explained in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (at 361), when the law requires proof of any fact, the tribunal of fact must feel an *actual persuasion* of its occurrence or existence before it can be found.
>
> Justice Hodgson put it differently, but to the same effect, by observing that when deciding facts, a civil tribunal of fact is dealing with two questions: "not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision": see D H Hodgson, 'The Scales of Justice: Probability and Proof in Legal Fact-finding' (1995) 69 *Australian Law Journal* 731; *Ho v Powell* [2001] NSWCA 168; (2001) 51 NSWLR 572 (at 576 [14]–[16] per Hodgson JA, Beazley JA agreeing).
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> Whatever way it is put, a "[m]ere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact": *NOM v DPP* [2012] VSCA 198; (2012) 38 VR 618 (at 655 [124] per Redlich and Harper JJA and Curtain AJA); *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431; (2012) 10 ASTLR 164 (at 176 [51] per Campbell JA, Bergin CJ in Eq and Sackville AJA agreeing).

[96] There was no error in the Commissioner asking herself whether she was satisfied that the incident occurred as a result of Mr Calovski operating the forklift in an unsafe manner. To make that finding, it would have been necessary that the Commissioner feel an *actual persuasion* that the allegation of misconduct relied upon by Opal Packaging was established on the material before the Commission.

[97] The reasons of Dixon J in *Briginshaw v Briginshaw*, emphasise that the seriousness of the allegation, the inherent unlikelihood of the alleged occurrence and the gravity of the consequences flowing from the finding in question are matters that properly bear upon whether the court is reasonably satisfied or feels actual persuasion that an event occurred.[118] Although no different standard of proof is to be applied, the nature of the fact and the consequences of the finding being made are appropriate to be taken into account when assessing whether the decision-maker feels actual persuasion as to a fact. Lee J referred to the observations in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 97 ALJR 857 that s 140 of the *Evidence Act 1995* (Cth):[119]

> … reflects the position of the common law that the gravity of the fact sought to be proved is relevant to "the degree of persuasion of the mind according to the balance of probabilities". By this approach, the common law, in accepting but one standard of proof in civil cases (the balance of probabilities), ensures that "the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved".

[98] In our view, the Commissioner approached the determination of whether she was satisfied that Mr Calovski had operated the forklift in an unsafe manner consistently with these principles. The Commissioner understood that the allegations made by Opal Packaging about Mr Calovski's conduct were serious. The Commissioner's observation that there needs to be sound evidence upon which a firm finding may be made, on the balance of probabilities, that Mr Calovski failed to operate the grab forklift in a safe manner, causing extensive damage and creating a safety incident that could have resulted in injury and loss of life, and that he lied or was dishonest about this, is a correct statement of the applicable legal principles.

[99] The primary basis of Opal Packaging's submission that the Commissioner misapplied *Briginshaw v Briginshaw* is the observation she made that it should have conducted testing of the forklift following the incident that would have conclusively ruled out water contamination. The comment made by the Commissioner is as follows:

> **[311]** The seriousness of the incident, in my view, warranted a more thorough investigation. The Respondent should have obtained the Applicant's account before the forklift was returned to service and, upon learning that soft pedal was alleged, it should have arranged for testing to conclusively rule out water contamination and given more careful consideration to the forklift's service history.

[100] Opal Packaging submits that this part of the decision demonstrates an approach that required it to rule out any competing allegation conclusively. That, it says, involves the imposition of an inappropriate standard of proof. The submission misreads the Commissioner's decision. In our opinion, the Commissioner did no more than to observe that, had appropriate testing been conducted, whether contamination had occurred would have been known with certainty.

[101] We do not believe that this aspect of the decision indicated the Commissioner imposed a standard of proof that required Opal Packaging to prove conclusively that there had not been water contamination. The Commissioner carefully weighed all aspects of the evidence to assess whether she was persuaded that Mr Calovski had operated the forklift in an unsafe manner as alleged. That included consideration of the likelihood of water contamination, the likelihood

that Mr Calovski operated the forklift in the manner alleged and Mr Calovski's direct evidence as to what occurred. In our view, the Commissioner's reference to the omissions in the investigation of the incident at that point of the reasoning was no more than an acknowledgement that, had appropriate testing been conducted, the exercise of weighing other aspects of the evidence would have been unnecessary.

[102] The Commissioner separately considered the failures that had occurred in the investigation as a relevant matter for the purposes of s 387(h) of the Act. The Commissioner considered that it was within the means of Opal Packaging to undertake an investigation into what was accepted to be a very serious safety incident and rule out the known causes of soft pedal and that the failure to do so was regrettable and weighed in favour of a finding that the dismissal was harsh.[120] There was no dispute that flaws in the investigation of an allegation of misconduct could be relevant to whether a dismissal was harsh, unjust or unreasonable. There may be a question as to whether a flawed investigation might more appropriately be described as contributing to a finding that a dismissal was unreasonable or unjust rather than harsh. However, we do not believe there was any error in the Commissioner's observations about there being flaws in the investigation. It might, in a particular case, be unreasonable or unjust to dismiss an employee on account of an incident of misconduct if the employer does so without conducting an appropriate investigation to determine whether the allegation of misconduct was properly founded. The Commissioner's reasons put the matter no higher.

[103] Finally, Opal Packaging submits that the Commissioner did not distinguish between the likelihood of water in brake fluid causing soft brakes with the likelihood of water being in the brake fluid. We do not accept that submission. Mr Brennan gave evidence about both of these matters which was referred to by the Commissioner. He said that if low brake fluid levels or water is introduced to the system the likelihood of soft pedal or non-existent pedal pressure is high. He also said that the likelihood of water being in the brake system and then turning into gas and then back into water occurring as being in the 2 to 3 out of 10 range. The Commissioner concluded that, while a 2 or 3 out of 10 does not indicate a high degree of likelihood, this scenario is more than a remote possibility and it should not be considered in isolation from other relevant factors when identifying the likely cause of the incident on the balance of probabilities. In our view, this finding was available on the evidence and does not indicate that she failed to distinguish between the likelihood of water in brake fluid causing soft brakes with the likelihood of water being in the brake fluid.

[104] In our view, no arguable error arises with respect to the Commissioner's application of the principles established in *Briginshaw v Briginshaw* and we reject this ground of appeal.

Conclusion

[105] Having found no errors in the Commissioner's determination of the matter, we do not consider that the grant of permission to appeal would be in the public interest as the grounds of appeal have insufficient prospects of success. Further, the appeal does not raise any legal or factual issue of significance or general application, there is no relevant diversity of decisions at first instance, the legal principles applied by the Commissioner are not disharmonious when compared with other decisions, and we do not consider that the Commissioner's decision is counter intuitive or manifests an injustice. In relation to the workplace safety issues raised by Opal Packaging as public interest considerations, we do not agree that the decision is

inconsistent with other unfair dismissal decisions in the Commission where an employee has been dismissed for unsafe work practices, or that the decision suggests that an employer is required to conclusively disprove speculative alternative theories about machinery failure or sends a message to employees that safety breaches can occur with impunity.

[106] For the reasons set out above, the Full Bench orders that permission to appeal is refused. The stay order made by Vice President Gibian lapses upon the determination of this appeal.

VICE PRESIDENT

Appearances:

I Latham, counsel, instructed by Ai Group for the Appellant.
J Martin, counsel, instructed by the AMWU for the Respondent.

Hearing details:

2024.

Sydney (in-person):
17 September 2024.

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[1] *Calovski v Opal Packaging Australia Pty Ltd* [2024] FWC 1717.

[2] Ibid at [6].

[3] Ibid at [70].

[4] Ibid at [70].

[5] Ibid at [106].

[6] Ibid at [72].

[7] Ibid at [106].

[8] Ibid at [106].

[9] Ibid at [106].
[10] Ibid at [106.]
[11] Ibid at [107].
[12] Ibid at [110].
[13] Ibid at [109].
[14] Ibid at [69].
[15] Ibid at [72].
[16] Ibid at [179].
[17] Ibid at [125].
[18] Ibid at [125].
[19] Ibid, at [82].
[20] Ibid. at [85].
[21] Ibid, at [87].
[22] Ibid, [102].
[23] Ibid, [210].
[24] Ibid at [212].
[25] Ibid at [222].
[26] Ibid at [103].
[27] Ibid at [285].
[28] Ibid at [138].
[29] Ibid at [140].
[30] Ibid at [145].
[31] Ibid at [145].
[32] Ibid at [151].
[33] Ibid at [181].
[34] Ibid at [182].
[35] Ibid at [155].
[36] Ibid at [159]-[160].
[37] Ibid at [173].
[38] Ibid at [175].
[39] Ibid at [185].
[40] Ibid at [6].
[41] Ibid at [187].
[42] Ibid at [189].
[43] Ibid at [189].
[44] Ibid at [190].
[45] Ibid at [191].
[46] Ibid at [191].
[47] Ibid at [197].
[48] Ibid at [6].
[49] Ibid at [192].
[50] Ibid at [193].
[51] Ibid at [194].
[52] Ibid at [195].

[53] Ibid at [198].

[54] Ibid at [198].

[55] Ibid at [230].

[56] Ibid at [234].

[57] Ibid at [235].

[58] Ibid at [237].

[59] Ibid at [238].

[60] Ibid at [252].

[61] Ibid at [265].

[62] Ibid at [255].

[63] Ibid at [267].

[64] Ibid at [268].

[65] Ibid at [269].

[66] Ibid at [270].

[67] Ibid at [273].

[68] Ibid at [274].

[69] Ibid at [275].

[70] Ibid at [281]-[282].

[71] Ibid at [283].

[72] Ibid at [286].

[73] Ibid at [296].

[74] Ibid at [297].

[75] Ibid at [306]-[307].

[76] Ibid at [308].

[77] Ibid at [309].

[78] Ibid at [311].

[79] Ibid at [312].

[80] Ibid at [313].

[81] Ibid at [314].

[82] Ibid at [316].

[83] Ibid at [317].

[84] Ibid at [319].

[85] Ibid at [351].

[86] 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, [17] per Gleeson CJ, Gaudron and Hayne JJ

[87] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54; (2011) 192 FCR 78 at [43] (Buchanan J).

[88] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan 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) 192 FCR 78 at [44] -[46]

[89] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343; (2010) 197 IR 266 at [27]

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

[91] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, at [26]-[27]; (2010) 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].

[92] *Illawarra Coal Holdings Pty Ltd (t/as South32) v Sleiman* [2024] FWCFB 364 at [37] and [40].

[93] *Lee v Lee* (2019) 266 CLR 129 at [55] (Bell, Gageler, Nettle and Edelman JJ).

[94] This appears to be a typographical error and is intended to refer to accelerator.

[95] [2024] FWC 1717 at [306]-[307].

[96] Ibid.

[97] Ibid at [268].

[98] Ibid at [283].

[99] Transcript PN281-PN282 in AB at 136.

[100] [2024] FWC 1717 at [210].

[101] Ibid at [283].

[102] Appeal Book (AB) at 1178.

[103] Transcript PN1477-PN1478 in AB at 238.

[104] Transcript PN1484-PN1486 in AB at 239.

[105] Transcript PN1488 in AB at 239.

[106] [2024] FWC 1717 at [286].

[107] AB at 1175-1176.

[108] Ibid, at 1178.

[109] Transcript PN1584 in AB at 247.

[110] Transcript PN1507-1508 in AB at 241.

[111] [2024] FWC 1717 at [275].

[112] Ibid, at [265].

[113] Ibid at [316].

[114] Ibid at [317].

[115] Ibid at [319].

[116] By reference to *Reifek v McElroy* (1965) 112 CLR 517 at 521 -522 and *Brinks Australia Pty Ltd re Brinks Australia Pty Ltd v Transport Workers' Union of Australia* [2002] AIRC 1137 at [7].

[117] *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369 at [98]-[100] (Lee J).

[118] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 (Dixon J).

[119] *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 97 ALJR 857 at [57] (Kiefel CJ, Gageler and Jagot JJ).

[120] [2024] FWC 1717 at [347]-[348].