DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Virgin Airlines Australia Pty Ltd
v
Dylan Macnish
(C2024/5936)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT SLEVIN

SYDNEY, 14 JANUARY 2025

Appeal against decision [2024] FWC 2154 of Commissioner Lim at Perth on 13 August 2024 in matter number U2024/1853 – Breach of drug and alcohol policy – Employee consumed one glass of prosecco 7.5 hours prior to signing on – "Eight-hour rule" prohibiting consumption of alcohol for a period of 8 hours prior to duty – Employee understood eight-hour rule to be a guideline rather than absolute prohibition – Employee disclosed alcohol consumption to Cabin Crew Manager prior to performing work and consulted DAMP Manual to seek guidance – Whether appropriate to consider an employee's subjective understanding of workplace policy – Assessment of whether employee's understanding of policy was reasonable – Whether direct findings of credit as to genuineness of employee's understanding of the policy should be overturned – Whether self-referral of a breach of policy was relevant where the employee was aware of rumours that he had performed work whilst drunk – Whether order for reinstatement was manifestly unreasonable or plainly unjust – Alleged loss of trust and confidence not soundly based – Permission to appeal granted – Appeal dismissed.

Introduction

[1] Virgin Airlines Australia Pty Ltd (**Virgin** or the **appellant**) seeks permission to appeal, and to appeal, a decision of Commissioner Lim of the Fair Work Commission (the **Commission**).[1] The decision, to reinstate Mr Dylan Macnish, arose from an application for an unfair dismissal remedy made by Mr Macnish under s 394 of the *Fair Work Act* 2009 (Cth) (the **Act**).

[2] Mr Macnish was employed as a cabin crew member for Virgin until his dismissal on 1 February 2024. Mr Macnish was dismissed because he consumed one glass of prosecco at a Christmas party for Virgin staff prior to 2:30pm on Sunday 17 December 2023, and then later agreed to perform work on the "red-eye" flight from Perth to Sydney that night. The shift commenced approximately seven and a half hours after he had consumed the glass of prosecco. Mr Macnish was dismissed for breaching Virgin's so-called "eight-hour rule" in that he consumed alcohol less than eight hours prior to the shift sign-on time.

[3] The Commissioner found that Mr Macnish had breached an aspect of Virgin's policies containing the "eight-hour rule", but concluded that, in all the circumstances, there was no valid reason for Mr Macnish's dismissal. The Commissioner found that Mr Macnish understood the concept of not consuming alcohol eight hours prior to commencing duty was a guideline rather than a rule and that it was not unreasonable for him have understood the policy in that manner. The Commissioner considered other relevant matters, including that Mr Macnish had self-reported his error, the treatment of other employees who had breached Virgin's drug and alcohol policies, and Mr Macnish's employment record, and concluded the dismissal was unfair. The Commissioner ordered that Mr Macnish be reinstated and that the continuity of his employment be maintained but without any order with respect to backpay.

[4] Virgin filed a notice of appeal on 29 August 2024. In its notice of appeal, Virgin sought a stay of the Commissioner's decision. A stay hearing was conducted before Vice President Gibian on 30 August 2024. The application for a stay was refused.[2] As a result, the order for Virgin to reinstate Mr Macnish to his previous position as a cabin crew member at Virgin remained in place pending determination of the appeal.

Decision under appeal

[5] Mr Macnish's dismissal by Virgin occurred a result of him consuming alcohol in breach of the "eight-hour rule". As was accepted by the Commissioner, aviation is a highly regulated industry and cabin crew perform safety-critical functions.[3] Virgin is regulated by the Civil Aviation Authority and subject to the *Civil Aviation Safety Regulations 1998* (Cth) (the **CASA Regulations**). Among other things, a cabin crew member will contravene the CASA Regulations if he or she performs duty on a flight after consuming alcohol at any time during the eight-hour period ending when the flight begins or have a blood alcohol content (BAC) of more than 0.02.[4]

[6] There is no suggestion that Mr Macnish contravened the CASA Regulations. Rather, Virgin contended that Mr Macnish has knowingly breached its policy that cabin crew must not consume alcohol within eight hours prior to rostered sign-on time for flight duty. This rule is set out in a Virgin manual entitled "Volume A4: Cabin Crew Policy and Procedures Manual" (the **A4 Manual**), which is a policy manual which runs to several hundred pages and covers a comprehensive range of topics relating to the work of cabin crew members. The A4 Manual provides, in part:[5]

> As a minimum, cabin crew shall abstain from consuming alcohol (whether or not an alcoholic beverage) at the time period of 8 hours immediately before commencing:
> - Standby
> - Airport/Available duty
> - Training
> - Rostered sign-on time for flight duty
> - Any duty or function preparatory to acting as a cabin crew
>
> NOTE: The above time frame is a minimum requirement and, depending on crew consumption of alcohol and other factors, crew may need to abstain from consuming alcohol at a time period of greater than 8 hours immediately before commencing a duty.

[7] The A4 Manual itself refers to another policy document known as "Volume SSM6: Drug and Alcohol Management Program" (the **DAMP Manual**). The A4 Manual records that the DAMP Manual "is designed to ensure that all team members and contractors understand their obligations with respect to management of drugs and alcohol".[6] The DAMP Manual appears to have been implemented to comply with the requirements of the CASA Regulations to maintain such a program.[7] The DAMP Manual records:[8]

> The purpose of this Policy is to ensure that all team members understand their obligations in respect to managing alcohol and other drugs and the interaction with their employment obligations in and about the workplace. This Policy also provides a framework for education, testing, rehabilitation and self-referral, and potential subsequent actions arising from testing for alcohol and other drugs.
>
> Team members will not present for work, undertake or perform any work, or be available for work (e.g. be on call with the possibility of being required to attend the workplace) for the Virgin Australia Group with alcohol or other drugs present in their system above the limits as prescribed in the DAMP.

[8] The DAMP Manual later states:[9]

> The purpose of this manual is to consolidate the policy and processes relating to the management of alcohol and other drugs in the workplace. It will also demonstrate compliance to both workplace health and safety and legislative obligations.

[9] In her decision, the Commissioner found that the DAMP Manual does not contain, or articulate, a blanket prohibition on drinking eight hours prior to duty. That finding is not challenged by Virgin.

[10] In the disciplinary process that resulted in Mr Macnish's dismissal, three allegations of misconduct were advanced. Allegations 1 and 2 arose from separate incident in which it was alleged that Mr Macnish had failed to comply with Virgin's Fatigue Risk Management System (**FRMS**) by improperly removing himself from rostered duties on the basis of fatigue. It was also alleged he was dishonest when questioned about this incident. The allegation of dishonesty was found not to be sustained and, although the allegation of a failure to comply with the FRMS was sustained, the letter of termination recorded that the decision-maker at Virgin was of the view that the allegation should not contribute towards the termination of his employment.

[11] Virgin nonetheless relied on that allegation at first instance as constituting a valid reason for dismissal. The Commissioner did not accept the submission. The Commissioner found that Mr Macnish was genuinely fatigued as a result of a medical incident that had occurred on a flight on which he had performed work and that he had not breached the FRMS.[10] Virgin's grounds of appeal allege no error in that respect. As such, allegations 1 and 2, and reference to them in this decision, need not be considered in detail other than to the extent it is necessary to refer to the conduct which is the subject of allegations 1 and 2 when assessing grounds 4a and 4b of the appeal, which allege that the decision to order reinstatement was manifestly unreasonable or plainly unjust.

[12] Allegation 3 related to the breach of the eight-hour rule contained in the A4 Manual by Mr Macnish on 17 December 2023. With respect to that allegation, the letter of termination stated:

> Secondly, it was found that you consumed alcohol within eight (8) hours of operating in your capacity as Cabin Crew (Allegation 3). In your responses you repeatedly stressed that you believed the 8-hour rule was a guideline and not a firm rule. However, these assertions were not persuasive given that you were reminded of this rule multiple times throughout your employment as particularised in the Investigation Findings – Notice to Show Cause letter dated 12 January 2024.
>
> Further, only 2 months prior to the incident, on 11 October 2023, you had a conversation with your Leader Crew Culture, Lydia Ridge during which she brought the following matters to your attention:
> - she had concerns around your fitness to fly and that you had allegedly been hungover on early morning sign-ons;
> - everyone metabolises alcohol differently and you may need to stop drinking earlier than the 8 hours to ensure compliance;
> - as an employee you had obligations to ensure that you are DAMP compliant; and
> - Virgin Australia has a zero tolerance approach to damp (sic) breaches.
>
> During this discussion you advised that you:
> - monitor your alcohol consumption on overnights;
> - ensure that you are not consuming more than 1 standard drink an hour; and
> - cease drinking at a minimum of 8 hours.
>
> Based on this discussion, your training and given you have operated as cabin crew for approximately 18 months, I reasonably believe that you did understand your obligation to abstain from alcohol in the 8 hours prior to a duty but performed a duty regardless of not complying with this obligation.

[13] As is apparent from the letter of termination, the decision-maker rejected Mr Macnish's assertions that he understood the eight-hour rule to be a guideline rather than a firm rule. As such, the letter of termination can be understood to be based on an allegation that Mr Macnish had contravened the eight-hour rule and that he had done so knowingly.

[14] The Commissioner accepted that Mr Macnish breached the eight-hour rule contained in the A4 Manual by consuming one glass of prosecco seven and a half hours prior to signing on for duty.[11] However, the Commissioner noted that there is not automatically a valid reason for dismissal simply because an employee is in breach of a policy.[12] The Commissioner found that it was not unreasonable for Mr Macnish to have understood the concept of not drinking eight hours prior to a duty as a guideline rather than a firm rule and that this understanding was shared by other employees.[13] The Commissioner accepted Mr Macnish's evidence that what he took away from his training was that he should not drink alcohol eight hours prior to a duty and that he had conveyed to Ms Ridge in the discussion in October 2023 that he did not do so. However, the Commissioner concluded that it was not unreasonable for Mr Macnish to think that the details of the rule would be contained in the DAMP Manual and to think that the DAMP Manual would take precedence over verbal discussions.[14]

[15] The Commissioner had earlier outlined the steps taken by Mr Macnish prior to commencing duties on the night of 17 December 2023 to ensure that it was appropriate for him to perform work on the shift.[15] A summary of the steps taken by Mr Macnish, which we set out from the stay decision, is as follows:[16]

(a) At approximately 5.30pm, the cabin supervisor, Mr McEwan, sent a message indicating that he was down one cabin crew member for the red-eye flight that night and asking if anyone would like to pick up the duty.

(b) Mr Macnish called Mr McEwan and disclosed that he had consumed alcohol at the Christmas party. Mr McEwan said words to the effect of: "I'm pretty sure 8 hours is just a guideline. You will need to be 0.00% when you sign in. I need to get a bit more rest, but you'll find the information in the DAMP Manual. Let me know how you go".

(c) Mr Macnish looked up the DAMP Manual and read through the section on "Fitness for Duty and Work". Mr Macnish undertook a search of the terms "8 hours", "8" and "hours" in the DAMP Manual. His assessment was that there was nothing in the DAMP Manual that restricted him from taking up the duty on the red-eye flight.

(d) At approximately 7pm, Mr Macnish used an Australian Standard certified breathalyser he had at home and recorded a BAC level reading of 0.00%. He then reported for duty at the rostered sign on time of 9.55pm, although the flight was delayed, and the actual departure time was 11.22pm.

(e) Mr Macnish subsequently heard rumours that he had performed work while drunk and, on 20 December 2023, came forward and reported to relevant managers that he had consumed the glass of prosecco at the Christmas party and then signed on approximately 7.5 hours later.

[16] In circumstances where Mr Macnish had taken steps to satisfy himself that he would not be in breach of the eight-hour rule and, in any event, the Commissioner had concluded that it was reasonable for him to understand the rule to be a guideline, the Commissioner found that the breach of the A4 Manual did not constitute a valid reason for dismissal.[17] The Commissioner went on to find that, even if she erred in saying the breach of the A4 Manual did not constitute a valid reason, she would have found that the dismissal was harsh.[18]

[17] The Commissioner found that reinstatement was the appropriate remedy. The Commissioner observed that Mr Macnish was well regarded by cabin crew managers who gave him "glowing" feedback, that Mr Macnish had conducted himself professionally and politely throughout the investigation and show cause process and that his responses showed genuine contrition and remorse. The Commissioner was satisfied that Mr Macnish had "learned a lasting lesson".[19] The Commissioner made an order maintaining the continuity of Mr Macnish's employment but recorded that Mr Macnish did not seek an order for backpay.[20]

Grounds of appeal

[18] Virgin's grounds of appeal are lengthy. In relation to permission to appeal and the public interest, the F7 – Notice of Appeal asserts as follows:

1. Virgin Australia submits that it is in the public interest for the grant of permission to appeal for the following reasons.

2. The PJ (primary judgement) raises the issue of whether an employer in a safety critical aviation industry can dismiss employees for breaches of fundamental safety instructions. More specifically, it raises questions of general importance as to:

a. what relevance and/or weight (if any) the subjective understandings, interpretations and recollection of employees about their training has, in circumstances where objective evidence of that training has been adduced, in determining whether a valid reason for dismissal exists; and

b. is it appropriate to reinstate an employee against whom the Commission has made adverse findings as to their work health and safety compliance (see Ground 4) and in circumstances where that reinstatement may expose workers and the public to work health and safety risks.

3. The PJ is unjust and counter-intuitive. It was found that there was a valid and reasonable safety policy (abstain from consuming alcohol 8 hours before flying duties), that this was communicated to Mr Macnish, that Mr Macnish breached part, Mr Macnish's and two other employees' subjective evidence about their understandings, interpretations and recollection of their training.

[19] The grounds of appeal (without setting out the particulars outlined in the Form F7 – Notice of Appeal) are as follows:

1. In finding that there was no valid reason for dismissal by way of Mr Macnish breaching a clearly documented safety critical obligation, namely the 'eight hour rule' (PJ at [23]) (Eight Hour Rule), the Commissioner improperly considered, and/or placed weight, or significant weight, on the subjective understandings, interpretations and recollections of Mr Macnish (and others) about the Eight Hour Rule, rather than the objective content and training records about the Eight Hour Rule.

2. In finding that there was no valid reason for dismissal, the Commissioner erred in finding that because the Eight Hour Rule was recorded in the A4 Manual, and not the DAMP Manual, it was reasonable for Mr Macnish to have regard only to the DAMP Manual, despite the Commissioner's positive findings as set out at Ground 1.

3. The Commissioner made the following significant errors of fact when she:
   a. found that Mr Macnish 'self referred' his breach of the Eight Hour Rule; and
   b. found the Eight Hour Rule was (as subjectively assessed by Mr Macnish) a guideline (PJ at [119]).

4a. The Commissioner erred in exercising the discretion to reinstate Mr Macnish, in that the order to reinstate was unreasonable and/or plainly unjust having regard to the Commissioner's positive findings that Mr Macnish breached an important safety rule which had been notified to him and in failing to consider, or failing to give adequate reasons for rejecting, matters relevant to reinstatement.

4b. Notwithstanding the Commissioner's findings against Virgin Australia as to the dismissal being unfair, the Commissioner failed to consider, or failed to give adequate reasons for rejecting, relevant matters (including reasonable and genuinely held concerns about Mr Macnish) which weighed against a decision to reinstate Mr Macnish, including:
   i. Virgin Australia employees reporting that they 'had concerns about Mr Macnish turning up to work hungover' and that Mr Macnish 'had come to work hungover twice and that he had boasted about being hungover' (PJ at [43] and [44]);
   ii. Virgin Australia's reasonable and genuinely held concerns that Mr Macnish had misused the FRMS Manual (PJ at [19]), after advising he was fatigued at 4.26am,

noting that Mr Macnish had 'previously accessed fatigue three times in three months' (PJ at [58]);

iii. Virgin Australia's reasonable and genuinely held concerns about Mr Macnish's conduct were so serious that Virgin Australia obtained CCTV footage of his hotel hallway (PJ at [59]);

iv. Virgin Australia's reasonable and genuinely held concerns about Mr Macnish's alcohol use that it was 'not satisfied that [Mr Macnish] would not engage in repeated conduct of a similar nature' and that Mr Macnish was a safety risk and 'not a risk that it is prepared to take'(PJ at [107]);

v. Virgin Australia's reasonable and genuinely held concerns about Mr Macnish attending work late (PJ at [145]);

vi. Virgin Australia's reasonable and genuinely held concerns about Mr Macnish's drinking (PJ at [134]);

vii. Virgin Australia's reasonable and genuinely held concerns that there had been a 'fundamental breakdown of trust,' that reinstatement would 'convey to other Cabin Crew Members that they can breach the 8-hour Rule and 'get away with it', that 'Mr Macnish's key managers consider Mr Macnish is dishonest' (PJ at [170]);

viii. that Mr Macnish had not 'self-referred' regarding any breach of the Eight Hour Rule (see 3(a) above);

ix. that 'Mr Macnish's key managers consider Mr Macnish is dishonest when he says he did not know or did not understand the 8-hour Rule'(PJ at [170]) a position or view which was reasonable, logical and inevitable having regard to the matters referred to at 1(e) above and their evidence in the hearing; and

x. that Virgin Australia proceeded with the disciplinary processes against Mr Macnish, including the substantiated allegations against him.

Permission to Appeal

[20] Section 604(1) of the Act makes clear that there is no right to appeal, and an appeal may only be made with the permission of the Commission. Generally, a Full Bench must grant permission to appeal if satisfied that is in the public interest to do so.[21] Otherwise, the Full Bench has a broad discretion as to whether permission to appeal should be granted.[22]

[21] The discretion of the Commission to grant permission is more confined in the case of an application for permission to appeal from a decision made in unfair dismissal proceedings under Part 3-2 of the Act. To that end, 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.

[22] 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) imposes a higher threshold for permission to appeal in respect of unfair dismissal appeals.[23] Permission to appeal can only be granted if the Full Bench is satisfied it is in the public interest to do so, and no residual discretion exists if that threshold is not met. Section 400(2) provides that, with respect to factual findings made in unfair dismissal proceedings, review on appeal is only

available if there has been a "significant" error of fact. A person may not appeal on grounds of an alleged error of fact that does not reach the significance threshold.[24]

[23] We are conscious of the threshold that is imposed by s 400(1) of the Act. However, we are satisfied that it is in the public interest to grant permission to appeal in this matter. The appeal concerns a circumstance in which an employee has been found to have breached the drug and alcohol policies of a major airline in undertaking work in what is accepted to be a safety critical industry. Whilst that fact might not always warrant permission to appeal being granted, it is relevant to our consideration. Further, the submissions advanced by Virgin on the appeal raise a number of issues of potential importance and general application, including as to the relevance of an employee's subjective understanding of his or her employer's policies and whether, in considering the question of reinstatement, a member of the Commission is required to take into account concerns said to be held by the employer about the dismissed employee which had been found not to be substantiated. Having regard to these matters, it is in the public interest to grant permission to appeal.

Grounds of appeal

Ground 1 – Mr Macnish's subjective understanding of Virgin's policies

[24] Ground 1 involves a contention that, having found that Mr Macnish contravened the eight-hour rule as set out in the A4 Manual, the Commissioner erred by improperly focusing on (or, in the alternative, by placing significant weight on) Mr Macnish's subjective understanding of Virgin's policies. Virgin submits that the logical and ordinary approach of the Commission when determining what training had been received by employees should involve an analysis of training records, rather than reliance on the fallible recollections of employees.

[25] Virgin's submissions mischaracterise the decision of the Commissioner and misunderstand the nature of the considerations that were relevant to the question of whether there was a valid reason for dismissal in this case. There are two principal difficulties with Virgin's submissions in relation to ground 1.

[26] First, the Commissioner did not consider Mr Macnish's subjective understanding of Virgin's policies for the purpose of ascertaining the content of Virgin's policies. The Commissioner considered Mr Macnish's understanding of Virgin's policies in order to assess whether the contravention of the eight-hour rule arose from a deliberate or knowing disregard of Mr Macnish's obligations or from a genuine misunderstanding of the nature of the eight-hour rule. It was appropriate, and essential given the manner in which the proceedings were conducted, for the Commissioner to consider whether Mr Macnish understood that Virgin's policies contained an absolute prohibition on consuming any alcohol in the period eight hours prior to signing on for duty. Although intention is not a necessary requirement for breach of a workplace policy to constitute a valid reason for dismissal, a knowing and conscious breach of an employer's health and safety policies is plainly more likely to constitute a valid reason than a breach which is inadvertent or unwitting.

[27] So much is apparent from the manner in which Virgin itself framed the allegation of misconduct. The letter of termination dated 1 February 2024 recorded that Mr Macnish had "repeatedly stressed" that he believed the eight-hour rule was a guideline and not a firm rule.

The decision-maker did not accept Mr Macnish's protestations in this respect and the letter of termination asserted that: *"I reasonably believe that you did understand your obligation to abstain from alcohol in the 8 hours prior to a duty but performed a duty regardless of not complying with this obligation"*. In order to consider whether Mr Macnish had acted with deliberate disregard of Virgin's policies (as Virgin alleged) or as a result of a genuine misunderstanding of the obligations contained in those policies (as Mr Macnish said), the Commissioner was required to consider his subjective understanding of the policies. There was no error in the Commissioner considering and making findings with respect of what Mr Macnish understood in relation to Virgin's policies or recalled in relation to the training he had received. Virgin's own submissions required the Commissioner to do so.

[28] There is no dispute that not every breach of a requirement of a workplace policy will constitute a valid reason for dismissal.[25] As long ago as *Bostik (Australia) Pty Ltd v Georgevski (No 1)* (1992) 36 FCR 20, Sheppard and Heerey JJ observed (at 29):

> Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable.

[29] As a result, it was necessary for the Commissioner to examine the nature and circumstances of the contravention of the eight-hour rule by Mr Macnish. That is what the Commissioner did by investigating Mr Macnish's knowledge of Virgin's polices.

[30] Second, there may, of course, be cases in which there is a valid reason for dismissal arising from an employee's breach of his or her employer's policies notwithstanding that the employee was ignorant of or misunderstood the requirements imposed by those policies. That might be the case if the employer's policies were clearly and unambiguously communicated to the employee and there was no excuse for the employee's ignorance or confusion. It might be the case because the conduct involved was so obviously inappropriate the employee should have known it was wrong irrespective of the content of the employer's policies. If the employer relies simply on the fact of a breach of policy and not any intention on the part of the employee, it might involve error to concentrate on the employee's understanding of the requirements of the employer's policies.[26]

[31] However, in this matter, the Commissioner did not limit her consideration as to whether there was a valid reason for the dismissal to Mr Macnish's understanding of Virgin's policies. Virgin is wrong to submit she did so. The Commissioner considered, expressly and in considerable detail, whether it was reasonable for Mr Macnish to have understood the concept of not drinking eight hours prior to a duty as a guideline in light of content of the DAMP Manual and the A4 Manual, the available training records and other communications and discussions in which Mr Macnish was involved.[27] After doing so, the Commissioner concluded that it was not unreasonable for Mr Macnish to believe the eight-hour rule to be a guideline.[28] The reasoning involved an objective assessment of the reasonableness of Mr Macnish's understanding of Virgin's policies. There was no error, as a consequence of this approach, in the manner in which the Commissioner approached the valid reason question.

[32] In relation to ground 1, Virgin referred to the decision of the Full Bench in *Bluescope Steel Ltd v Knowles* [2020] FWCFB 3439; (2020) 298 IR 391 (***Knowles***). In *Knowles*, the Full

Bench found that the member at first instance had made a number of significant errors of fact. One of those errors involves a finding that Mr Knowles had breached a safety procedure. The Full Bench found (in part) as follows:[29]

> Secondly, the Commissioner's finding that Mr Knowles had not breached CSP031 was based on a significant error of fact. This finding took into account Mr Knowles' subjective understanding of CSP031, which was to hoist the crane's tongs rather than long travel to clear the bore of a coil. In doing so, Mr Knowles applied his discretion above the express requirements of CSP031. However, the Commissioner found that BlueScope condoned Mr Knowles' practice by not correcting his CSP031 annual re-accreditation response to the question "what would you do before hoisting after unloading a coil (with tongs or C hook)?" Mr Knowles responded, "make sure clear of coil". Mr Knowles says that his response is incomplete and omits reference to long travelling.
>
> The question invited Mr Knowles to address what he is required to do prior to hoisting. Mr Knowles' answer to "make sure clear of coil" reflects the requirement in CSP031 which expressly states, "ensure the hook is clear of coil bore before hoisting". Mr Knowles' answer cannot reasonably be interpreted to mean that he would hoist (as opposed to first long travelling) to ensure the hook is clear of a coil. Indeed, Mr Knowles' interpretation of CSP031 to hoist before long travelling is not evident in his response. Further, the theoretical assessment required Mr Knowles to answer questions on hazard identification. As set out in CSP031 Mr Knowles identifies, "fatality from tipped coil, collision with 66 crane, people in area, equipment damage" as the hazards for which the control measures in CSP031 exist. This lends supports to a finding that Mr Knowles was familiar with the content of CSP031 and the mandate to long travel to clear the bore before hoisting. Accordingly, Mr Knowles' submission that BlueScope did not communicate this requirement cannot reasonably be sustained. The Commissioner's finding that Mr Knowles' conduct had been condoned by BlueScope is not available on the evidence.

[33] Virgin contends that the decision in *Knowles* is "very analogous" to the present case because error was found as a result of the primary decision-maker taking into account the employee's understanding of a procedure and because the Full Bench rejected Mr Knowles' submission that Bluescope did not adequately communicate the policy requirement in circumstances in which he was aware of the content of the policy.

[34] The decision in *Knowles* does not assist Virgin. In this matter, the Commissioner did not take into account Mr Macnish's understanding of the eight-hour rule for the purposes of assessing whether there had been a breach of the rule. The Commissioner accepted there had been a breach of the eight-hour rule. As we have explained, the Commissioner considered Mr Macnish's understanding of the rule for the purposes of determining whether Virgin's allegation that he had knowingly disregarded its requirements was made out. The assessment of whether an employer has adequately communicated a policy to its employees is necessarily a fact-specific inquiry. The Commissioner appropriately considered that issue by asking herself whether it was reasonable for Mr Macnish to understand the eight-hour rule to be a guideline in light of Virgin's published policies, training materials and such evidence as there was in relation to communications with Mr Macnish in relation to the requirements concerning alcohol consumption.

[35] Virgin also submits that the decision, and the approach of considering an employee's understanding of its policies, sets an unattainable standard in relation to the training of employees such that every lawful and reasonable direction would have to be repeatedly

communicated to ensure that each employee's recollection and interpretation of the policy was consistent at all times. We do not accept this submission. A key basis of the Commissioner's conclusion that it was not unreasonable for Mr Macnish to understand the eight-hour rule to be a guideline was that it was not contained in the DAMP Manual. It is not an unattainable standard to expect that the DAMP Manual, which purports to consolidate Virgin's policies with respect to drug and alcohol management and was published to comply with Virgin's own obligations under the CASA Regulations, would clearly articulate what Virgin regards as a critical safety policy in relation to alcohol consumption.

[36] Ground 1 is rejected.

Ground 2 – The DAMP Manual and the A4 Manual

[37] Ground 2 involves as a submission that the Commissioner erred by finding that it was reasonable for Mr Macnish to rely on the DAMP Manual when the eight-hour rule was contained in the A4 Manual in circumstances in which the A4 Manual also contained policies that apply to cabin crew members. We reject ground 2 for three reasons.

[38] First, the DAMP Manual explicitly states that it is a consolidation of policies about drugs and alcohol. The DAMP Manual states, at P.4.2, that the purpose of the DAMP Manual is to "*consolidate the policy and processes relating to the management of alcohol and other drugs in the workplace*". The Commissioner found, clearly and correctly in light of the documentary evidence, that the DAMP Manual is intended to consolidate Virgin's policies on the management of drugs and alcohol and that it applies to all Virgin employees.[30] It was not unreasonable that Mr Macnish examine the document which purports to be a consolidation of policies with respect to the management of drugs and alcohol in order to ascertain the requirements that Virgin imposes with respect to alcohol consumption.

[39] Second, the CASA regulations require the DAMP Manual to be comprehensive. Regulation 99.045 requires that an organisation required to maintain a drug and alcohol management program maintain a DAMP which includes, among other things, a "drug and alcohol education program"[31] which is defined in regulation 99.010 as follows:

> ***drug and alcohol education program***, for a DAMP organisation, means a program that includes the following components:
>
> (a) for SSAA employees—awareness of:
>
> (i) the organisation's policy on drug and alcohol use; and
>
> (ii) drug and alcohol testing in the workplace; and
>
> (iii) support and assistance services for people who engage in problematic use of drugs and alcohol; and
>
> (iv) information about the potential risks to aviation safety from problematic use of drugs and alcohol;
>
> (b) for DAMP supervisors—education and training to manage people who engage in problematic use of drugs or alcohol.

[40] As such, the DAMP Manual was required to set out Virgin's "policy on drug and alcohol use".[32] In circumstances where there is a regulatory requirement that it is comprehensive and that the DAMP Manual itself explicitly states that it is designed to be comprehensive, it was

reasonable for Mr Macnish to have regard to it and not refer to the longer, and less specific, A4 Manual. That is particularly so in circumstances where he was seeking to ascertain information for the purposes of performing work on a flight later the same evening on which he was not previously rostered to work.

[41] Third, the Commissioner found that Mr McEwan, the cabin crew manager for the flight on which Mr Macnish performed work, told Mr Macnish that he was "pretty sure 8 hours is just a guideline" but that he would "find the information in the DAMP Manual".[33] Mr Macnish disclosed to the supervisor on the flight that he had consumed the glass of prosecco and Mr McEwan, in effect, advised Mr Macnish to check the requirements in the DAMP Manual if he was unsure about whether it was appropriate for him to perform work on the flight. Mr Macnish relied on the statement and checked the DAMP Manual which, it is agreed, did not set out the eight-hour rule. The course of action taken by Mr Macnish was appropriate. He was unsure of whether it was appropriate to take up the additional shift. He sought guidance was Mr McEwan and was told to check the DAMP Manual. It was, in our opinion, reasonable for Mr Macnish to rely on the advice of the cabin crew manager in relation to where to find information about Virgin's drug and alcohol policies.

[42] There is no error in the Commissioner's decision of the type sought to be established by ground 2 and, accordingly, ground 2 is rejected.

Ground 3a and 3b – Alleged significant errors of fact

[43] Ground 3a is that the Commissioner made a significant error of fact in finding that Mr Macnish "self-referred" his breach of the eight-hour rule. Ground 3b of the appeal, as clarified in Virgin's oral submissions, is that the Commissioner erred in finding that Mr Macnish genuinely understood the eight-hour rule to be a guideline rather than an absolute rule.

[44] With respect to ground 3a, the Commissioner took into account, as a relevant consideration for the purposes of s 387(h) of the Act, that Mr Macnish "self-reported" his error in relation to the eight-hour rule.[34] The Commissioner earlier set out her factual findings in relation to the reporting of the incident. The findings are as follows:

> [79] Over Monday 18 to Wednesday 20 December 2023, Mr Macnish heard rumours that he had operated the red-eye flight on Sunday 17 December 2023 while drunk. Mr Macnish decided to speak to Ms Ridge about the matter.
>
> [80] On Wednesday 20 December 2023, before going to see Ms Ridge, Mr Macnish called Mr McEwen and discussed the rumour. Mr Macnish asked Mr McEwen if he was sure that Mr Macnish didn't do anything wrong. Mr McEwen said words to the effect of, "You haven't breached the policy, it could be helpful if you go in and clear the air about the rumour".
>
> [81] Mr Macnish went to the Virgin Perth office and asked to speak with Ms Ridge. She was not available, and so he spoke with Ms Solis instead. Mr Macnish explained that he had heard rumours started by other co-workers that he had undertaken the red-eye flight on Sunday 17 December 2023 whilst intoxicated, and that he wanted to come in and clear it up.
>
> [82] Mr Macnish further explained that he had consumed one glass of prosecco by 2:30pm, then nursed a second glass as a social crutch. He left this second glass somewhere when he left the venue at 4:30pm. Ms Solis and Mr Macnish had a discussion about the 8-hour Rule, where Ms

> Solis said it was a rule, not a guideline, and that it was in the DAMP Manual. Mr Macnish said that he checked the DAMP Manual before the red-eye, and that there is no rule.
>
> [83] Ms Solis left the room to look through the DAMP Manual with another Virgin employee, Ms Madeline Williams. Ms Solis, Ms Williams and Mr Macnish looked through the DAMP Manual. Ms Williams then had the idea to check the A4 Manual, where she found the A4 Rule.
>
> [84] Ms Macnish's evidence is that Ms Solis said to him words to the effect, "I'll let Lydia know that you've come forward with this. You might be stood down for it but that is a decision for Lydia. Don't worry, this won't affect your career, there have been much worse allegations against people, even some who are LCC's now." Ms Solis contests this – she says that she only said, "Lydia will be in touch with next steps". Ms Solis was not called for cross-examination. On balance, I find that Ms Solis told Mr Macnish that she would tell Ms Ridge that he had come forward, that he might be stood down and that Ms Ridge would be in touch with the next steps.

[45] Virgin alleges that there are two difficulties with the Commissioner's approach. It pointed out that "self-referral" has a particular meaning in the DAMP Manual as involving a situation in which an employee notifies that he or she is suffering from a problem with drug or alcohol dependence requiring medical intervention.[35] That was not the case for Mr Macnish. There does appear to be some confusion of language in the Commissioner's decision in this respect as she uses the terminology of both "self-referral" and "self-reporting". In our opinion, however, it is sufficiently clear that the Commissioner intended to refer to self-reporting.

[46] Mr Macnish points out that the DAMP Manual encourages self-reporting and provides that: "The reporting of errors will not result in disciplinary action".[36] Virgin submits, however, that the Commissioner erred by taking into account the fact that Mr Macnish came forward and disclosed his contravention of the eight-hour rule to his credit because "it was only once Mr Macnish became aware he was about to be caught, that he owned up". Virgin argued that disclosure of Mr Macnish's actions, in circumstances where he did so only after becoming aware of rumours that he had been on duty whilst drunk, was not a factor favouring a finding that his dismissal was unfair.

[47] These submissions rely on an underlying assumption that Mr Macnish was being investigated or would have been subject to disciplinary action other than as a result of his voluntary disclosure. There was no evidence at all that Virgin was investigating Mr Macnish in relation to the flight on 17 December 2023 or that Virgin managers or human resources representatives were aware of Mr Macnish's conduct. Furthermore, Mr Macnish gave evidence at first instance that he was not aware he would get in trouble and disclosed what had occurred at the work Christmas party to ensure he had not breached policy. It was open to the Commissioner to find that Mr Macnish self-reported, and to treat that as a relevant matter in considering whether the dismissal was harsh, unjust or unreasonable for the purposes of s 387(h) of the Act.

[48] There is no error in relation to ground 3a and it is rejected.

[49] In relation to ground 3b, the Commissioner accepted Mr Macnish's evidence that he understood that the eight-hour rule was a guideline rather than an absolute rule. Virgin clarified in oral submissions that it contended, in ground 3b, that the Commissioner erred by accepting

Mr Macnish's evidence as to his understanding of the eight-hour rule. In that respect, Virgin challenges a finding of credit the Commissioner made having seen and heard Mr Macnish give evidence. Where factual findings are likely to have been affected by impressions about the credibility and reliability of witnesses formed by a primary decision-maker as a result of seeing and hearing them give their evidence, an appellate bench will ordinarily not interfere with the findings unless they are demonstrated to be wrong by reference to "incontrovertible facts or uncontested testimony" or they are "glaringly improbable" or "contrary to compelling inferences".[37]

[50] There is no basis for the Full Bench to interfere with the Commissioner's finding that Mr Macnish genuinely believed the eight-hour rule was a guideline in circumstances in which those findings are likely to have been influenced by the Commissioner having seen and heard Mr Macnish give his evidence. No basis has been established to suggest that the finding is "glaringly improbable" or "contrary to compelling inferences". The inference that Mr Macnish's evidence was genuine is supported by his conduct. Contrary to Virgin's submissions, the fact that Mr Macnish sought clarification from Mr McEwan as to whether it was appropriate for him to accept the additional shift and that he checked the DAMP Manual is consistent with Mr Macnish understanding that the eight-hour rule was a guideline but wishing to check to ensure there was no difficulty with him undertaking the shift.

[51] To the extent that Virgin submits that the Commissioner erred in finding that it was reasonable for Mr Macnish to have understood the eight-hour rule to be a guideline, we do not agree. It was open to the Commissioner to reach that conclusion, and it was, in our opinion, the correct finding to be made having regard to the evidence. The most significant consideration supporting the Commissioner's finding is that, for the reasons we have set out with respect to ground 2, it was reasonable for Mr Macnish to rely on the DAMP Manual as setting out Virgin's policies with respect to drugs and alcohol. Virgin accepts that the DAMP Manual does not dictate that cabin crew members must not consume alcohol in the period of eight hours prior to signing on for duty.

[52] Three other aspects of the evidence were relied upon by Virgin to establish that Mr Macnish could not have reasonably understood the eight-hour rule to be a guideline rather than an absolute prohibition. First, Virgin relies upon the training provided to Mr Macnish when he commenced employment. The Commissioner considered the evidence in relation to the training in which Mr Macnish participated. The Commissioner made the following findings:[38]

> (a) Mr Macnish was taught about the existence of the DAMP Manual and relevant CASA Regulations.
>
> (b) He was told that Cabin Crew Members should not consume alcohol eight hours prior to sign-on. He was taught that the eight hours was a guideline in the sense that some people might need more time to metabolise alcohol. I find that he conflated the two concepts together and his takeaway was that the 8-hour Rule generally was a guideline.
>
> (c) Mr Macnish was not taught that the A4 Manual has a drug and alcohol policy and that it formalises the 8-hour Rule.

[53] No challenge is made to those findings. The findings were based on an assessment of both documentary evidence and the evidence of Mr Macnish and Ms Ridge, Virgin's Leader

Crew Culture. In the absence of challenge, there is no basis upon which those findings should be overturned.

[54] The findings of the Commissioner reflect that it was not unambiguously communicated that Virgin imposed an absolute prohibition on consuming alcohol within eight hours of signing on for duty. The presenter's notes for the training session in which Mr Macnish participated record that the presenter should have said that employees "must not consume drugs or alcohol 8 hours before your duty commences" and a regulatory quiz question asked participants "how long before sign-on must crew abstain from drinking?".[39] However, that message was confused by the fact that participants were not told that the A4 Manual contained any information in relation to drug and alcohol consumption and that a significant component of what was conveyed was that there was zero tolerance from "DAMP breaches" and that, if in doubt, employees should check the DAMP Manual.[40] That is what Mr Macnish did on 17 December 2023 prior to accepting the additional shift.

[55] Second, Virgin referred to edition 18 of an electronic newsletter known as "The Cross Check" disseminated on 22 September 2023. The newsletter contained the following text:[41]

> **DAMP testing: How does it work?**
>
> If you are displaying signs of intoxication at sign on or during your duty, you may be subject to reasonable grounds DAMP testing. This can be done in response to behaviours, conduct, or information indicating you may be under the influence of alcohol or other drugs above the prescribed level while at work. To ensure you are always fit to fly, crew must not consume alcohol for a minimum 8hrs before any of these duties: Standby, Airport/Available duty, training, rostered sign-on for flight duty, and any duty or function before acting as cabin crew.

[56] As the Commissioner observed, the publication does contain a clear statement that cabin crew must not consume alcohol eight hours prior to duty. However, the Commissioner accepted Mr Macnish's evidence that he did not recall reading edition 18 of the Cross Check or what he thought when he read it.[42] In our opinion, the inclusion of the statement on one occasion in a regular electronic newsletter sent to cabin crew which deals with an array of subjects did not dictate a conclusion that it was not reasonable for Mr Macnish to rely on the DAMP Manual on 17 December 2023. Further, the reference to "DAMP testing" in the newsletter suggests that the DAMP Manual contains the relevant requirements.

[57] Third, Virgin refers to a meeting that Mr Macnish had with Ms Ridge on 11 October 2023. The Commissioner made the following findings in relation to what occurred at the meeting:[43]

> (a) Ms Ridge told Mr Macnish that the meeting was not about sick days, it was about concerns a co-worker had raised which were that Mr Macnish had come to work hungover on early morning sign-ons.
>
> (b) Mr Macnish was shocked by this. He stressed to Ms Ridge that he cared deeply about his job and that had never drunk alcohol within eight hours of attending work.
>
> (c) Mr Macnish raised with Ms Ridge that his performance history with Virgin was glowing. Ms Ridge affirmed that she was not questioning his work ethic but needed to address the concerns raised about his wellbeing and fitness for duty.

> (d) Mr Macnish told Ms Ridge that he monitors his alcohol consumption on overnights; makes sure to not drink more than one standard drink per hour and ceases drinking at a minimum of eight hours before duty.

[58] Contrary to Virgin's submissions, the fact that Mr Macnish indicated to Ms Ridge that he makes sure that he ceases drinking a minimum of eight hours before duty does not mean that he understood Virgin's policies to contain an absolute prohibition on the consumption of alcohol eight hours prior to signing on. His statement is equally consistent with Mr Macnish seeking to adhere to a guideline he regarded as best practice. The Commissioner also found that Ms Ridge referred to Virgin having zero-tolerance for "DAMP breaches" reinforcing that the relevant requirements arose from the DAMP Manual.

[59] For these reasons, we can detect no error in the Commissioner's findings that Mr Macnish genuinely understood the eight-hour rule to be a guideline and that it was reasonable for him to do so. Ground 3b must also be rejected.

Grounds 4a and 4b – Reinstatement order

[60] Grounds 4a and 4b involve a contention that the Commissioner's finding that it was appropriate to order reinstatement was manifestly unreasonable or plainly unjust. Ground 4a relies on certain positive findings for Virgin's case from the Commissioner's decision below in arguing this ground of appeal.[44] In ground 4b, it is alleged that the Commissioner failed to consider or failed to give adequate reasons for rejecting matters which are said to weigh against a decision to reinstate Mr Macnish. We reject grounds 4a and 4b for the reasons that follow.

[61] The question whether to order a remedy in a case where a dismissal is found to be unfair involves the exercise of a broad discretion.[45] Section 390(3)(a) provides that any other remedy can only be ordered if the Commission is satisfied that reinstatement is "inappropriate". The section indicates that some latitude is allowed to the member of the Commission hearing an unfair dismissal case to decide whether they are "satisfied" that reinstatement of the applicant is "inappropriate". The concept of "satisfaction" as to "appropriateness" of reinstatement contemplates a range of legally permissible outcomes.[46]

[62] In guiding this discretion, s 390(3) also underscores the primacy of reinstatement as a remedy for an unfair dismissal as the discretion to order a remedy of compensation may only be exercised if the Commission is satisfied that reinstatement is "inappropriate". Further, one of the objects of Part 3-2 of Chapter 3, in which the unfair dismissal provisions appear, is "to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement".[47] The terminology of primary remedy is simply used to say that it is the first and perhaps foremost remedy.[48] The emphasis the Act places on reinstatement as a remedy for unfair dismissal is relevant when considering Virgin's submissions that the outcome of reinstatement in this case was plainly unjust or unreasonable.

[63] A consequence of the fact that there is a range of permissible outcomes in relation to the question is that an appeal with respect to an order for reinstatement cannot be upheld merely because the Full Bench might have reached a different conclusion. It is necessary for an appellant to demonstrate error in the manner in which the member of the Commission at first instance formed the opinion that reinstatement was appropriate. In this matter, ground 4a seeks

to achieve that outcome by contending that an order for Mr Macnish's reinstatement was manifestly unreasonable or plainly unjust. Ground 4a relies on the approach of detecting error in the final limb identified in *House v The King* as follows:[49]

> It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

[64] This is not a case in which it is unclear how the Commissioner reached the conclusion that reinstatement was appropriate. In any event, Virgin has not come close to convincing us that the decision to reinstate Mr Macnish is unreasonable or plainly unjust.

[65] Virgin's submission relies on a contention that it was unjust or unreasonable for Mr Macnish to be reinstated in circumstances in which he had breached an important safety rule. We do not agree. Safety is of critical importance in aviation and Virgin appropriately says it adopts a strong stance with respect to safety. However, whether the decision to reinstate Mr Macnish was within the range of permissible legal outcomes must be considered in light of the whole of the circumstances. The Commissioner found that Mr Macnish was well-regarded by cabin crew managers; Mr Macnish genuinely and reasonably understood that the eight-hour rule was a guideline; Mr Macnish took reasonable steps to ensure he was not breaching Virgin's drug and alcohol policies prior to signing-on for duty on 17 December 2023; the steps taken by Mr Macnish included disclosing his consumption of the glass of prosecco to the cabin crew manager on the flight and seeking guidance, checking the DAMP Manual and using a home breathalyser; Mr Macnish was remorseful and demonstrated contrition once he found out he had breached a policy; and Mr Macnish had learnt a lasting lesson. In those circumstances, in our opinion, it was open to the Commissioner to order reinstatement notwithstanding that Mr Macnish had breached the eight-hour rule. The outcome was not manifestly unreasonable or plainly unjust.

[66] In ground 4b, Virgin contends that the Commissioner failed to give adequate consideration to a range of matters that it raised which weighed against a decision to reinstate Mr Macnish. In our opinion, the ground has no merit.

[67] Ten matters are set out in ground 4b which it is alleged the Commissioner failed to consider, or give adequate reasons for rejecting. Most of the matters concern allegations made with respect to Mr Macnish that Virgin either did not seek to substantiate by leading any evidence or, having put forward such evidence as it could uncover, were found to be unsubstantiated. The assumption underlying the Virgin's submissions is that, when considering reinstatement, the Commissioner was required to separately consider and give weight to its alleged "concerns" in relation to Mr Macnish's conduct even where the Commissioner had found those concerns to be without foundation or Virgin had not even attempted to substantiate its concerns. The assumption is unsound and must be rejected.

[68] Virgin contends the Commissioner failed to consider, or give adequate reasons for rejecting, its concerns about Mr Macnish turning up to work hungover, that he had misused the FRMS entitlement, his attendance and his drinking more generally (as a result of an incident in

France).[50] The Commissioner did not fail to consider those matters. The Commissioner considered the allegations and found that they were either not supported by any evidence or made findings that the allegations were not substantiated.[51] In some instances, Mr Macnish's account was not even challenged by Virgin.[52] It is well established that any alleged loss of trust and confidence in an employee must be soundly and rationally based.[53] The allegations identified by Virgin were not soundly based. When considering reinstatement, the Commissioner was not required to separately give weight to Virgin's "concerns" about allegations that were denied by Mr Macnish and the Commissioner found were baseless.

[69] It is also notable that Virgin contends that, in considering reinstatement, the Commissioner failed to consider, as relevant to reinstatement, matters that Virgin itself did not believe warranted dismissal. In relation to Mr Macnish's alleged breach of the FRMS Manual, for example, Virgin explicitly communicated in the letter of termination that, having considered Mr Macnish's responses and the mitigating circumstances, it did not believe the incident should contribute to the decision to terminate his employment.[54] Similarly, there is no suggestion that the other instances in which Mr Macnish had accessed fatigue entitlements or had attended work late were considered by Virgin to warrant any disciplinary action at all.[55] Any "concerns" Virgin held about those matters were evidently not sufficiently serious to be regarded as a reason why Mr Macnish's employment should not continue.

[70] Finally, Virgin contends that the Commissioner failed to consider, or give adequate reasons for rejecting, its concerns that Mr Macnish would engage in repeated conduct of a similar nature to the breach of the eight-hour rule and was a safety risk, that Mr Macnish was dishonest about his understanding of the eight-hour rule and that the decision would convey to cabin crew that they can breach the eight-hour rule and "get away with it".[56] The Commissioner did not fail to consider those matters. The Commissioner concluded that the decision would not cause Virgin staff to think they can "get away" with breaches of drug and alcohol policies, but rather assist in staff clearly understanding Virgin's policies.[57] The Commissioner recorded Virgin's submission that it had lost trust and confidence in Mr Macnish but concluded that Mr Macnish had learned a lasting lesson and "will act accordingly if he is reinstated".[58]

[71] It is not necessary to say very much about the final matter referred to in ground 4b, that is, that the Commissioner failed to consider, or give weight to, the fact that Virgin had proceeded with the disciplinary processes against Mr Macnish, including the substantiated allegations against him. It was not explained how the fact of the disciplinary process, as distinct from the substance of the allegations, is itself relevant to reinstatement. In any event, we would not infer that the Commissioner did not consider the fact of the disciplinary processes. The disciplinary processes prompted the unfair dismissal proceedings and were discussed extensively by the Commissioner in her decision. It is also not necessary to address at length the contention that the Commissioner failed to consider that Mr Macnish had not "self-referred" the breach of the eight-hour rule.[59] For the reasons given with respect to ground 3a, there is no error in the Commissioner's consideration of whether Mr Macnish had self-reported the breach of policy.

[72] There was no error in the Commissioner's approach to the question of reinstatement. Grounds 4a and 4b are also rejected.

Conclusion

[73] For the reasons outlined above, permission to appeal should be granted but the appeal dismissed. The Full Bench makes the following orders:

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

VICE PRESIDENT

Appearances:

N Ellery, counsel, instructed by *T Reaburn* of McCullough Robertson for the Appellant.
TJ Dixon, counsel, instructed by *J Nicholas* of Nicholas Legal for the Respondent.

Hearing details:

Sydney:
2024 (in-person).
11 November.

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[1] *Macnish v Virgin Airlines Australia Pty Ltd* [2020] FWC 2154.

[2] *Virgin Airlines Australia Pty Ltd v Macnish* [2024] FWC 2333.

[3] [2024] FWC 2154 at [112].

[4] *Civil Aviation Safety Regulations 1998* (Cth), Regulation 91.520(2).

[5] A4 Manual, 3.2.

[6] A4 Manual, 3.2.

[7] *Civil Aviation Safety Regulations 1998* (Cth), Regulation 99.030.

[8] DAMP Manual, P.3.

[9] DAMP Manual, P.4.2.

[10] [2024] FWC 2154 at [135]-[143].

[11] [2024] FWC 2154 at [112].

[12] By reference to *Sydney Trains v Hilder* [2020] FWCFB 1373.

[13] [2024] FWC 2154 at [114]-[124].

[14] [2024] FWC 2154 at [124] and [132].

[15] [2024] FWC 2154 at [72]-[86].

[16] [2024] FWC 2333 at [6].

[17] [2024] FWC 2154 at [133].

[18] [2024] FWC 2154 at [163].

[19] [2024] FWC 2154 at [173].

[20] [2024] FWC 2154 at [176] and [178].

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

[22] *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].

[23] *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].

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

[25] *Sydney Trains v Hilder* [2020] FWCFB 1373 at [35].

[26] *Sydney Trains v Hilder* [2020] FWCFB 1373 at [33].

[27] [2024] FWC 2154 at [26]-[42], [114], [116], [117]. [120], [122] and [123].

[28] [2024] FWC 2154 at [116] and [122].

[29] *Bluescope Steel Ltd v Knowles* [2020] FWCFB 3439; (2020) 298 IR 391 at [35]-[36]. The majority of the Full Court of the Federal Court found no jurisdictional error in the manner the Full Bench determined the matter in *Knowles v Bluescope Steel Ltd* [2021] FCAFC 32; (2021) 284 FCR 118.

[30] [2024] FWC 2154 at [125].

[31] *Civil Aviation Safety Regulations 1998* (Cth), regulation 99.045(b)(i).

[32] *Civil Aviation Safety Regulations 1998* (Cth), regulation 99.010 (a)(i) (definition of "drug and alcohol education program").

[33] [2024] FWC 2154 at [73].

[34] [2024] FWC 2154 at [153].

[35] DAMP Manual, 3.1.

[36] DAMP Manual, P.2.

[37] *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22; (2016) 331 ALR 550 at [43] (French CJ, Bell, Keane, Nettle and Gordon JJ); *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129 at [55] (Kiefel CJ, Bell, Gageler, Nettle and Edelman JJ).

[38] [2024] FWC 2154 at [37].

[39] See [2024] FWC 2154 at [29] and [36].

[40] [2024] FWC 2154 at [28]-[29].

[41] [2024] FWC 2154 at [41].

[42] [2024] FWC 2154 at [42].

[43] [2024] FWC 2154 at [48].

[44] [2024] FWC 2154 at [9], [112], [146]-[152] and [163](e).

[45] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [9].

[46] See, for example, *Moszko v Simplot Australia Pty Ltd* [2021] FWCFB 6046; (2021) 310 IR 373 at [45].

[47] *Fair Work Act 2009* (Cth), s 381(1)(c).

[48] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [10] referring to *Wark v Melbourne City Toyota*, Print R4864, 20 May 1999; *Newtronics Pty Ltd v Salenga*, Print R4305, 29 April 1999; *Rowley v EDI Rail Pty Ltd* [2008] AIRCFB 64; *Colson v Barwon Health* [2014] FWCFB 1949.

[49] *House v The King* (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTeirnan JJ).

[50] Ground 4b(i), (ii), (iii), (v) and (vi).

[51] [2024] FWC 2154 at [134], [143], [144] and [145].

[52] [2024] FWC 2154 at [134](b).

[53] See for example, *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191; *Colson v Barwon Health* [2013] FWC 8734 at [21]-[22] (in relation to which a Full Bench refused permission to appeal in *Colson v Barwon Health* [2014] FWCFB 1949); *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [27].

[54] [2024] FWC 2154 at [107].

[55] [2024] FWC 2154 at [144]-[145].

[56] Ground 4b(iv), (vii) and (ix).

[57] [2024] FWC 2154 at [172].

[58] [2024] FWC 2154 at [170] and [173].

[59] Ground 4b(viii).