AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Barclay v Nylex Corporation Pty Ltd

Ross VP

19 – 21 March, 25, 30 April, 30 May 2003

Termination of Employment — Harsh, unjust or unreasonable termination — Consideration of other relevant matters — Applicant permanent nightshift supervisor — Employment suspended and then terminited due to employee sleeping while at work — Valid reason — Whether employee notified — Limited opporutunity to respond — Applicant's age, length of service and personal consequences of termination relevant matters for determining whether termination harsh under Workplace Relations Act 1996 (Cth), s 170CG(3)(e) — Reinstatement inapporpriate Workplace Relations Act 1996 (Cth), s 170CG(3)(e).

Cases Cited

Allied Express Transport Pty Ltd v Anderson (1998) 81 IR 410.

Australian Meat Holdings Pty Ltd v McLauchlan (1998) 84 IR 1.

Byrne v Australian Airlines Ltd (1995) 185 CLR 410; 61 IR 32.

Crozier, Re (2001) 50 AILR 4-488.

Crozier v Palazzo Corporation Pty Ltd (t/as Noble Park Storage and Transport) (2000) 98 IR 137.

Edwards v Giudice (1999) 94 FCR 561.

Jones v Dunkel (1959) 101 CLR 298.

Mislov v Port Lincoln Health Services Inc (2001) 110 IR 45.

Perkins v Grace Worldwide (Aust) Pty Ltd (1997) 72 IR 186.

Queensland Medical Laboratory v Blewett (1988) 16 ALD 440.

R v Hunt; Ex p Sean Investments Pty Ltd (1979) 180 CLR 322.

Ryder v Curtin University of Technology (WA) (2002) 117 IR 401.

South Australia v Singh-Gill [1994] AILR 233.

Sprigg v Paul's Licensed Festival Supermarket (1998) 88 IR 21.

Wark v Melbourne City Toyota (1999) 89 IR 132.

Wilson v Chubb Protective Services [2002] SAIRComm 35.

Woodman v Hoyts Corporation Pty Ltd (2001) 107 IR 172.

Cur adv vult

Ross VP.

Introduction

1 The applicant, Mr Raymond Charles Barclay, commenced employment with Nylex Corporation Pty Ltd (the respondent) on 7 October 1977.

2 For about the last 20 years of his employment Mr Barclay held the position of Nightshift Supervisor, Injection Moulding Department at the respondent's plant at Hartnett Drive, Seaford. He was employed on permanent nightshift and worked from 11 pm to 7 am Monday to Friday. He often used to work seven-day weeks, especially during busy production periods.[1]

3 As Nightshift Supervisor the applicant had responsibility with respect to the supervision of employees, the quality control of manufactured product, the maintenance of plant and the health and safety of employees. A description of Mr Barclay's responsibilities is set out in Ex A6.[2] Mr Barclay was the most senior employee on the nightshift.[3]

4 Mr Barclay commenced a period of extended leave on 24 April 2002. He returned to work on 1 July 2002. In his second week back at work Mr Barclay agreed to work longer shifts, at the respondent's request. In that week Mr Barclay worked a 58-hour week, including three 12-hour shifts and 14 hours on 12 July 2002.

5 On 16 July 2002 his employment was suspended and was subsequently terminated on 29 July 2002, essentially for sleeping while at work. At the time his employment was terminated Mr Barclay was 60 years of age.

6 Mr Barclay was paid five weeks wages in lieu of notice together with his statutory entitlements.

7 Mr Barclay subsequently filed an application for relief in respect of the termination of his employment pursuant to s 170CE(1) of the *Workplace Relations Act 1996* (Cth) (the WR Act). The application was lodged on 26 August 2002, some six days outside the time prescribed in s 170CE(7). On 23 October Grainger C extended the time for lodgment.[4]

8 Conciliation did not result in the resolution of the matter and a s 170CF(2) certificate was issued. The applicant elected, under s 170CFA(1), to proceed to arbitration to determine whether the termination of his employment was "harsh, unjust or unreasonable".

The hearing

9 At the hearing of Mr Barclay's substantive application for relief, the following witnesses gave evidence on behalf of the applicant:

- Mr Raymond Barclay, the applicant;
- Mr Fred Ruecroft, an employee of the respondent who works on the nightshift at the Seaford plant; Mr Barclay was his direct supervisor; and
- Mr Peter Neuman, a forklift driver employed by the respondent at its Seaford plant.

10 The respondent called nine witnesses:

- Ms Kaye Klarenbeck;

---

1 Transcript, 19 March 2003 at para 69.

2 Also see transcript, 25 March 2003 at paras 7750-7759.

3 Transcript, 19 March 2003 at paras 764, 781.

4 PR923957.

- Mr Colin Waddell, Operations Manager, Nylex Materials Handling;
- Mr Gerd Jansons, currently Production Manager, Small Packaging Division at the respondent's Seaford plant, formerly Production Manager, Injection Mould Operation;
- Mr Jack Siakallis, currently Nightshift Supervisor in the Injection Department at the respondent's Seaford plant; during the period that Mr Barclay was employed by the respondent he was the leading hand on the nightshift in the Injection Department;
- Mr Simon Steer, machine operator on the nightshift in the Injection Department of the respondent's Seaford plant;
- Mr Peter William Robert Coates, currently Dayshift Supervisor on the foaming line at the respondent's Seaford plant; prior to July 2002 he was a nightshift leading hand in the Blowmould Department;
- Mrs Kathy Pegrum, Quality Control Inspector at the respondent's Seaford plant and a shop steward for the National Union of Workers;
- Mr Bradley Kenneth Sawyer, Nightshift Supervisor of the Blowmould Depa tment at the respondent's Seaford plant; and
- Mr Carl Guglielmino, Group Human Resources Manager, Nylex Division, Austrim Nylex Ltd.

11 The evidence was heard over four days (19, 20, 21 and 25 March 2003). At the conclusion of the evidence I prepared a document titled "Draft Agreed Facts". A copy of this document was sent to each of the parties and they were invited to comment on it in their written submissions. The hearing reconvened on 30 April to allow the parties to speak to their written submissions. At the conclusion of the hearing on that day the parties were provided with an opportunity to file supplementary written submissions in relation to a number of matters which arose during the course of argument. Supplementary written submissions were subsequently filed by both parties.

12 I take this opportunity to record that I have had regard to all of the evidence and the submissions of the parties, including their comments on the Draft Agreed Facts document.

The evidence

13 I propose to deal with the evidence in a broadly chronological order. Other aspects of the evidence — for example, the evidence about Mr Barclay sleeping at work — are dealt with later in this decision.

Late December 2001

14 In late December 2001 Messrs Jansons and Barclay met and discussed issues related to sleeping at work.

15 The essence of Mr Barclay's evidence in respect of this meeting is that Mr Jansons said that if he slept on his break he should ensure that he didn't exceed his allocated break time.[5] The following extract from Mr Barclay's evidence encapsulates his recollection of the meeting:

> Mr Levin: What did you say that in response to from Gerd?
>
> Mr Barclay: He said if you are having a sleep, he didn't say I have heard rumours, he said if you are having a sleep in your lunch break, make sure you don't exceed your allocated time and I said, well, I should be able to do what I like in my own break.

5 Transcript, 19 March 2003 at para 106.

> Mr Levin: And did he respond then saying to you you are a supervisor and you should be setting standards?
> Mr Barclay: No.
> Mr Levin: Did he respond at all?
> Mr Barclay: No.
> Mr Levin: I see, so you just said when I have my break, I can do what I want to do and you are trying to say that he just said nothing after that?
> Mr Barclay: That is right.[6]

16 Mr Barclay maintained that Mr Jansons did not tell him that he was not allowed to sleep on his breaks, nor was he given a warning to that effect.[7] There is no written confirmation of a verbal warning on Mr Barclay's personnel file.

17 According to Mr Jansons' evidence he had two discussions with Mr Barclay about sleeping at work.

18 The first took place in November 2001. Mr Jansons' statement sets out his recollection of this meeting:

> 3. I heard rumours about Barclay sleeping during nightshift late last year. I raised this matter with Barclay on that occasion. I said there were rumours about him sleeping on the job, and if this was correct, he should stop it immediately. Barclay's response was, "when I have my break I can do what I want to do". I told Barclay that he was a Supervisor and was supposed to be setting standards.
> 4. I cannot recollect his response to my comments. I definitely told Barclay in my discussions with him at that time that any incidences of sleeping at work were a serious breach of his duties as a Foreman/Supervisor. …[8]

19 Mr Jansons says that during the course of the meeting he gave Mr Barclay a verbal warning not to sleep while at work.[9] But at one point during his cross-examination he agrees that he did not provide Mr Barclay with a verbal warning.[10]

20 In relation to the second meeting Mr Jansons said:

> 5. The second time I had discussions with Barclay about him sleeping at work was around the time that the issue of the photograph being taken of him sleeping at work was investigated. This was in approximately March/April this year. On that occasion I again stressed to Barclay that he should not be sleeping at any time during the shift, and it was important for him to set appropriate standards for the machine operators on the shift.[11]

21 In his supplementary statement Mr Jansons said:

> 3. I confirm there were specific occasions when I spoke to Barclay about rumours of him sleeping on the nightshift. I specifically said to Barclay that I did not know if the rumours were true or not, but if he was sleeping he must stop it.
>
> …

---

6 Transcript, 20 March 2003 at paras 2284-2287.

7 Transcript, 19 March 2003 at para 197.

8 Exhibit R12.

9 Transcript, 21 March 2003 at paras 5045-5061, 5115-5120.

10 Transcript, 21 March 2003 at para 5113.

11 Exhibit R12 at para 5.

> 5. On both occasions I spoke to Barclay about sleeping I said the same thing. I indicated that if the rumours about him sleeping were true he must stop. There was no qualification to this statement. At no time did I tell Barclay that he was entitled to sleep on his breaks. I did not tell him at any time that he could do what he likes on his breaks. I indicated that if he was sleeping he must stop.[12]

22 Mr Barclay denies that there was any second meeting with Mr Jansons in March or April 2002 about this issue.[13]

23 I prefer the evidence of Mr Barclay to that of Mr Jansons. On a number of occasions Mr Jansons' oral evidence was at variance with what he said in his written statement.[14] Further, his evidence in relation to the meeting and what he told Mr Barclay is hopelessly confused.

24 In the course of Mr Jansons' cross-examination it was put to him that he said to Mr Barclay: "Look, if it is happening make sure you don't exceed your allocated time." Mr Jansons agreed that that is what he said.[15] Later in his cross-examination the following exchange takes place:

> Mr Carter: Yet you agree with me that you said to Mr Barclay the same thing in effect; namely, make sure you don't exceed your allocated break?
>
> Mr Jansons: No, I said to Ray that he plays a very important role being a supervisor and it is not setting a very good example.
>
> Mr Carter: But you just agreed with me a moment ago, didn't you, that his evidence is right in terms of you saying to him make sure you don't exceed your allocated break?
>
> Mr Jansons: Not really, no, no.[16]

25 Mr Carter returned to this issue later in his cross-examination:

> Mr Carter: Has there been any direction issued by management subsequent to Mr Barclay's termination in relation to whether or not night shift employees, for example, are entitled to sleep on their breaks?
>
> Mr Jansons: Not that I know of.
>
> Mr Carter: So your position is — still is that that is permissible …
>
> Mr Jansons: But that is only my opinion.
>
> Mr Carter: But in this matter, for example, that was the opinion you communicated to Mr Siakallis and to Mr Barclay?
>
> Mr Jansons: Yes.[17]

26 In his evidence Mr Steer said that when he informed Mr Jansons that he had taken photographs of Mr Barclay sleeping Mr Jansons said "he is allowed to sleep in his 20 minute lunch break".[18]

27 I also note that Mr Jansons conceded that he had told another Nylex employee — Mr George Zakkus — that it was okay if he slept at work provided

12 Exhibit R13 at paras 3 and 5.

13 Transcript, 19 March 2003 at para 264; 20 March 2003 at paras 2304-2307.

14 Transcript, 19 March 2003 at paras 5254-5259, 5287-5296.

15 Transcript, 19 March 2003 at para 5130.

16 Transcript, 19 March 2003 at paras 5142-5143.

17 Transcript, 19 March 2003 at paras 5359-5361.

18 Transcript, 19 March 2003 at paras 5773-5774.

it was during his allocated breaks.[19] Mr Jansons confirmed that this was still his position.[20] I think it highly probable that he said the same thing to Mr Barclay.

28 Mr Jansons' oral evidence was also at variance with his witness statement. For example,[21] in his first statement he says:

> 5. The second time I had discussions with Barclay about him sleeping at work was around the time that the issue of the photograph being taken of him sleeping at work was investigated. This was in approximately March/April this year. On that occasion I again stressed to Barclay that he should not be sleeping at any time during the shift, and it was important for him to set appropriate standards for the machine operators on the shift.[22]

29 In the course of his cross-examination Mr Jansons was asked about this part of his statement and he conceded that he did not have any knowledge of there being an investigation about the photograph.[23]

30 I find that in late December 2001 Messrs Jansons and Barclay met and discussed issues relating to sleeping at work. At that meeting Mr Jansons told Mr Barclay that if he slept on his break he should ensure that he didn't exceed his allocated break time. Mr Jansons did *not* give Mr Barclay a warning not to sleep at work.

The photograph incident and the meeting on 25 March 2002

31 In November 2001 Mr Steer took some photographs of Mr Barclay, apparently sleeping whilst at work.[24]

32 Mr Guglielmino received these photographs from Mr Phil Kelly, the senior NUW delegate at Nylex Mentone, in mid March 2002,[25] following an earlier telephone conversation between Messrs Guglielmino and Steer.

33 Mr Barclay did not see Mr Steer take a photograph of him[26] but became aware of the existence of the photographs. He lodged a complaint against Mr Steer in relation to the issue. This complaint led to an internal investigation under the Company's dispute resolution process. The investigation was conducted by Mr David Boyte, a resolution officer.

34 As part of the dispute resolution process Messrs Steer and Barclay signed a Complaint Handling System Agreement (referred to herein as the EEO agreement).[27]

35 The EEO agreement which resulted from Mr Barclay's complaint about Mr Steer's conduct states that Messrs Barclay and Steer have agreed to resolve the complaint, on the following basis:

> To resolve the complaint.
>
> 3.1 Simon Steer agrees/has been directed to do the following things:

19 See Mr Neuman's evidence at para 3239, transcript 20 March 2003 and Mr Janson's evidence at paras 5121-5130, transcript 20 March 2003.

20 Transcript, 20 March 2003, at para 5360.

21 Also see transcript, 21 March 2003 at paras 5287-5296.

22 Exhibit R12 at para 5.

23 Transcript, 21 March 2003 at paras 5254-5256

24 Transcript, 21 March 2003 at paras 5743-5744.

25 Exhibit R21 at para 3.

26 Transcript, 19 March 2003 at para 226.

27 Marked Annexure CG1 to Ex R19.

> Simon has been informed that Cameras are not permitted on site, any further breach of this conduct will be dealt with the upmost [sic] severity.

3.2 Ray Barclay agrees/has been directed to do the following things:

> Not to sleep at anytime during the shift he is responsible for running.[28]

36 The differences between paras 3.1 and 3.2 of the EEO agreement are important. In my view para 3.1 amounts to a warning. Mr Steer is being told that cameras are not permitted on site and any further instance of such conduct will be dealt with severely. Paragraph 3.2 is of a different character. It is an undertaking by Mr Barclay as to his future conduct. There is no statement as to the consequences which would flow from the breach of such an undertaking.

37 The EEO agreement was signed by Mr Barclay on 3 April 2002.

38 Mr Barclay agrees that he signed the EEO agreement.[29] He says that while he did not regard it as a warning[30] he accepts that the outcome of the dispute resolution process was that he promised not to sleep while at work.[31]

39 I also note that Mr Guglielmino did not regard the EEO agreement as a warning, rather he said that it constituted an undertaking from Mr Barclay not to sleep at work.[32]

40 Together with Mr Nick Sayles (the General Manager at the Seaford plant), Mr Guglielmino met Mr Barclay on 25 March 2002 to discuss the photographs which appeared to show him sleeping while at work.

41 Mr Guglielmino says that at that meeting Mr Barclay denied sleeping on the job. He then said that if he slept at any time while he was at work it was during his breaks. According to Mr Guglielmino Mr Barclay said it was nobody else's business what he did on those breaks.[33]

42 In the course of this meeting Mr Barclay objected strongly to the fact that somebody at the workplace had taken a photograph of him.

43 Mr Guglielmino's evidence was that during the course of the discussion with Mr Barclay he indicated that it was "highly inappropriate for him to be sleeping on the job, if that was the case … [and] that the matter would be investigated further".[34]

44 Mr Barclay does not dispute Mr Guglielmino's evidence in this regard, but his evidence was that when he denied sleeping on the job he was referring to the night on which the photograph was taken, rather than making a global statement.

45 Mr Barclay recalls being told that the matter would be investigated further. He also accepts that he was told (by Mr Sayles) that by sleeping on the job he

---

28 Marked Annexure CG1 to Ex R19.

29 Transcript, 19 March 2003 at para 253.

30 Transcript, 19 March 2003 at paras 261-263.

31 Transcript, 20 March 2003 at para 2317.

32 Transcript, 25 March 2003 at para 7361.

33 Exhibit R19 at para 7.

34 Exhibit R19 at para 9.

was not setting a very good example for the rest of the employees on his shift.[35] But Mr Barclay rejected the suggestion that he was given a warning in respect of this issue.[36]

46 Mr Barclay was not shown any photographs at the meeting, nor did he ask to see them.[37]

47 Mr Barclay accepts that he said words to the effect that if he did sleep at any time while at work it was during his breaks,[38] and recalled saying words to the effect that "Well surely what I do on my own lunch break is my own business."[39]

48 He did not dispute that Mr Guglielmino said it was "highly inappropriate" for him to be sleeping on shift,[40] as he could not recall precisely what was said.

49 It is agreed that Mr Barclay was not given a warning during the course of the meeting on 25 March 2002.[41]

Meeting on 8 April 2002 (Messrs Barclay, Guglielmino and another?)

50 Mr Guglielmino says that he met with Mr Barclay at about 5 pm on 8 April 2002.[42] According to Mr Guglielmino only he and Mr Barclay attended the meeting. Mr Sayles was expected to attend but was unavailable. Mr Barclay maintained that he never had a one-on-one meeting with Mr Guglielmino.[43]

51 Mr Guglielmino's evidence in respect of the meeting is:

> 11. In this discussion Barclay verbally undertook that he would not sleep at any time during a shift for which he was responsible. This meant from the time he clocked in until clocking off, including any rest breaks and meal breaks. I stressed to Barclay that, given his responsibilities as Night Shift Supervisor, any incidents of sleeping on the job were a serious breach of his employment contract.
>
> 12. During these discussions I stressed the serious nature of the sleeping issue and indicated that if there were any breaches of his undertaking the Company would have no choice but to terminate Barclay's employment. In that discussion, Barclay gave me a verbal undertaking, in addition to the written undertaking appearing in the dispute resolution agreement, that he would not sleep at work in the future.[44]

52 In his additional supplementary statement Mr Guglielmino says:

> 11. In para 11 of my statement I refer to my subsequent discussion with Ray which took place on 8 April. This was a meeting that was set up by Nick, but Nick was called away to meet a customer, and was unable to attend.
>
> 12. Ray and I met in the meeting room at Nylex Seaford. It was approximately 5 pm. Nick had arranged for Barclay to meet us at Seaford at that time.

35 Transcript, 19 March 2003 at paras 198 and 278.

36 Transcript, 19 March 2003 at paras 285-286.

37 Transcript, 19 March 2003 at para 275; 20 March 2003 at para 1892.

38 Transcript, 19 March 2003 at paras 1222-1223.

39 Transcript, 19 March 2003 at para 277.

40 Transcript, 20 March 2003 at paras 2314-2315.

41 Transcript, 25 March 2003 at para 7289.

42 Exhibit R21 at para 11.

43 Transcript, 19 March 2003 at para 287; 20 March 2003 at paras 2318-2330.

44 Exhibit R19.

13. The purpose of the meeting was for me to follow up from the outcome of the dispute resolution process as per para 3.3 of the dispute resolution agreement and to bring the matter to a conclusion.
14. I said to Ray that the purpose of this meeting was to conclude the management side of the dispute process. I told him I wanted to ensure he understood how seriously the Company was taking the issue of him sleeping on the job, and that sleeping at any time neglected his responsibilities as the shift supervisor, especially as he was the most senior person on the night shift.
15. I did not take any file notes of the meeting, but I recall that Ray responded along the lines of "Listen I told you before it was during my meal breaks, and all I was doing was resting my eyes".
16. I said to him that I knew that he had given an undertaking in the dispute resolution process, that he would not sleep at any time during the shift at all. He responded by saying words like "Yeah that's right, but I still reckon some of those bastards are out to get me".
17. I responded with words like "Ray please understand this is serious. If you're found sleeping on the job again at any time, the Company will have no choice but to terminate your employment. This has to stop. Do you understand?"
18. Ray was annoyed, and said something like "I've already said so. I will be getting legal advice — this is not over yet".
19. I responded "Ray, that's up to you. Let's leave it at that". The meeting concluded at that point.
20. Ray was annoyed that he was getting a final warning and I took that to be the reason that he was threatening to get legal advice. It has to be remembered that this is only the second time I had ever met Ray. In the earlier discussion with Nick and myself on 25 March 2002 Ray had also indicated that he would be seeking legal advice in relation to the issue.[45]

53 Mr Barclay was taken to Mr Guglielmino's evidence during the course of his cross-examination. Mr Barclay agrees that he gave an undertaking that he wouldn't sleep on the job.[46] He concedes that the reason for the meeting was to follow-up the outcome of the dispute resolution process[47] and that Mr Guglielmino "probably would have" mentioned something about sleeping,[48] but he could not recall the actual words used.[49]

54 Mr Barclay also accepts that during the course of the discussion Mr Guglielmino said that the meeting was to ensure that he understood how serious the company was taking the issue.[50]

55 The meeting on 8 April is canvassed a number of times during the course of Mr Barclay's evidence, at transcript paras 2388-2397:

> Mr Levin: And that Carl stated to you that the meeting was to ensure that you understood how serious the company was taking the issue?
> Mr Barclay: Oh, yes, yes.
> Mr Levin: And that they were concerned and taking seriously the issue about you conforming with your responsibilities of shift supervisor. That

45 Exhibit R21.

46 Transcript, 20 March 2003 at paras 2354-2357, 2365-2366.

47 Transcript, 20 March 2003 at paras 2383-2386.

48 Transcript, 20 March 2003 at para 2360.

49 Transcript, 20 March 2003 at paras 2363-2364, 2369-2382.

50 Transcript, 20 March 2003 at para 2387.

came up?

Mr Barclay: Well, it probably would have come up in the conversation, yes.

Mr Levin: I am not asking you if it probably would have, but do you think words to that effect were said to you?

Mr Barclay: I can't recollect that, no.

Mr Levin: Okay, was the issue of — well, you have just said that the meeting was to discuss — I beg your pardon, was to ensure that from the company's perspective, you understood how serious the company was taking the issue. Now, I am asking you — he will give evidence that it was also to discuss with you not neglecting your responsibilities as shift supervisor. Do you dispute that?

Mr Barclay: No, I don't dispute that. I am sure he would have brought that up.

Mr Levin: Okay, you are sure he would have brought that up. Did you say something along the lines of — do you remember this, listen, I have told you before that it was during my meal breaks and all I was doing was closing my eyes?

Mr Barclay: No, I don't remember saying that, no.

Mr Levin: Well, he will say that you never admitted sleeping. All you did was just say all I might have done was close my eyes or words to that effect. Do you deny that?

Mr Barclay: No, I don't deny that, but I can't remember that.

Mr Levin: You can't remember it?

Mr Barclay: No.

Mr Levin: You might have said it, but — ?

Mr Barclay: Well —

Mr Levin: Is it something you might have said?

Mr Barclay: I might have said that, yes.

Mr Levin: But you can't recall?

Mr Barclay: No.

Mr Levin: So if he says that you said it, you can't dispute that?

Mr Barclay: No.

56 Later, during the course of Mr Barclay's cross-examination the following exchange takes place:

Mr Levin: And he said words to the effect, Ray, please understand if you are found sleeping on the job again, the company will have no choice but to terminate your employment, this has to stop, do you understand?

Mr Barclay: No, no.

Mr Levin: And, Ray, you said, yes, I have already said so, I will be getting legal advice, this is not over yet?

Mr Barclay: No, I don't remember saying that.

Mr Levin: And that he responded, Ray, that is up to you, let us leave it at that and then you left the room and it went for about 15 minutes. You don't remember any of that, or do you dispute it?

Mr Barclay: No, I am not disputing it. I just don't remember it.

Mr Levin: Well, I had better take it bit by bit, so that it is fair to you about what you do and don't dispute, so he says that you said, yes, that is right, but I still reckon some of those bastards are out to get me. Do you remember that?

Mr Barclay: No, I wouldn't have said that, used those words.

Mr Levin: You wouldn't have said that?

Mr Barclay: Wouldn't have used those words, anyway.

Mr Levin: Okay, the next bit. He says he said to you words to the effect of, Ray, please understand if you are found sleeping on the job again, the company will have no choice but to terminate your employment, this has to stop, do you understand?

Mr Barclay: No, I can't recall that, no.

Mr Levin: Did he not say that?

Mr Barclay: I can't dispute that, no.

Mr Levin: You can't dispute it?

Mr Barclay: No.

Mr Levin: Are you sure you can't dispute it?

Mr Barclay: Yes.

Mr Levin: All right, so you are conceding you can't dispute him saying to you, Ray, please understand if you are found sleeping on the job again, the company will have no choice but to terminate your employment and this has to stop, do you understand?

Mr Barclay: No.

Mr Levin: You can't dispute that?

Mr Barclay: No, because I can't remember him saying that.

Mr Levin: But you don't dispute that he said it. You just can't remember?

Mr Barclay: No, I can't remember.[51]

57 There is a conflict as to whether there was a subsequent meeting on or about 8 April between Messrs Barclay and Guglielmino or whether there was only one meeting at which Messrs Barclay, Guglielmino and Sayles were present. Mr Barclay maintained at all times that he never had a one-on-one meeting with Mr Guglielmino.[52] The applicant's further final ritten submissions and the respondent's further written submissions address this issue.

58 I do not propose to canvass all of the submissions advanced by the parties on this matter. I find that there were two meetings. One on 25 March (between Messrs Barclay, Guglielmino and Sayles) and the other on 8 April (between Messrs Barclay and Guglielmino). Three particular matters support my conclusion in this regard:

- *The evidence as to the date of the meetings*: Mr Barclay did not dispute that he met with Messrs Guglielmino and Sayles on 25 March. It is also apparent from his evidence that at a meeting with Mr Guglielmino he gave a verbal undertaking not to sleep at work. During the course of that meeting Mr Barclay said that he had *already* given such an undertaking.[53] This was clearly a reference to the EEO agreement signed on 3 April 2003. It follows that this meeting must have taken place sometime after 3 April 2003.
- *Duration of the meetings*: The meeting involving Messrs Barclay, Guglielmino and Sayles was short. Mr Barclay says that it went for "5, 10 minutes most".[54] It seems improbable that the range of issues which Mr Barclay concedes were raised with him by Mr Guglielmino at a meeting could have been canvassed in the space of 5 or 10 minutes.

51 Transcript, 20 March 2003 at paras 2401-2412.

52 Transcript, 19 March 2003 at para 287; 20 March 2003 at paras 2318-2330.

53 Transcript, 20 March 2003 at para 2361.

54 Transcript, 20 March 2003 at para 1866. See also paras 1872 and 1865.

- *Outcome of the meeting*: At para 285 of the transcript Mr Barclay was asked about the outcome of his meeting with Messrs Guglielmino and Sayles. He said: "There was no particular outcome … ."[55] It was also Mr Barclay's evidence that at a meeting with Mr Guglielmino he gave a verbal undertaking not to sleep at work. It seems to me that such an undertaking could properly be described as an outcome of the meeting. This suggests that two meetings took place. At one there was no particular outcome and at the other Mr Barclay gave a verbal undertaking.

59 Contrary to Mr Guglielmino's evidence before me, I find that Mr Sayles attended the meeting on 8 April 2002. Such a finding is consistent with Mr Barclay's evidence that he never attended a one-on-one meeting with Guglielmino. It is also consistent with Mr Guglielmino's evidence before Grainger C. At that time Mr Guglielmino said that the general manager (Mr Sayles) was present at a meeting he had with Mr Barclay after the EEO agreement had been signed.[56]

60 There is also a conflict in the evidence of Messrs Guglielmino and Barclay regarding what was said during the course of the 8 April meeting. The essence of the conflict is that Mr Guglielmino says he told Mr Barclay that if he was found sleeping on the job again the company would have no choice but to terminate his employment. Mr Barclay cannot recall Mr Guglielmino saying anything of the sort.

61 The respondent contended that at one point in his evidence Mr Barclay concedes that he was warned by Mr Guglielmino. At para 2532 of the transcript the following exchange took place:

> Mr Levin: And I put it to you that you were warned by Carl in the meeting of 8 April that you say you can't recall, that if you were caught again, you would be dismissed?
> Mr Barclay: Yes.

62 In my view this exchange needs to be seen in the context of Mr Barclay's evidence as a whole. Viewed in that light I think that Mr Barclay's "concession" is simply a confirmation of his previous evidence — namely, he cannot recall being warned by Mr Guglielmino.

63 The respondent contended that "to prefer the evidence of Barclay, and find that no warning of termination had been given, would be to prefer Barclay's evidence over Mr Guglielmino's (for which there is demonstrably no basis), and is contrary to the relative recollection of the meeting of the two individuals, and the entire context in which the second meeting between Mr Guglielmino and Barclay took place".[57] The essence of the respondent's submission is that on the basis of relative credibility and context in which the meeting of 8 April took place, I should accept Mr Guglielmino's evidence that he gave Mr Barclay a warning.[58]

64 I have had regard to the matters raised by the respondent but I do not find them persuasive. A number of considerations have led me to reject Mr Guglielmino's evidence on this point.

---

55 Transcript, 19 March 2003 at para 285.

56 Transcript, 17 October 2002 at para 220.

57 Exhibit R22 at p 34.

58 See pp 31-34 of Ex R22.

65 First, in my view, Mr Guglielmino's evidence was unsatisfactory in a number of respects. During the course of his evidence he was:

- evasive;[59]
- non responsive to questions;[60] and
- argumentative.[61]

66 On no fewer than six separate occasions I had to direct Mr Guglielmino to confine his answers to the questions asked of him.[62]

67 It seems to me that Mr Guglielmino cast himself in the role of an advocate for the respondent's cause rather than as a witness giving evidence about facts within his knowledge. On a number of occasions Mr Guglielmino sought to make what were essentially submissions from the witness box rather than confining himself to responding to questions put to him.[63]

68 There is also some inconsistency between Mr Guglielmino's evidence before Grainger C in the extension of time proceedings and his evidence before me. In the course of his evidence before me Mr Guglielmino said that at the time he terminated Mr Barclay's employment he knew that Mr Boyte had spoken to Messrs Steer and Barclay individually. He accepted that in the proceedings before Grainger C he could not recall whether Mr Boyte had spoken to Messrs Steer and Barclay individually or together.[64]

69 Mr Guglielmino also changed his evidence during the course of his cross-examination in these proceedings. He initially indicated that he had only spoken to Mr Steer once since the termination of Mr Barclay's employment and that was at the start of these proceedings on 18 March 2003. Mr Guglielmino's attention was then drawn to his supplementary statement in which he said: "I have recently had discussions with Simon Steer … concerning the evidence he will give in these proceedings."[65]

70 Mr Guglielmino then conceded that he had in fact spoken to Mr Steer twice since the termination of Mr Barclay's employment (in addition to the discussion at the commencement of these proceedings).[66]

71 In addition to the generally unsatisfactory nature of Mr Guglielmino's evidence a number of other matters tell against concluding that Mr Barclay was given a warning at their meeting, in particular the contents of the termination letter and the fact that 3 April 2002 (when the EEO agreement was signed) was the focal point of Mr Waddell's investigation,[67] and not the warning allegedly given by Mr Guglielmino.[68]

72 The terms of the termination letter are set out later in this decision (at [120]). The letter makes reference to Mr Barclay's written undertaking that he would not sleep at work, but makes no reference to any previous warning that if he

---

59 Transcript, 25 March 2003 at paras 6900, 7555-7560.

60 Transcript, 25 March 2003 at paras 6901, 7488.

61 Transcript, 25 March 2003 at paras 6917, 7124-7127.

62 Transcript, 25 March 2003 at paras 6926, 6901, 7109, 7334-7336, 7488, 7573.

63 Transcript, 25 March 2003 at paras 7214-7215, 7588-7590.

64 Transcript, 25 March 2003 at paras 7046-7047, 7062-7067.

65 Exhibit R20 at para 2.

66 Transcript, 25 March 2003 at paras 7523-7549.

67 Transcript, 21 March 2003 at paras 4470-4475, 4615-4616, 4637-4640, 4698.

68 Though Mr Waddell did refer to the alleged warning at para 4473 it was not the reference point of his investigation.

was found sleeping on the job then his employment would be terminated.[69] Had such a warning been given then one would expect a reference to it in the termination letter.

73 Mr Barclay's personnel file did not include one written warning, nor was there any record of him ever receiving a verbal warning.[70] In his evidence Mr Waddell accepted that it would generally be appropriate for a copy of any written warning, or confirmation of a verbal warning, to be placed on an employee's personnel file.[71] Mr Jansons' evidence was to the same effect, though he was referring to warnings in relation to "a serious or extremely grave matter".[72]

74 In view of the conclusion I have reached regarding the absence of any warning, it is unnecessary for me to deal with the applicant's *Jones v Dunkel* (1959) 101 CLR 298 submissions relating to the respondent's failure to call Mr Sayles.

75 I find that Mr Barclay was *not* told that if he was found sleeping on the job again the company would have no choice but to terminate his employment. I also find that during the course of the meeting:

- Mr Guglielmino said that the meeting was to ensure that Mr Barclay understood how seriously the company was taking the issue and that it was "highly inappropriate" for him to be sleeping on the job.
- Mr Barclay said words to the effect that if he did sleep at any time whilst at work it was during his breaks and that surely what he did on his breaks was his business.
- Mr Barclay gave an undertaking not to sleep at work.

The meeting on 16 July 2002 (Messrs Waddell, Arrowsmith and Barclay)

76 On 16 July 2002 Mr Waddell and Mr Ted Arrowsmith had a meeting with Mr Barclay concerning the specific allegations that he was:

- sleeping on the nightshift;
- had altered a machinery operator's log sheet; and
- had manhandled an employee.

77 Mr Waddell's evidence is that in the course of the meeting Mr Barclay denied sleeping during nightshift but indicated that on the night in question (11 July 2002) he had taken his break in the granulator room. Mr Barclay also acknowledged that he had filled in a substitute machine operator's log sheet and said that he did not know what had happened to the original log sheet.[73]

78 Mr Waddell's evidence is that he told Mr Barclay that the issues "were serious and could lead to disciplinary action which could include dismissal".[74]

79 Mr Barclay was told not to attend for work that evening but to meet with Messrs Waddell and Guglielmino the following day (17 July 2002).

80 Mr Waddell's "further statement" sets out his recollection of the meeting, in these terms:

---

69 It is also relevant to note that Ms Bremner's file notes of the meeting on 17 July do not suggest that there had been any reference to a previous warning given to Mr Barclay.

70 Transcript, 21 March 2003 at paras 4489-4491.

71 Transcript, 21 March 2003 at paras 4653-4654.

72 Transcript, 21 March 2003 at paras 5217-5219.

73 Exhibit R10 at para 7.

74 Exhibit R11 at p 3.

July 16 Tuesday

- Interviewed Ray with Ted around 7.00 am
- Advised Ray that I wanted to discuss three issues
- Asked Ray if he had been sleeping on his night shift
- He said that he never slept on shift
- Showed Ray Simon's log and asked if he had seen this before
- Ray said no he had never seen that log and did not know where the original was
- Showed Ray other copy of log and asked if he had filled in this one
- Ray said that he had filled in the log himself as there was not one handed in for that machine
- Referred Ray to Simon's note on the bottom of his log and asked Ray if he had been in the granulator room the night in question
- Ray said Yes and that he had had his break in the granulator room
- I asked why the granulator room
- Ray said that it was a quiet place and that he could have his break wherever he wanted
- I expressed surprise that Ray would want to go into the granulator room for his break
- He again said that he could have his break wherever he wanted to
- Advised Ray that there were allegations that he had manhandled one of the casual operators
- Ray denied this
- Ray said that the casual was one of Simon's friends and that he had had a lot of problems with Simon and his friends
- Ray regarded Simon as a trouble-maker that should have been fired
- Ray was upset at the manhandling allegations and stated that he would sue Simon and anyone else who made allegations against him
- Ray asked that I interview all the shift people re Simon and his behaviour. I took this to mean right then
- Advised Ray that this was not possible (they had all gone home) or necessary
- Asked Ray to meet with Carl at 9.00 on Wed and he agreed
- Told Ray that these three issues were serious and could lead to disciplinary action which could include dismissal
- Ray stated that if that were the case we would be hearing from his lawyers
- Asked Ray not to attend night shift that night and that he would be paid for it[75]

81 Mr Waddell agrees that Mr Barclay invited him to speak to other employees actually working on the shift.[76] In his supplementary statement Mr Waddell adds "I took this to mean right then" and "they had all gone home".

82 Later on 16 July Mr Waddell met with Mr Steer and Mrs Pegrum about the allegations made against Mr Barclay.[77] Mr Waddell also met with Mr Siakallis, then the leading hand on the nightshift in the Injection Moulding Department.[78]

75 Exhibit R11 at 3.

76 Transcript, 21 March 2003 at paras 4116 and 4132.

77 Exhibit R10 at para 8.

78 Exhibit R10 at para 9.

Mr Siakallis told Mr Waddell that Mr Barclay often slept on the job and that this led to significant problems on the nightshift. A diary entry in respect of those discussions is annexed to Mr Waddell's statement.[79]

83 After the meetings referred to above Mr Waddell rang Mr Barclay and asked if he could come and see him later that afternoon.[80] A meeting between Messrs Waddell and Barclay took place at about 3.30 pm Mr Waddell's recollection of that meeting is set out in his further statement, in the following terms:

- I advised Ray that I had interviewed Cathy, Simon, Paul and Jack and that they had confirmed the allegations put to Ray that morning
- Ray said that they were wrong
- Reiterated to Ray that the allegations against him were serious
- Advised Ray that he would be suspended on full pay whilst I investigated the matters
- Ray advised that he would be seeking legal advice
- Confirmed that he would come to the meeting with Carl next morning
- Ray said that he would (attend the meeting) and that he would be bringing representation
- Assumed that this would be his lawyer[81]

84 In his further statement Mr Waddell says:

> When he came back in, we met in my office and he sat down and I said to him that I'd followed up him telling me that he had not been sleeping at all on the shift, and I said that I had to inform him that not only Simon had said that he had been sleeping on shift, but also Kathy, Paul and Jack had all said the same. I paused and looked at him and he said "they are wrong". He didn't say anything else. He just stared at me and said that. I then said to him that I would then have to continue having him suspended pending continuing the investigation. He still hadn't said anything else, and I looked at him and I said to him "Ray, these allegations are pretty serious" and he didn't say anything. He just sat there silent, looking at me. It was a strange silence. He just seemed like he wasn't going to say anything. So after about 15 seconds of this awkward pause while I waited for him to comment, and he just looked at me, I said "OK, then you're still suspended on pay and we will see you at the meeting tomorrow". I asked him whether he was going to come to the meeting tomorrow and he said "yes and I will be bringing representation". He said that quite emphatically. I said "OK", and he left.[82]

85 On 16 July after Mr Barclay had been told that his employment was suspended and a full investigation was to take place in relation to the allegations against him he concedes that it was serious, that he was worried and that it may lead to his dismissal.[83]

86 Mr Barclay's evidence in respect of the first meeting on 16 July differs in three significant respects from Mr Waddell's recollection. Mr Barclay says:

- that there was an allegation that he had been sleeping on shift but he chose not to respond to it.[84] His denial in respect of sleeping at work

---

79 Exhibit R10 at Annexure CW2.

80 Transcript, 20 March 2003 at paras 2435-2479, 3891-3895.

81 Exhibit R11 at p 4.

82 Exhibit R11 at p 7.

83 Transcript, 19 March 2003 at paras 1311, 1313, 1318.

84 Transcript, 20 March 2003 at para 1568.

was limited to the allegation in respect of 11 June, it was not a blanket denial[85] — but Mr Barclay accepts that he did not make it clear that he was talking about just the one incident;[86]

- he did *not* tell Mr Waddell that he took his break in the granulator room;[87] and
- denies being told that the "issues were serious and could lead to disciplinary action which could include dismissal".[88]

87 In relation to the first issue I find that Mr Waddell told Mr Barclay of an allegation that he had been sleeping on shift and that Mr Barclay denied the allegation. I further find that Mr Barclay's denial was not qualified by reference to any particular incident but was a general denial.

88 On the second issue I prefer the evidence of Mr Barclay to Mr Waddell's recollection of the meeting.

89 On his own evidence Mr Waddell said that at the time he met Mr Barclay on 16 July he had been told by Mrs Pegrum that Mr Steer had found Mr Barclay asleep during the course of the nightshift. He had not obtained further details at that stage but was in possession of Mr Steer's log sheet which had been photocopied by Mrs Pegrum.[89]

90 During cross-examination Mr Waddell conceded that when he first spoke to Mr Barclay on 16 July he didn't have the specifics of the allegation from Mr Steer concerning where and when it was said that Mr Barclay was asleep.[90]

91 On the basis of this evidence it was put to Mr Waddell that (at the meeting on 16 July) he did *not* ask Mr Barclay whether he had been asleep in the granulator room. Indeed it was said that it would have been impossible for him to do so because at that stage he had not been told about where it was that Mr Barclay had allegedly been sleeping.

92 Mr Waddell rejected this proposition and said that "I actually asked him whether he was asleep in the granulator room, and he said to me that he had his break in the granulator room".[91]

93 Mr Waddell said that, at the relevant time, he was aware of the allegation that Mr Barclay had been asleep in the granulator room. The source of his knowledge in this regard was said to be the comment at the bottom of the operator shift log — Annexure CP1 to Mrs Pegrum's statement.[92]

94 Mr Waddell was then taken to the document upon which he relied. It contains no reference to the allegation that Mr Barclay was asleep in the granulator room. Mr Waddell then retracted his evidence that Annexure CP1 was the source of his knowledge regarding the granulator room allegation and conceded that he had made a mistake.[93]

95 He went on to say:

---

85 Transcript, 20 March 2003 at paras 2442-2446.

86 Transcript, 20 March 2003 at para 2442.

87 Transcript, 20 March 2003 at paras 2233, 2447.

88 Exhibit R11 at p 3.

89 See Annexure CP1 to Mrs Pegrum's statement, Ex R17.

90 Transcript, 21 March 2003 at para 4313, 4316.

91 Transcript, 21 March 2003 at para 4317.

92 Transcript, 21 March 2003 at para 4318.

93 Transcript, 21 March 2003 at paras 4326, 4341-4342.

> I definitely knew that he had been in the granulator room. … I am just struggling for the actual time, that is all.[94]

96 Mr Waddell conceded that he was told of the details of the sleeping allegation — including where it is said Mr Barclay was asleep — later that day from Mr Steer.[95]

97 Mr Waddell's recollection was that the issue of the granulator room was raised in his meeting with Mr Barclay but he couldn't remember who said it.[96]

98 In my view Mr Waddell's evidence as to his recollection of what was said at the meeting with Mr Barclay on 16 July is improbable. At that time he was unaware of the specific allegation that Mr Barclay had been asleep in the granulator room. He only became aware of the specifics of the allegation later that day during the course of a meeting with Mr Steer. He could not have put the specific allegation to Mr Barclay because at the time he was unaware of it. I think that the meetings which took place on 16 July have merged in Mr Waddell's recollection such that he is mistaken as to his recollection of part of the meeting with Mr Barclay on 16 July. Contrary to Mr Waddell's evidence I find that Mr Barclay did *not* tell Mr Waddell that he took his break in the granulator room.

The meeting on 17 July 2002 (Messrs Guglielmino, Waddell, Bremner, Barclay and four others)

99 At the meeting on 17 July 2002 Messrs Guglielmino and Waddell and Ms Lisa Bremner (Human Resources, Nylex Materials Handling) attended from management. Mr Barclay attended together with four fellow employees (Messrs Fred Ruecroft, Klaus Warnke, Ishman Atman and Les Szabo). These employees were supportive of Mr Barclay and advised management that there were some people working on the nightshift who were antagonistic to Mr Barclay. It was suggested that the sleeping allegations were fabricated.

100 Ms Bremner's file notes of the meeting are attached to Mr Waddell's witness statement.[97]

101 A number of other witnesses were asked questions about the extent to which Annexure CW3 is an accurate record of the meeting.

102 Mr Barclay acknowledged that most of the observations are correct[98] but he denied that Mr Guglielmino said "very serious and could possibly lead to legal action"[99] and rejected the proposition that Mr Atman made the comments attributed to him on p 2 of Ms Bremner's notes.[100]

103 Mr Ruecroft said it was a fair recording of the matters he raised[101] and an "accurate note".[102]

---

94 Transcript, 21 March 2003 at paras 4327-4328.

95 Transcript, 21 March 2003 at paras 4329, 4357-4358.

96 Transcript, 21 March 2003 at paras 4349-4350.

97 Exhibit R10, Attachment CW3.

98 Transcript, 19 March 2003 at para 520.

99 Transcript, 19 March 2003 at paras 527-528, 530.

100 Transcript, 19 March 2003 at paras 536-537.

101 Transcript, 20 March 2003 at para 2654.

102 Transcript, 20 March 2003 at para 2926.

104 In his evidence Mr Guglielmino says that the notes of the meeting are correct in that everything that was written down was said, but it does not contain every word that everybody said.[103]

105 It is common ground that the three allegations made against Mr Barclay were raised at the meeting.[104]

106 Mr Barclay was taken to the following note in Annexure CW3: "Ray agreed he had slept on the shift previously but since signing the agreement he has not slept during a shift."[105] He agreed that contrary to what he said at the meeting on 17 July his evidence was that he had had a couple of sleeps in the second week of July (prior to the meeting on 17 July).[106]

107 He accepted that what he said to management on 17 July "wasn't strictly correct"[107] and admitted he lied in saying that he hadn't slept on shift since signing the EEO agreement.[108]

108 Mr Barclay also conceded that he did not raise any explanation for sleeping[109] such as:

- having to work long hours the previous week;
- any explanation or excuse related to stress; or
- that he wasn't able to sleep at home that week.

109 Mr Barclay agreed that he had the opportunity to do so.[110] Further, Mr Ruecroft agreed that the meeting provided Mr Barclay with an opportunity to respond to the allegations made against him.[111] Counsel for Mr Barclay contended that these concessions needed to be evaluated in context:

- First, given that Mr Barclay was not disclosing having slept at all in the course of his 58 hours the previous week, it could not be expected that he would proffer an explanation.
- Second, it is clear that he and others at the meeting were raising questions as to the perceived lack of response by management to the problems caused by Steer and others. On Mr Barclay's evidence there was a connection between his sleeping at work and the stress he experienced by reason of his difficulties with Steer and others. It is agreed that he had raised his difficulties with Steer with Mr Guglielmino and Mr Sayles in the meeting at a time proximate to the EEO agreement and had been given no feedback.
- Third, it is apparent from the record of the meeting that Mr Guglielmino (without disclosing his own dealings with Mr Steer and Mrs Pegrum) was attributing the problems on the shift to Mr Barclay himself (as he said he had done from the very first moment he says he became aware of the problems with Mr Steer: see para 22 (ii) of his first statement).

---

103 Exhibit R21 at para 21.

104 Mr Ruecroft's evidence at paras 2778-2781, transcript, 20 March 2003.

105 Transcript, 19 March 2003 at para 1338.

106 Transcript, 19 March 2003 at para 1353.

107 Transcript, 19 March 2003 at paras 1354-1355.

108 Transcript, 19 March 2003 at para 1358.

109 Transcript, 20 March 2003 at paras 2499-2503.

110 Transcript, 20 March 2003 at para 2504.

111 Transcript, 20 March 2003 at paras 2856, 2858.

- Fourth, Mr Ruecroft gave evidence that Mr Guglielmino was "arrogant" and it was clear that his mind was made up.[112] Mr Guglielmino's own comment prior to the recess in the meeting that it "… will not look good in court" is consistent with this.
- Fifth, Mr Barclay was at this stage feeling very low and depressed, feeling that he had no support from the management.[113] He had been suspended by Mr Waddell (in the presence of Mr Arrowsmith) the previous day, Mr Waddell having peremptorily refused Mr Barclay's request to come and speak with workers on the shift.

110 I find that at the meeting on 17 July 2002 the allegations against Mr Barclay were raised with him and he was provided with an opportunity to respond to those issues. I have had regard to the contextual matters raised by Mr Barclay's counsel, but I have not found them persuasive on this point. Mr Barclay did not attribute his failure to provide an explanation for his sleeping to feeling low and depressed. The fact that Mr Barclay was not disclosing having slept at all during the previous week no doubt explains why he chose not to proffer an explanation for sleeping, but this does not alter the fact that he was provided with an *opportunity* to respond to allegations against him. He simply chose not to take advantage of the opportunity offered.

111 In relation to Ms Bremner's file notes of the meeting I find that they are an accurate record of the meeting. In particular I accept that Mr Guglielmino said that the matter was "very serious and could possibly lead to legal action".

112 Mr Waddell's evidence is that prior to meeting on 17 July he had spoken with Mr Barclay and formally suspended him pending further investigation of the sleeping allegations. In his statement Mr Waddell also says:

> 12. …The specific nature of the allegations against Barclay were made clear to him in the course of the various meetings I had with him on both Tuesday 16 July and Wednesday 17 July 2002. He was also well aware that his continued employment with the Company was under review. [114]

113 Mr Waddell was taken to the following note in Annexure CW3: "Colin will contact Ray early next week to arrange a meeting."

114 Mr Waddell agrees that he undertook to contact Mr Barclay the following week to discuss the course of the investigations he had conducted to that point[115] and he accepts that he did not call Mr Barclay in during the course of the investigation, as promised, to discuss with him the allegations.[116]

The investigation

115 Between 17 and 29 July 2002 Mr Waddell undertook further investigations into the allegation that Mr Barclay was sleeping while on duty. In particular Mr Waddell says that he:

- obtained statutory declarations from two supervisory level employees (Messrs Coates and Sawyer); and
- made enquiries with a number of managerial level employees and workers in the injection moulding department.

---

112 Transcript, 20 March 2003 at at paras 2625, 2686.

113 Transcript, 19 March 2003 at paras 539-545.

114 Exhibit R10.

115 Transcript, 21 March 2003 at para 4456-4462.

116 Transcript, 21 March 2003 at paras 4467, 4724-4725.

116 In his further statement Mr Waddell says:

> Between 17th and 29th I interviewed Peter Coates, Brad Sawyer, Gerd Jansons, Cathy Pegrum, Jack Siakallis and Ted Arrowsmith
>
> - Gerd advised that he had given Ray two verbal warnings within the last year. One prior to Christmas 2001 and one around the time of the photo incident (see Gerd's statement)
> - Ted advised that he had given Ray a verbal warning early in 2002 as he had heard rumours that Ray was sleeping on shift
> - Brad Sawyer was asked the same questions and he also could remember Ray sleeping since April 3rd and was prepared to sign a stat dec
> - Cathy advised that she had seen Ray sleeping a number of times since April 3rd as she often worked overtime from 3 am and when arriving at the injection area saw Ray asleep in the supervisor's office
> - Jack advised that Ray had slept after April 3rd, he had had quite a work load on the shift doing two jobs and was unhappy about it
>
> Once this investigation was over I met with Carl and we discussed the findings. Carl and I agreed that unless there were any further explanations from Ray that we had solid grounds for dismissal[117]

117 Messrs Ruecroft[118] and Neuman[119] were not spoken to by any manager during the course of the investigation.

118 No-one from management spoke to Mr Barclay after the meeting on 17 July until the meeting on 29 July.[120]

The meeting on 29 July 2002 (Messrs Guglielmino, Waddell and Barclay)

119 Mr Barclay's employment was terminated on 29 July 2002 following a meeting between Messrs Guglielmino, Waddell and Barclay. Mr Guglielmino says that he made the decision to terminate Mr Barclay's employment.[121] Mr Waddell says it was a joint decision but Mr Guglielmino denies this and maintained that the decision was his alone.[122] Mr Guglielmino's recollection of that meeting is set out at paras 19 and 20 of his first witness statement:

> 19. On or about 29 July 2002 Colin Waddell and I met with Barclay again. On that occasion I advised Barclay that as a result of its extensive investigations the Company had concluded that it was not prepared to tolerate his serious and ongoing breaches of his contract of employment caused by sleeping on the job. Barclay was told that the Company had no alternative but to terminate his employment in the circumstances. At that point Barclay stood up in the meeting and said "ok". He then walked to the door and said, "You'll be hearing from my solicitor".
> 20. When Barclay left the discussion, Colin Waddell and I prepared a letter of termination and arranged for that to be sent to Barclay formally advising him that his employment was terminated.[123]

120 A letter of termination was subsequently sent to Mr Barclay. That letter is in the following terms:

---

117 Exhibit R11.

118 Transcript, 20 March 2003 at paras 2604, 2696-267, 2804.

119 Transcript, 20 March 2003 at para 3284.

120 Transcript, 19 March 2003 at paras 546, 589-592.

121 Transcript, 25 March 2003 at para 6852.

122 Transcript, 25 March 2003 at paras 7105, 7500-7505.

123 Exhibit R19.

> This letter is to confirm our discussion today with respect to your conduct whilst working on shift, particularly concerning the matter of you sleeping on shift. As you are aware this matter has been the subject of discussion with you over the past few months. You had given an undertaking in writing that this would not occur again and despite this assurance from you, on further investigation of recent claims we are satisfied that you have continued to breach this undertaking and your fiduciary responsibility as supervisor of injection moulding on night shift.
>
> Ray, you clearly understood the seriousness of this issue and I am disappointed that you failed to follow through with your undertaking not to sleep on shift. As discussed today, given the seriousness of this breach, you leave us with no option but to terminate your employment with Nylex effective from today.
>
> You will be paid five weeks pay in lieu of notice and any outstanding annual leave or long service leave which will be paid directly into your normal bank account.[124]

121 The letter of termination has two dates on it, 29 July 2002 (under the address) and 30 July 2002 (at the top).

122 In his additional supplementary statement Mr Guglielmino provides the following elaboration of his earlier evidence as to what took place at the meeting on 29 July 2002:

> 27. I asked Colin to organise a meeting for the three of us. Colin and I agreed that we had enough to proceed with a termination, given we had four employees all of whom had said that Ray continued to sleep and it was for an hour or longer, and Kathy who said that she had also seen him sleeping — although it was unclear as to exactly when she had seen him. However, I did not prepare a termination letter or put together Ray's pay, because we hadn't met with him yet. I definitely felt that we had a really strong case, and in fairness I was doubtful as to what it was that he was going to say that would explain this all away. Colin and I confronted him on the 29th of July saying to him that after the investigations, we had concluded that he had actually been continuing to sleep on the job despite his denials (by which I meant on the 16th and the 17th — but which I did not specify), and that we would not tolerate this behaviour given that he continued to do it. At this point, there was a five to ten second gap where we looked at him, and he just did not respond. He just had a bland expression on his face and so I said to him words almost just like "OK then, Ray. If there's nothing else then the Company has no alternative other than to terminate your employment". And he just immediately got up, still staring at me, saying "OK, you'll be hearing from my solicitor". There was no denial by him or outrage, or questioning our decision, or saying we were wrong.
> 28. After he left, we were in Colin's office and I proceeded to get Colin to type out a letter of termination, which (because it was already late in the day) was posted to him the following day. I rang the pay mistress at Mentone late that afternoon and advised her to make up his pay and transfer the appropriate amount into his account.[125]

123 Prior to the meeting Messrs Guglielmino and Waddell had agreed that they had enough to proceed to terminate Mr Barclay's employment. Mr Guglielmino says that:

---

124 Exhibit A9.

125 Exhibit R21 at paras 27, 28.

I definitely felt that we had a really strong case, and in fairness I was doubtful as to what it was that he was going to say that would explain this all away.[126]

124 Messrs Guglielmino and Waddell denied that any decision to terminate Mr Barclay's employment was made prior to the meeting on 29 July.[127]

125 At para 14 of his first statement Mr Waddell says:

> 14. *Due to the overwhelming evidence that Barclay had frequently slept during nightshifts* for which he was responsible *it was decided to terminate Barclay's employment on the grounds of misconduct*. It was the Company's view that the circumstances of this matter were extremely grave having regard to the supervisory-level nature of Barclay's position and the persistency of the conduct. Barclay was the person responsible for proper and adequate supervision of workers on nightshift in the injection moulding department. He had failed completely to fulfil this role, notwithstanding that the sleeping allegations had been raised directly with him on a number of prior occasions, and had been the subject of an investigation in the course of a dispute resolution process in April 2002.
> 15. Barclay's employment was terminated on 29 July 2002 following another meeting between himself, Carl Guglielmino and me. Upon termination, Barclay was paid five weeks pay in lieu of notice together with his statutory entitlements.[128] (Emphasis added.)

126 In his further statement Mr Waddell says:

> With all this information, which totally said to us that what Ray had been saying to was not true (ie that he had not been sleeping, or even that it might have been during his breaks), was overwhelming. Also, as far as I'm concerned, sleeping on your breaks when you're being paid to be at work, and particularly when you are the supervisor, is just unacceptable. But regardless of that, we now had so many people who seemed to me to be senior and reliable like Jack, Kathy, Brad and Peter (Simon was more junior), that we certainly had enough to dismiss him on the sleeping, particularly given the extent of it, and that it had continued after he had been given the warning from Carl. We ended up agreeing Carl and I that we would call him in. I want to emphasise that we didn't prepare ourselves for a termination, (for example, no-one prepared any letters of termination or anything else like that or do any pay calculations), because the whole thing was that we wanted to go and meet him again and see if he had changed his story. But unless he said something different at the meeting, or admitted that he should have actually said that he had been sleeping and he had some good reason or something like that, that we would dismiss him. When we went to that meeting, we didn't have any termination letters or anything else like that. We went in with a view that we had enough to dismiss him, and it would then depend what he said. When we went in, the meeting only went for about 5 minutes. We focused on the sleeping because we didn't feel that we had enough to go ahead for a dismissal on the other two issues. By then, the casual had said he didn't want to proceed with giving evidence, and there wasn't enough certainty about the falsifying of the log sheet. But the evidence to us about the sleeping was overwhelming. I was quite frankly interested in what he was going to say, and whether he was going to change his story and admit he had been sleeping, because it seemed from everyone who had spoken to me that he certainly had been and not just for short periods. Carl did the talking, and said like that we had looked into the allegations about whether he had been sleeping or not and that the evidence was (I can't remember if he used the

126 Exhibit R21 at para 27.

127 Transcript, 25 March 2003 at paras 6919-6921, 6930-6931.

128 Exhibit R10.

> word overwhelming — but something like that), and we had even got some stat decs to back it up and it was a serious breach of employment. He was silent after that and we both looked at Ray, who just stayed absolutely silent and looked at us. There was 15 seconds of awkward silence before Carl continued "well if that's it we're going to have to terminate your employment". He stood up, and then said "I'll see you in Court" and walked out of the room.[129]

127 Mr Waddell was cross-examined about when the decision was made to terminate Mr Barclay:

> Mr Carter: At what point did you decide to terminate? Was it after the statutory declarations were obtained?
>
> Mr Waddell: I can't remember the exact time but it was after we had obtained the information, we believed that there was enough information to justify the dismissal.
>
> Mr Carter: Yes, are you able — we are talking about a relatively tight frame here — tight frame — the initial suspension, let us say, is on 16 July, the termination is on the 29th, the statutory declarations are on the 24th and 25 July?—
>
> Mr Waddell: It was —
>
> Mr Carter: And you estimate a date where you and Mr Guglielmino reached a collective decision to terminate?
>
> Mr Waddell: It was shortly before the 29th.
>
> Mr Carter: Yes, can you just explain now to his Honour your evidence that on the 29th you had not made up your mind?
>
> Mr Waddell: Not made up my mind, what?
>
> Mr Carter: Look, to terminate Mr Barclay's employment?
>
> Mr Waddell: We believe that we had enough evidence to do that, yes, that is correct.
>
> Mr Carter: Well, you just said a moment ago that you had reached the decision, perhaps, a couple of days before the 29th?
>
> Mr Waddell: We discussed the evidence a couple of days before the 29th and in that discussion we believed that there was enough evidence to warrant dismissal.
>
> Mr Carter: Yes, and you decided to terminate, yes?
>
> Mr Waddell: No, we — there was enough evidence to allow us to terminate.[130]

128 The meeting began at about 4 pm and did not last more than five or so minutes.[131]

129 Mr Guglielmino says that he rang the payroll department at about 4.30 pm on 29 July to formalise Mr Barclay's termination payment.

130 There is conflict in the evidence of Messrs Waddell and Guglielmino as to whether the decision to terminate Mr Barclay's employment was a joint decision or Mr Guglielmino's alone. I accept Mr Waddell's evidence on this point. I have already remarked on the generally unsatisfactory nature of Mr Guglielmino's evidence.

131 I find that the decision to terminate Mr Barclay was jointly made by Messrs Guglielmino and Waddell. Further, I find that that decision was made

---

129 Exhibit R11 at pp 8-9.

130 Transcript, 21 March 2003 at paras 4828-4834.

131 Transcript, 25 March 2003 at para 6872.

prior to the meeting with Mr Barclay on 29 July 2002. In addition to my general impression of the witnesses and the manner in which they gave their evidence, three particular matters support my conclusion in this regard:

- Mr Barclay said that during the meeting he was told that he would be paid five weeks pay in lieu of notice plus his accrued entitlements.[132] He was not cross-examined on this issue and I accept his evidence. Mr Guglielmino could not recall saying this during the meeting.[133] Later in his evidence he denied that Mr Barclay was told at the meeting that he would be given five weeks pay in lieu of notice.[134] I prefer Mr Barclay's evidence on this point. In my view the reference to five weeks pay suggests a degree of premeditation in respect of the decision to terminate Mr Barclay's employment.
- I have already concluded that the decision to terminate Mr Barclay's employment was a joint one. That being so it is difficult to see how it could have been made *during* the meeting on 29 July. There is no evidence of any adjournment during that meeting to allow Messrs Guglielmino and Waddell to discuss the matter. It must have been prior to the meeting and a decision made at that time.
- There are inconsistencies in Mr Waddell's evidence on this issue. At para 14 of his first statement he says "Due to the overwhelming evidence that Barclay had frequently slept during nightshifts for which he is responsible it was *decided* to terminate Barclay's employment on the grounds of misconduct". This reference to the decision to terminate Mr Barclay's employment appears *before* there is any mention of the meeting on 29 July 2002. Mr Waddell changes the complexion of his evidence in his further statement.[135] During the course of his cross-examination Mr Waddell also changed his evidence on this issue. At first he says that a collective decision (with Mr Guglielmino) was made to terminate Mr Barclay's employment "shortly before the 29th". Later he says that there had been no prior *decision* to terminate, but rather "there was enough evidence to allow us to terminate".

132 I now turn to consider the relevant statutory provisions and the evidence advanced in relation to them.

Harsh, unjust or unreasonable

133 Section 170CG(3) of the Act provides:

> (3) In determining, for the purposes of the arbitration, whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:
>
> (a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and
>
> (b) whether the employee was notified of that reason; and
>
> (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

---

132 Transcript, 19 March 2003 at para 618.

133 Transcript, 25 March 2003 at para 6968.

134 Transcript, 25 March 2003 at para 7176.

135 See [126].

(d) if the termination related to unsatisfactory performance by the employee — whether the employee had been warned about that unsatisfactory performance before the termination; and

(da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and

(db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and

(e) any other matters that the Commission considers relevant.

134 In *Byrne v Australian Airlines Ltd*[136] the High Court considered the meaning of the expression "harsh, unjust or unreasonable" in the context of cl 11(a) of the Transport Workers (Airlines) Award 1988. That clause provided:

> Termination of employment by an employer shall not be harsh, unjust or unreasonable. For the purposes of this clause, termination of employment shall include terminations with or without notice.

135 In their joint judgment McHugh and Gummow JJ said, at 465-468:

> It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.
>
> …
>
> Procedures adopted in carrying out the termination might properly be taken into account in determining whether the termination thus produced was harsh, unjust or unreasonable. The submissions for the respondent in the present appeals appeared to concede this. But the burden of the respondent's submissions is that there was error in determining the issue without regard to the very material circumstance of the finding of the primary judge as to the complicity of the appellants in pilfering. Those submissions should be accepted. This means that the primary judge was bound to consider whether, on the evidence given at the trial, the respondent could resist the allegation of breach of cl 11(a), provided that the evidence concerned circumstances in existence when the decision to terminate employment was made.

136 Given that the observations in the joint judgment were made in a different context they are not binding,[137] but I find them highly persuasive. In my view, for the purpose of s 170CG, a termination of employment may be:

- *harsh*, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct;
- *unjust*, because the employee was not guilty of the misconduct on which the employer acted; and/or

---

136 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; 61 IR 32.

137 Their Honours said at 467 of the joint judgment: "… it should be emphasised that the present task is to construe the Award and that nothing now said necessarily determines the meaning of the phrase 'harsh, unjust or unreasonable' in any other setting."

- *unreasonable*, because it was decided on inferences which would not reasonably have been drawn from the material before the employer.

137 In determining whether or not a termination of employment was "harsh, unjust or un easonable" the Commission must consider each of the matters referred to in s 170CG(3)(a) to (e).[138] Not only must the matters be considered but the words "must have regard to" mean that each must be treated as a matter of significance in the decision making process. [139]

138 It is important to bear in mind that in determining this question (ie whether a termination of employment was harsh, unjust or unreasonable) no one consideration and no combination of considerations is necessarily determinative of the result.[140] For example, the existence of a "valid reason" for termination is only one of a number of specified matters to which the Commission must have regard. As a Full Bench of the Commission observed in *Windsor Smith v Liu*:

> … the question of whether there was a valid reason for termination of employment is no longer the critical question in determining whether the termination was contrary to the Act.[141]

139 Similarly, the *WR Act* does not, in s 170CG(3) or elsewhere, require the Commission to give any want of procedural fairness conclusive weight.[142]

140 Each of paras (a) to (db) of s 170CG(3) require the Commission to have regard to "whether" a circumstance existed. Whether it existed must be then taken into account, considered and given due weight as a fundamental element in determining whether the termination was harsh, unjust or unreasonable. A consequence of this construction is that the Commission is obliged to make a finding in respect of each of the circumstances specified in s 170CG(3)(a) to (db), in so far as each of these paragraphs is applicable[143] or relevant to the factual circumstances of a particular case.[144] I note here that given the size of the respondent employer's undertaking and the presence of dedicated human resource specialists within that undertaking, paras 170CG(3)(da) and (db) are not relevant in this case.

141 I propose to deal with each of the matters in s 170CG(3) in turn.

Valid reason

142 Section 170CG(3)(a) provides that in determining whether a termination was "harsh, unjust or unreasonable" the Commission must have regard to "whether there was a valid reason for the termination relating to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service".

143 I note at the outset that the question posed by s 170CG(3)(a) is whether a

---

138 *Edwards v Giudice* (1999) 94 FCR 561 at 564 per Moore J; *King v Freshmore (Vic) Pty Ltd*, Print S4213, 17 March 2000 per Ross VP, Williams SDP and Hingley C.

139 See *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322.

140 *Woodman v Hoyts Corporation Pty Ltd* (2001) 107 IR 172 per Giudice J, Watson SDP and Grainger C.

141 Print Q3462, 13 July 1998 per Giudice P, Polites SDP and Gay C at 8.

142 *Crozier v Australian Industrial Relations Commission* (2001) 50 AILR 4-488.

143 *Chubb Security Australia Pty Ltd v Thomas*, Print S2679, 2 February 2000 per McIntyre VP, Marsh SDP and Larkin C; *Tenix Defence Systems Pty Ltd v Fearnley*, Print S6238, 22 May 2000 per Ross VP, Polites SDP and Smith C.

144 *King v Freshmore (Vic) Pty Ltd*, Print S4213, 17 March 2000 per Ross VP, Williams SDP and Hingley C; *Tenix Defence Systems Pty Ltd v Fearnley*, Print S6238, 22 May 2000 per Ross VP, Polites SDP and Smith C.

valid reason for termination existed. That question is not limited to whether the reason which was given to the dismissed employee was a valid one.[145] Further, there is abundant authority to support the view that it is appropriate for the Commission to perform the task required by s 170CG(3)(a) by making findings as to conduct or capacity and then forming its own view on whether there was a valid reason for the termination of the employment.[146]

144 The applicant submits that there was no valid reason for the termination of his employment.

145 The respondent contended that three separate aspects of Mr Barclay's conduct each constituted a valid reason for the termination of his employment, namely:

- sleeping during working hours;
- the log sheet incident; and
- issues of deception and breach of trust.

146 I now turn to deal with each aspect of Mr Barclay's conduct which the respondent contends constituted a valid reason for his termination.

Sleeping during working hours

147 The issue of whether or not Mr Barclay slept during working hours was dealt with by a number of the witnesses called on his behalf.

148 Mr Neuman's evidence was that he was aware that "occasionally Ray would rest during his breaks and he would shut his eyes. It did not appear to me that Ray was ever asleep on these occasions, because he would respond instantly when spoken to".[147] In his statement Mr Neuman says that he normally worked day shift but he "quite regularly" (about five times a month) worked a 12-hour shift starting at 3 am, overlapping with nightshift. Consequently Mr Neuman worked part of his shift with Mr Barclay as his direct supervisor. A review of Mr Neuman's overtime records suggested that he had not worked *any* 12-hour shifts in the 18 months prior to Mr Barclay's termination.[148] These records were put to Mr Neuman and he accepted them.

149 Mr Ruecroft — who worked nightshift with Mr Barclay for about 10 years — said that "Although I have seen Ray resting with his eyes shut, I could not say whether he was asleep or merely resting his eyes",[149] however Mr Ruecroft acknowledged that Mr Barclay may have been sleeping.[150] Mr Ruecroft assumed that Mr Barclay was on a break at the time. In this regard it was said that Mr Barclay would only take his breaks when work permitted.[151]

145 *MM Cables (A Division of Metal Manufacturers Ltd) v Zammit*, Print S8106, 17 July 2000 per Ross VP, Drake SDP and Lawson C; *Ryder v Curtin University of Technology (WA)* (2002) 117 IR 401.

146 *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1; *Ryder v Curtin University of Technology (WA)* (2002) 117 IR 401.

147 Exhibit A5 at para 8.

148 Exhibit R9.

149 Exhibit A3 at para 5.

150 Transcript, 20 March 2003 at para 2746.

151 Exhibit A3 at paras 4 and 6.

Mr Ruecroft also said that if he saw Mr Barclay with his eyes closed and spoke to him Mr Barclay would open his eyes straight away.[152] Mr Neuman's evidence was to the same effect.[153]

150 Mr Ruecroft also said that there were occasions when he wasn't able to find Mr Barclay. He would disappear for about half an hour up to four times a night, doing his security rounds.[154]

151 A number of the respondent's witnesses gave evidence in relation to these issues.

152 Mr Coates said that he witnessed Mr Barclay sleeping on the job "on many occasions over approximately a two year period".[155] Specifically Mr Coates says:

> 6. I first witnessed Barclay sleeping in the supervisor's office in the Finishing Department approximately two years ago.
> 7. During nightshift it was often necessary for me to go to the finishing room to use a mixer. On those occasions I witnessed Barclay sleeping in the supervisor's office almost every night. The lights were off in the finishing room and it was obvious to me that Barclay was there to have a sleep. On all those occasions Barclay was fast asleep.
> 8. On many occasions I would be required to walk through the finishing room half an hour or so after I had initially seen Barclay, and he would still be fast asleep in the supervisor's office.
> 9. I am aware that Barclay purchased a sandwich shop in Mornington towards the end of 2000. Barclay was working at this sandwich shop during the day.
> 10. I also observed Barclay sleeping in the supervisor's office in the Injection Department on several occasions. Some of these occasions took place before Barclay commenced working in the sandwich shop.
> 11. On all these occasions Barclay looked as though he was fast asleep. He had his feet on the desk, and his head cradled up against the wall.
> 12. Over the two years or so prior to Barclay's departure from the company I would often be approached during nightshift by Jack Siakallis, the leading hand in the injection room who was trying to find Barclay to fix some problem which had arisen in the Injection Department. Barclay had disappeared from the Inspection Department for lengthy periods on those occasions.

153 At the relevant time Mr Coates was a nightshift leading hand in the Blowmould Department.

154 Mr Coates' evidence was that when he was a nightshift leading hand/service operator[156] he went into the mixing room (shown on Ex R1, the floor plan of the Seaford site) on seven or eight occasions each night to mix powder. This process would usually take three to four minutes.[157] According to Mr Coates he would "quite often" set the mixer going and take the opportunity to go to the toilet while it was mixing.[158] It was Mr Coates' evidence that while he was

152 Transcript, 20 March 2003 at para 2762.

153 Paragraph 8 of Ex A5 and transcript, 20 March 2003 at paras 3193-3197.

154 Transcript, 20 March 2003 at para 2640.

155 Exhibit R16 at para 5.

156 Transcript, 21 March 2003 at paras 6152-6156.

157 Transcript, 21 March 2003 at para 6091.

158 Transcript, 21 March 2003 at para 6092.

undertaking these tasks, on "probably three, four nights" a week[159] he would observe Mr Barclay sleeping in the supervisor's office in the Finishing Department for periods ranging from "at least half an hour on every occasion"[160] to "just over an hour".[161]

155 Mr Coates readily accepted that he could not see the supervisor's office in the Finishing Department from the mixing room but said that "you walk past it to go to the toilet and it is in clear view then".[162]

156 In his witness statement Mr Sawyer says that he saw Mr Barclay sleeping at work in the supervisor's office in the Finishing Department on "at least twenty separate occasions over a 12-18 month period prior to his departure in July 2002".[163]

157 In his oral evidence Mr Sawyer amended his written statement in two respects:

- he had said that he had seen Mr Barclay asleep in the supervisor's office in the Finishing Department on "at least twenty separate occasions".[164] In his oral evidence he said, in effect, that this was a dramatic understatement.[165] In fact there was no week in which he didn't recall Mr Barclay sleeping.[166]
- in his written statement he says that when he observed Mr Barclay asleep in the supervisor's office in the Finishing Department he "was fast asleep for up to an hour".[167] In his oral evidence he said that Mr Barclay slept for periods of between half an hour and an hour and a half.[168]

158 Mr Sawyer's evidence was that:

> On each of those occasions he was fast asleep. Several times it was necessary for me to go back and forth from the Blowmould Department to the finishing room for mixing over periods of up to an hour. On those occasions Barclay remained asleep for the entire period. He was fast asleep for up to an hour on those occasions.[169]

159 Mr Sawyer says that he witnessed Mr Barclay sleeping in the supervisor's office in the Injection Room "at least a couple of times a week".[170] On several occasions Mr Coates was with him when he saw Mr Barclay sleeping.[171]

160 Mr Sawyer is the Nightshift Supervisor at the Blowmould Department at the respondent's Seaford plant.

---

159 Transcript, 21 March 2003 at para 6096.
160 Transcript, 21 March 2003 at para 6098.
161 Transcript, 21 March 2003.
162 Transcript, 21 March 2003 at para 6181.
163 Exhibit R18 at para 7.
164 Exhibit R18 at para 7.
165 Transcript, 25 March 2003 at paras 6571-6573, 6595.
166 Transcript, 25 March 2003 at para 6578.
167 Exhibit R18 at para 8.
168 Transcript, 25 March 2003 at paras 6553, 6596-6619.
169 Exhibit R18 at para 8.
170 Exhibit R18 at para 10. See also transcript, 25 March 2003 at para 6550 — "roughly three times a week".
171 Transcript, 25 March 2003 at para 6554.

161 Mr Sawyer said that he could see into the supervisor's office in the Finishing Department from the Mixing Room.[172] This is inconsistent with Mr Coates' evidence.[173]

162 Mr Siakallis' evidence is that in the last 12-18 months of his employment Mr Barclay slept on nightshift almost every night for up to two to three hours a night.[174] Mr Siakallis said that this meant that Mr Barclay was often not available to fix machinery breakdowns and machinery operators often had to wait to take their breaks during the nightshift.[175] According to Mr Siakallis, Mr Barclay "did very little work at all during night shifts".[176]

163 In terms of where Mr Barclay slept Mr Siakallis said that he would sometimes sleep in the supervisor's office and on "many other occasions" he "completely disappeared and would go and sleep at other places in the Nylex Seaford plant" such as the granulator room or the Finishing Department.[177] In particular, Mr Siakallis said that he saw Mr Barclay asleep in both his office and in the supervisor's office in the Finishing Department.[178] While Mr Siakallis did not see Mr Barclay asleep in the granulator room he did see him "coming out from the granulator room after a long time".[179]

164 Mr Siakallis' evidence was that after Mr Barclay signed the EEO agreement in April 2002 he saw Mr Barclay sleeping "almost every night" for "about an hour and a half".[180]

165 According to Mr Siakallis after Mr Barclay returned to work from his long service leave he slept on nightshift three or four nights a week for an hour and a half on each occasion.[181]

166 At the relevant time Mr Siakallis was the leading hand on the nightshift in the Injection Department.

167 Mrs Pegrum's evidence is that on a number of occasions she came into the plant on the nightshift and saw Mr Barclay sleeping. Mrs Pegrum said that "On those occasions I would kick on the door of the supervisor's office or bang on the walls of the office to wake up Barclay",[182] though she was unable to say in what year this occurred.[183]

168 During the last two years of Mr Barclay's employment Mrs Pegrum said that she would "often have machine operators on the nightshift complaining that they were unable to take toilet breaks or heat breaks because Barclay was not available to stand in for them."[184]

---

172 Transcript, 25 March 2003 at paras 6645-6646.

173 Transcript, 21 March 2003 at para 6181.

174 Exhibit R14 at para 5.

175 Exhibit R14 at para 10.

176 Exhibit R14 at para 12.

177 Exhibit R14 at paras 7 and 8.

178 Transcript, 21 March 2003 at paras 5565-5569.

179 Transcript, 21 March 2003 at paras 5570-5571.

180 Transcript, 21 March 2003 at para 5457.

181 Transcript, 21 March 2003 at para 5480-5481.

182 Exhibit R17 at para 4.

183 Transcript, 25 March 2003 at paras 6342 and 6515-6517; Mr Barclay contests Mrs Pegrum's evidence in this regard, see transcript, 20 March 2003 at paras 2230-2232.

184 Exhibit R17 at para 5.

169 A few times a year Mrs Pegrum would work 12-hour shifts starting at 3 am.[185] On those occasions Mr Barclay would usually be relieving operators on their breaks on a machine when she arrived at 3 am.[186]

170 Mr Steer's evidence was that in early July he was working nightshift when his machine broke down and it was necessary for him to go and find Mr Barclay. After looking for 45 minutes Mr Steer says that he eventually found Mr Barclay in the granulator room, curled up in a ball, fast asleep.[187]

171 None of the employees who gave evidence ever raised concerns with Mr Barclay regarding his sleeping.[188]

172 During the course of his oral evidence Mr Barclay conceded that he had slept during his breaks "a couple of times a week" while on nightshift[189] but said that this practice stopped after 25 March 2002,[190] other than "a couple of times" during the second week in July 2002.[191]

173 Mr Barclay accepted that it was common knowledge that he slept on shift[192] but did not feel he was setting a bad example as he only slept during his breaks.[193] He conceded that if another employee saw him asleep they wouldn't know if he was on a break or not.[194]

174 There is a conflict between the evidence of Mr Barclay and that of a number of other witnesses as to:

- where he slept;
- the duration of his sleeps; and
- the extent to which he slept after 25 March 2002.

175 In terms of where he slept Mr Barclay maintains that the only place he slept was in his office.[195] In particular he denies sleeping in the supervisor's office in the Finishing Department[196] or in the granulator room.[197]

176 Messrs Sawyer, Coates and Siakallis say that they saw Mr Barclay sleeping in the supervisor's office in the Finishing Department.

177 Mr Siakallis said that while he did not see Mr Barclay asleep in the granulator room he did see him "coming out from the granulator room after a long time".[198] Mr Steer says that on 11 July 2002 he found Mr Barclay "fast asleep" in the granulator room.

---

185 Transcript, 25 March 2003 at paras 6439-6440.

186 Transcript, 25 March 2003 at paras 6434-6435.

187 Exhibit R15 at para 10.

188 Mrs Pegrum, transcript, 25 March 2003 at paras 6495-6497, 6526-6527. Mr Sawyer at para 6647, but did bring it up with his supervisor.

189 Transcript, 19 March 2003 at paras 739-740.

190 Transcript, 19 March 2003 at paras 1133-1137, 1161-1163.

191 Transcript, 19 March 2003 at paras 1165, 1185-1191; transcript, 20 March 2003 at paras 1755 and 1978.

192 Transcript, 19 March 2003 at para 1478.

193 Transcript, 19 March 2003 at paras 789-790, 795-796, 797 and 1448; transcript, 20 March 2003 at paras 1859-1860.

194 Transcript, 20 March 2003 at paras 2177-2179.

195 Transcript, 19 March 2003 at paras 766, 779.

196 Transcript, 19 March 2003 at paras 778, 1479; transcript, 20 March 2003 at paras 2032-2034.

197 Transcript, 19 March 2003 at para 768.

198 Transcript, 21 March 2003 at paras 5570-5571.

178 As to the duration of his sleeps, Mr Barclay says that he never once slept for longer than 20 minutes[199] and despite the absence of an alarm clock[200] he was a light sleeper[201] and was able to wake up after a precise amount of time so that he only slept for the duration of his break.[202] He rejects the proposition that he slept for periods of up to an hour[203] and says that it would not have been possible for him to perform the range of his duties if he slept to the extent suggested by Mr Sawyer.[204]

179 Mr Coates says that he observed Mr Barclay sleeping for periods ranging from "at least half an hour" to "just over an hour".[205] Mr Sawyer says that Mr Barclay slept for periods of between half an hour and an hour and a half.[206]

180 Mr Siakallis' evidence was that Mr Barclay slept at work almost every night for up to two to three hours a night.[207]

181 In terms of the extent to which he slept after 25 March 2002 Mr Barclay says that he only slept "a couple of times" during the second week in July 2002[208] and that he did not sleep (during his breaks or at any other time) from 25 March until he went on leave in April 2002.[209] He rejects the evidence of the respondent's witnesses to the contrary.[210]

182 Mr Coates says that he recalled two specific occasions in April when he saw Mr Barclay sleeping. At para 13 of his witness statement he says:

> I can recall two specific occasions which took place on 8 and 10 April 2002 when I witnessed Ray Barclay asleep in the supervisor's office in the Injection Department. I am aware of these dates because I had sent some employees from the Blowmould Department to the Injection Department because there was insufficient work available. On both occasions I went over to the Injection Department to check on these employees and observed Barclay sleeping in the supervisor's office. On both occasions Barclay was asleep for a period of at least 15 minutes while I was present in the injection room. I was standing in a position in the Injection Department facing the supervisor's office where I could directly observe Barclay for that entire period of time. He was clearly asleep, with his feet on a desk and head resting against a wall.[211]

183 Mr Coates' oral evidence in relation to what he observed on 8 and 10 April 2002 was consistent with his written statement.[212] During the course of his cross-examination Mr Coates said that he did not know how long Mr Barclay slept on those occasions.[213] In my view this is not inconsistent with

199 Transcript, 19 March 2003 at para 876; 20 March 2003 at paras 2181-2183 and 2229.
200 Transcript, 19 March 2003 at para 754.
201 Transcript, 20 March 2003 at para 3854.
202 Transcript, 19 March 2003 at paras 757-763.
203 Transcript, 19 March 2003 at para 570.
204 Transcript, 19 March 2003 at paras 570-571.
205 Transcript, 21 March 2003 at para 6098.
206 Transcript, 25 March 2003 at paras 6553, 6596-6619.
207 Exhibit R14 at para 5.
208 Transcript, 20 March 2003 at para 1755.
209 Transcript, 20 March 2003 at para 1978.
210 Transcript, 20 March 2003 at para 2087.
211 Exhibit R16.
212 Transcript, 21 March 2003 at paras 6172-6178.
213 Transcript, 21 March 2003 at para 6178.

his witness statement. A fair reading of the totality of his evidence is that Mr Barclay slept for at least 15 minutes on both 8 and 10 April 2002, but he did not know if Mr Barclay slept for longer than 15 minutes.

184 Mr Barclay did not see Mr Coates walk past his office on 8 and 10 April 2002.

185 According to Mr Siakallis, Mr Barclay's sleeping pattern, ie "for up to 2-3 hours a night" did *not* change after 25 March 2002.[214]

186 Mr Barclay rejected the evidence of Messrs Coates and Siakallis in this regard.[215]

187 In relation to Mr Coates' evidence as to him sleeping on 8 and 10 April, Mr Barclay says that he had his feet on his desk, his hands on his lap or by his face and his eyes open, hence Mr Coates probably thought he was asleep.[216]

188 Mr Barclay contests part of Mr Steer's evidence in relation to the "granulator room incident" on 11 July 2002. He agrees that Mr Steer found him in the granulator room during the nightshift. He also agrees that he was "curled up in a ball"[217] and that Mr Steer turned the light on and saw him.[218] But Mr Barclay denies that he was asleep[219] and says that his eyes were open when Mr Steer came into the room.[220] According to Mr Barclay he had been moving material into the room when he experienced pain due to an earlier hernia complaint — he assumed a curled up position in order to relieve the pain.[221]

189 Mr Barclay conceded that with the lights out the granulator room was reasonably dark.[222] On the night in question the plastic swing doors to the room were almost closed.[223] The doors are not completely transparent, but are a smoked colour, they let some light through.[224]

190 I do not accept Mr Barclay's evidence on these matters. His evidence did not compare favourably with that of the other witnesses. Mr Barclay's recollection relating to a range of issues altered during the course of his evidence. For example:

- whether it was "almost pitch black" in the granulator room when the light was out;[225]
- the extent to which he slept at work during the 18 months prior to the termination;[226] and
- whether a lack of management support and work related stress resulted in his sleeping at work.[227]

---

214 Exhibit R14 at para 5.

215 Transcript, 19 March 2003 at paras 1323-1326; transcript, 20 March 2003 at paras 1979-1980.

216 Transcript, 20 March 2003 at para 1990.

217 Transcript, 19 March 2003 at para 477.

218 Transcript, 20 March 2003 at para 1762.

219 Transcript, 19 March 2003 at para 478.

220 Transcript, 19 March 2003 at para 480.

221 Transcript, 19 March 2003 at para 477.

222 Transcript, 20 March 2003 at para 1793.

223 Transcript, 20 March 2003 at para 1803.

224 Transcript, 20 March 2003 at paras 1784-1787.

225 Transcript, 20 March 2003 at paras 1801, 1808, 1809.

226 Transcript, 19 March 2003 at paras 739-740, 1135-1136, 1139-1154.

227 Transcript, 19 March 2003 at paras 1053, 1061-1062, 1366-1371, 1418, 1419.

191 Mr Barclay also seemed confused as to how many times he slept during the second week in July 2002.[228] On occasions his evidence was non-responsive and argumentative.[229]

192 The evidence of Messrs Sawyer and Coates as to Mr Barclay sleeping in the supervisor's office in the Finishing Department is broadly consistent. I note there is some inconsistency as to whether they could see into the supervisor's office from the mixing room.[230] I prefer Mr Coates' evidence in this regard given the changes in Mr Sawyer's evidence, and his confusion as to certain dates[231] and about when he saw the respondent's solicitors.[232] I note that in his written submission (Ex A13, p 2) counsel for Mr Barclay contended that the site plan (Ex R1) reveals that the toilet (marked as WC) is nowhere near the supervisor's office in the Finishing Department. However, it is conceded that this proposition was not put to Mr Coates.[233] Nor is there any evidence which contradicted Mr Coates' statement that he could see into the supervisor's office when walking to the toilet.

193 In relation to the granulator room incident on 11 July 2002 I prefer Mr Steer's evidence to that of Mr Barclay. I have taken into account Mr Steer's antipathy towards Mr Barclay but I regard Mr Barclay's recollection of the incident as improbable. He gave no satisfactory explanation as to why the lights were off when he was in the granulator room.

194 I find that:

- Mr Barclay slept whilst at work on at least a couple of occasions a week in the 12-month period prior to 25 March 2002.
- The duration of his sleeps exceeded the time of his allocated breaks.
- Mr Barclay slept in his office, in the supervisor's office in the Finishing Department and in the granulator room.
- On 8 and 10 April 2002 Mr Barclay slept in his office for a period of at least 15 minutes.
- On 11 July 2002 Mr Barclay slept in the granulator room during the nightshift.
- On at least two other occasions in the second week of July 2002 Mr Barclay slept whilst at work.

195 Counsel for Mr Barclay contended that in all the circumstances there was no valid reason for the termination of Mr Barclay's employment. In essence counsel submitted that I should prefer Mr Barclay's evidence about the extent to which he slept at work in preference to that of Messrs Sawyer, Coates, Steer and Siakallis.[234] Further, counsel submitted that whatever the resolution of the evidentiary conflict about the extent to which Mr Barclay slept at work the following circumstances point against the existence of a valid reason for termination:

- the absence of a contractual term preventing sleeping on breaks;
- the absence of any company policy preventing sleeping during breaks;

228 Transcript, 19 March 2003 at paras 1110-1120.

229 Transcript, 20 March 2003 at para 1713.

230 See [155] and [161].

231 Transcript, 25 March 2003 at paras 6770-6776.

232 Transcript, 25 March 2003 at paras 6749-6764.

233 Transcript, 30 April 2003 at para 8000.

234 See paras 20-26 of Ex A13.

- the express permission from Mr Barclay's immediate supervisor, Mr Jansons, to sleep on breaks provid d the allocated time was not exceeded;
- the unconscionable hours worked by Mr Barclay in the second week of July 2002. In this regard Mr Sawyer agreed that it is difficult to readjust the body clock when returning to nightshift after periods of leave;[235]
- the interconnection between Mr Barclay sleeping at work and his stress flowing from the lack of support from management for the difficulties he was experiencing on the shift;
- Mr Barclay had not been warned that repetition of sleeping at work would result in dismissal;
- other employees were warned about sleeping at work before dismissal;
- no employee had complained to Mr Barclay; and
- no harm was done, or danger caused to anyone as a consequence of Mr Barclay's sleeping.

196 In reply the respondent relied on a number of authorities in support of its contention that sleeping at work constitutes a valid reason for termination,[236] and made reference to the introductory words in Ch 6 of *The Common Law of Employment*,[237] namely:

> Unless an employee has a job as a mattress tester or a similar occupation, sleeping on duty is neglect of duty.[238]

197 In my view the question of whether sleeping at work constitutes a valid reason for termination depends on the circumstances. The relevant factual matrix must be considered. Issues such as the frequency and duration of sleeping, the nature of the work being performed and the responsibilities of the employee concerned, will all be relevant. In certain circumstances a single instance of sleeping has been found to be sufficient to constitute a valid reason for termination. For example, where the applicant was a security officer on duty at Kirribilli House[239] or an emergency services officer at a minesite who was required to "maintain a state of alertness on duty and conduct themselves in a manner which ensures their ability to respond to emergencies for the full twelve hours of their shift".[240] In different circumstances such conduct would not constitute a valid reason for termination.[241]

198 In this case I am satisfied that there was a valid reason for the termination of Mr Barclay's employment based on his conduct. Specifically Mr Barclay slept at work despite undertaking to senior management that he would not do so.

199 In reaching this conclusion I have had regard to all of the evidence. In my view the following findings support my conclusion:

235 Transcript, 25 March 2003 at paras 6716-6721.

236 *Wilson v Chubb Protective Services* [2002] SAIRComm 35; *Mislov v Port Lincoln Health Services Inc* (2001) 110 IR 45; *Stolz v Australian Protective Service,* Print S9631, 30 August 2000 per Wilks C.

237 Mackin JJ, Maloney C and McCarry JJ, *The Common Law of Employment* (Sydney, Lawbook Co, 1978).

238 A Avins, *Employees' Misconduct* (India, Allahabad University Press, 1968) p 70.

239 *Stolz v Australian Protective Service*, Print S9631, 30 August 2000 per Wilks C.

240 *Adams v Western Mining Corporation* (1996) 76 WAIG 5019 per Coleman CC.

241 See *Carter v EG Green and Sons Pty Ltd*, Print P9619, 23 March 1998 per O'Connor C.

- Mr Barclay was the most senior employee on the nightshift. His responsibilities included the supervision of employees and their health and safety.
- In early April 2002 Mr Barclay gave an undertaking not to sleep at work. At the time he was aware that senior management held the view that it was highly inappropriate for him to be sleeping at work.
- Mr Barclay broke his undertaking. He slept in his office for a period of at least 15 minutes on both 8 and 10 April 2002. On 11 July 2002 he slept in the granulator room during the nightshift and on at least two other occasions in the second week in July 2002 he slept whilst at work (but note my comments regarding the extended hours worked by Mr Barclay in the second week in July — see [205] – [206]).

200 I have had regard to the arguments advanced by counsel on behalf of Mr Barclay, but I do not find them persuasive.

201 The first three points advanced by counsel assume that Mr Barclay's sleeping was confined to his breaks. I have already considered the evidence regarding the duration of Mr Barclay's sleeps and found that they exceeded the time of his allocated breaks. Mr Barclay slept whilst on duty.

202 Even if I am wrong about the duration of Mr Barclay's sleeps and they were confined to his breaks, that does not lead me to alter my conclusion. It is not the *duration* of Mr Barclay's sleeps after 3 April 2002 (when he gave a written undertaking not to sleep at work) which is determinative. What is critical is the fact that he slept at all, for whatever period of time, in clear breach of his undertaking to senior management that he would not sleep at all whilst at work.

203 Any permission given by Mr Barclay's immediate supervisor (Mr Jansons), whether express or implied, that he could sleep during his breaks was clearly repudiated in his meeting with Mr Guglielmino on 8 April 2002. At that meeting it was made clear to Mr Barclay that it was "highly inappropriate" for him to be sleeping on the job. Further, Mr Barclay signed a document (the EEO agreement) in which he agreed "Not to sleep *at anytime* during the shift he is responsible for running" (emphasis added).

204 I deal with counsel's contentions as to the failure to warn Mr Barclay, and the respondent's conduct in respect of other employees, later in this decision.

205 In relation to the fourth point advanced by counsel I have had regard to the extended hours worked by Mr Barclay in the second week of July 2002 and to the fact that this was shortly after he had returned to work after a period of extended leave. I have also taken into account Mr Sawyer's evidence regarding the difficulty in readjusting to shift work after a period of leave. But I note that Mr Barclay's evidence was that he had no problem sleeping at home during the first week in July.[242]

206 I do regard the long hours worked by Mr Barclay in the second week of July as a mitigating factor. Mr Barclay gave evidence to the effect that working the extended hours affected his ability to sleep at home.[243] If Mr Barclay's conduct was limited to sleeping at work in the second week of July in breach of his undertaking, I would not regard that fact alone as constituting a valid reason for termination.

---

242 Transcript, 19 March 2003 at paras 1256-1259.

243 Transcript, 19 March 2003 at paras 1259-1260 and 1263-1265.

207 Counsel also relies on a connection between Mr Barclay's sleeping at work and his stress from the lack of management support in relation to the difficulties he was experiencing on the shift. There is considerable confusion in Mr Barclay's evidence as to whether work related stress resulted in him sleeping at work.[244]

208 In his discussions with management, Mr Barclay never sought to explain or excuse his sleeping on the basis of stress relating to a lack of management support.

209 I accept that the support given to Mr Barclay by his immediate supervisor and other members of management in respect of the difficulties he was encountering with Mr Steer and others was inadequate. But in my view the alleged connection between the lack of management support and Mr Barclay's conduct in sleeping at work has not been established.

210 I also accept that none of the persons who observed Mr Barclay sleeping raised it with him, but I do not regard this as particularly significant. Mr Barclay was the senior employee in the nightshift and there would no doubt be an understandable reluctance on the part of his subordinates to raise any concerns they had about his sleeping with him. In any event senior management did raise it and made it clear that sleeping at work was "highly inappropriate".

211 Nor do I consider the fact that "no harm was done" as a consequence of Mr Barclay's sleeping to be a relevant consideration. Mr Barclay was the senior employee on the nightshift and he was responsible for the health and safety of the employees he supervised. The fact that no employee was injured while he slept is fortunate but not material to my conclusion that his conduct constituted a valid reason for the termination of his employment.

212 I now turn to consider the log sheet incident.

The log sheet incident

213 At about 6.30 am on Thursday 11 July 2002 Mrs Pegrum went to the Injection Moulding Department. At that time Mr Steer informed her of some problems he said that he had experienced during the nightshift which resulted in downtime on his machine. Mr Steer showed Mrs Pegrum his "Injector Operator Log Sheet" for the shift in question. The log sheet was substantially completed but did not contain entries for the eighth hour of the shift or the total number of good mouldings. In the comments section of his log sheet Mr Steer had written:

> "Down Time". Had to look for Ray! When found him had to wake him up.

214 Mrs Pegrum took the operator log sheet from Mr Steer and photocopied the document. She then returned it to him to be completed at the end of the shift. The document photocopied by Mrs Pegrum is annexed to her statement and marked as "CP1".

215 Later on the morning of 11 July 2002 Mrs Pegrum asked to see the log sheet for machine 16 (the machine which Mr Steer had been working on). This request was made of the dayshift supervisor. The log sheet prepared by Mr Steer was not there. In its place was another log sheet, prepared by Mr Barclay. A copy of the replacement log sheet is annexed to Mrs Pegrum's statement and marked "CP2". This document does not contain the comments set out above.

216 Later on 11 July 2002 Mrs Pegrum approached Mr Waddell and advised him of discrepancies in paperwork prepared by an operator on the nightshift.

---

244 Transcript, 19 March 2003 at paras 1047-1069, 1366-1371.

217 In the course of his evidence Mr Barclay denied seeing the document marked as "CP1".[245] His evidence was that the original operator's log sheet given to him by Mr Steer was "a lot dirtier … It had coffee spilled all over it and looked like somebody had walked all over it, and I could hardly make out many of the features whatsoever".[246] He threw it out and filled out a duplicate document.[247]

218 Mr Steer's evidence in relation to this issue is consistent with that given by Mrs Pegrum.

219 Further Mr Steer rejected the proposition that the log sheet he handed in was coffee stained and difficult to read.[248]

220 During the course of her cross-examination Mrs Pegrum accepted that she did not know whether Mr Steer handed in the document he showed her.[249]

221 There are conflicts in the evidence of Messrs Barclay and Steer regarding whether the document handed in by Mr Steer at the end of his shift on 11 July was the completed version of "CP1" and the state of the document (ie dirty/coffee stained or not).

222 There is also an evidentiary conflict as to whether Mr Barclay raised the fact that the log sheet was coffee stained and illegible with anyone from management. Initially Mr Barclay agreed with the proposition that before he gave evidence in these proceedings he had never raised the issue of the coffee stained log sheet with anyone from management.[250]

> Mr Levin: The replacement sheet didn't contain any reference to the down time during the shift. Now, I want to ask you, it is true, isn't it, that you have never before today ever raised the issue of coffee stains on the time sheet, with anyone from the company. Correct?
> Mr Barclay: From the — like, from management?
> Mr Levin: Yes, from management?
> Mr Barclay: Yes, that is right.[251]

223 Later Mr Barclay changes his evidence on this issue:

> Mr Levin: Okay. And you have just been suspended and have been told that it was because of an allegation about the — just make sure I get the words right — about altering a machine operator's log sheet. And you were then met, again, to discuss it. I put it to you that had there been a simple explanation of coffee spilling on it, being the reason that you would have raised it with management?
> Mr Barclay: I actually raised it with Colin. I said that wasn't the log sheet that was handed to me. I said I re-copied it because I could hardly understand it all because it looked like there had been coffee spilt on it.
> Mr Levin: You have just said, twice, in evidence, that you didn't tell management or Colin — I asked you first management and then Colin — you just gave evidence that you never told him about coffee, now are you saying you did?

245 Transcript, 19 March 2003 at paras 340, 352, 994.

246 Transcript, 19 March 2003 at para 300.

247 Transcript, 19 March 2003 at para 358.

248 Transcript, 21 March 2003 at paras 5969-5971.

249 Transcript, 25 March 2003 at para 6420.

250 Transcript, 19 March 2003 at paras 943-944, 964; transcript, 25 March 2003 at paras 7893-7902.

251 Transcript, 19 March 2003 at paras 943-944.

> Mr Barclay: Yes, I did, I did say it with Colin.
>
> Mr Levin: Okay. Let us get it clear. So you say now that, when I just asked you if you told no-one in management, you said, "that is right", that was incorrect?
>
> Mr Barclay: Well, yes, that is incorrect —
>
> Mr Levin: And when I then asked you again, and did you tell Colin and you said "no", that was also incorrect?
>
> Mr Barclay: Yes, that was, I did tell Colin.[252]

224 Mr Barclay was unable to provide any explanation for why the reference to a coffee stained document does not appear in his witness statement,[253] but he did say that he had raised the issue with his solicitor and counsel[254] and that it should have been in his statement.[255] He relied on a prior consistent statement — Ex A6. This was a draft of a letter to the respondent's Managing Director, Mr Sack, prepared by Mr Barclay a couple of weeks after his termination.[256] At p 5 of the letter Mr Barclay refers to the log sheet incident in the following terms:

> The first log sheet that he had produced was not the log sheet that was handed to me at 7.00 AM.
>
> That log sheet that was handed to me had coffee spilled all over it and looked like a elephant had walked all over it.

225 This prior consistent statement of Mr Barclay's was admitted for the purpose of rebutting allegations of recent invention levelled at Mr Barclay during cross-examination.

226 Mr Waddell says that Mr Barclay did not tell him anything about the original log sheet being coffee stained or illegible.[257]

227 I prefer the evidence of Messrs Steer and Waddell and Ms Pegrum to that of Mr Barclay in respect of this issue.

228 I find that:

- At the end of his shift Mr Steer handed in the completed version of the log sheet marked as annexure CP1 to Mrs Pegrum's statement.[258]
- Mr Steer's completed log sheet was *not* illegible and coffee stained.
- Mr Barclay destroyed Mr Steer's log sheet and filled in a duplicate document[259] which did not include the comments made by Mr Steer in the log sheet he handed in at the conclusion of the shift.
- Mr Barclay did not say to anyone from management that the log sheet handed in by Mr Steer was coffee stained and illegible.

229 I have concluded that the log sheet incident also provides a valid reason for the termination of Mr Barclay's employment. In my view Mr Barclay destroyed Mr Steer's log sheet in a deliberate effort to conceal the allegation that he had been asleep during the shift.

---

252 Transcript, 19 March 2003 at paras 965-968.

253 Transcript, 19 March 2003 at para 983.

254 Transcript, 19 March 2003 at para 984.

255 Transcript, 19 March 2003 at para 946.

256 Transcript, 20 March 2003 at paras 3754, 3760.

257 Transcript, 21 March 2003 at para 4435.

258 Exhibit R17.

259 Annexure CP2 to Ex R17.

230 I now turn to consider the allegation that Mr Barclay engaged in deceptive conduct.

Deceptive conduct and breach of trust

231 The respondent contended that Mr Barclay lied to management when confronted with allegations regarding sleeping at work. In particular it was put that "he was dishonest, deceptive and lying to management on 25 March, and again at both meetings on 16 July and on 17 July in denying sleeping at all, or since 25 March 2002".[260]

232 In relying on a decision of the South Australian Industrial Commission in *South Australia v Singh-Gill*,[261] the respondent submitted that a lie told to an employer represents a fundamental breach of the duty of good faith owed by the employee to the employer.

233 In my view Mr Barclay has been less than frank in his various conversations with management representatives regarding allegations that he slept during his shift. Other than during the meeting on 17 June, Mr Barclay has never admitted to sleeping on shift. His position was that he didn't sleep at work, and if he did it was during his breaks. In the proceedings before me Mr Barclay said that when he denied sleeping at work he was referring to the particular allegations being put to him (ie when the photograph was taken or the granulator room incident on 11 July 2002) and that he was not making a blanket denial. I reject Mr Barclay's evidence in this regard. In my view Mr Barclay has consistently sought to conceal the fact that he slept whilst at work. His denials to management in this regard have not been qualified by reference to any particular incident, but were general denials.

234 At the meeting on 25 March 2002 Mr Barclay acknowledged that he said words to the effect that he had not been sleeping on the job but if he did sleep it is during his breaks.[262] Mr Barclay conceded that it would have been more open and honest for him to simply admit that he had been sleeping a couple of times a week since December 2000.[263]

235 In relation to the meeting on 17 July 2002 Mr Barclay was taken to the following note in Annexure CW3: "Ray agreed he had slept on the shift previously but since signing the agreement he has not slept during a shift."[264] He agreed that co trary to what he said at the meeting on 17 July his evidence was that he had had a couple of sleeps in the second week of July (prior to the meeting on 17 July).[265]

236 He accepted that what he said to management on 17 July "wasn't strictly correct"[266] and admitted he lied in saying that he hadn't slept on shift since signing the EEO agreement.[267]

237 In my view the significance to be attached to deceptive conduct of the type evident in this case is dependent on all of the circumstances.[268] In some cases

260 Exhibit R22 at p.24.

261 *South Australia v Singh-Gill* [1994] AILR 233.

262 Transcript, 19 March 2003 at paras 1222-1223.

263 Transcript, 19 March 2003 at para 1250.

264 Transcript, 19 March 2003 at para 1338.

265 Transcript, 19 March 2003 at para 1353.

266 Transcript, 19 March 2003 at paras 1354-1355.

267 Transcript, 19 March 2003 at para 1358.

268 See *Woodman v Hoyts Corporation Pty Ltd* (2001) 107 IR 172.

the fact that the applicant has lied might support the conclusion that the termination was not harsh, unjust or unreasonable.[269] In other cases despite the applicant having lied it might be held that there was no valid reason for the termination.[270]

238 In this case — having regard to all the circumstances — I am satisfied that Mr Barclay's deceptive conduct constituted a valid reason for the termination of his employment. I have taken into account the submissions made on behalf of the applicant as to the various extenuating circumstances but I do not find them persuasive. Mr Barclay occupied a position of significant trust and responsibility. It was incumbent on him to be honest in dealing with management in response to allegations that he was sleeping at work. His conduct fell well short of that obligation. Further, his deceptive conduct was not limited to an isolated incident.

239 In conclusion I am satisfied that there was a valid reason for the termination of Mr Barclay's employment, relating to his conduct. Three aspects of Mr Barclay's conduct are relevant in this regard:

- Mr Barclay slept at work despite undertaking to senior management that he would not do so;
- the log sheet incident; and
- Mr Barclay's deceptive conduct in his dealings with management regarding allegations that he was sleeping at work.

240 I should also note that it is not the combination of these matters which constitutes the valid reason. In my view each one standing alone is sufficient to provide a valid reason for termination.

Employee notified of reason and given opportunity to respond

241 Section 170CG(3)(b) requires the Commission to have regard to "whether the employee was notified of that reason". The reference to "that reason" is a reference to the "valid reason" for the employee's termination. In *Crozier v Palazzo Corporation Pty Ltd (t/as Noble Park Storage and Transport)*[271] (*Crozier*) a Full Bench of the Commission considered what was meant by the word "notified" in the context of s 170CG(3)(b). It concluded that it was directed to the giving of notice *prior* to a decision to terminate:

> As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.[272]

242 I have already found that the decision to terminate Mr Barclay's employment

---

269 *McIndoe v BHP Coal Pty Ltd*, PR901846, 2 March 2001 per Giudice J, Williams SDP and Gay C.

270 *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410.

271 *Crozier v Palazzo Corporation Pty Ltd (t/as Noble Park Storage and Transport)* (2000) 98 IR 137. A subsequent application for prerogative writ relief was dismissed, see *Crozier v Australian Industrial Relations Commission* (2001) 50 AILR 4-488.

272 *Crozier* at 151.

was made prior to the meeting on 29 July 2003 (see [131]). It follows that Mr Barclay was not notified of the reason for the termination of his employment prior to the decision to terminate.

243 Section 170CG(3)(c) provides that the Commission must have regard to "whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee". In *Crozier* the Commission decided that the "opportunity to respond" referred to in s 170CG(3)(c) was a reference to any such opportunity which is provided *before* a decision is taken to terminate the employee's employment.

244 No allegations are made in respect of Mr Barclay's performance, they all relate to his conduct.[273]

245 I have already found that the allegations against Mr Barclay were raised with him at the meeting on 17 July 2002 and that he was provided with an opportunity to respond to those issues (see [110]).

246 But I think it is also relevant to note that Mr Barclay was never given any particulars of the allegations against him, either verbally or in writing.[274] Further, Mr Waddell undertook to contact Mr Barclay in the week following the meeting on 17 July 2002 to discuss the course of his investigations to that point and the allegations against him, but he did not call Mr Barclay during the course of his investigation (see [114]).

247 It is agreed that Mr Barclay was not provided with any specifics of the allegations made against him at the meeting on 29 July 2002[275] and Mr Guglielmino could not recall whether he had made any reference to the statutory declarations.[276]

24 Having regard to all of the circumstances I find that Mr Barclay was provided with a limited opportunity to respond to the reason for his termination.

Warnings

249 Where a termination of employment is related to unsatisfactory performance by the employee the Commission must have regard to whether the employee had been warned about that unsatisfactory performance before termination (s 170CG(3)(d)).

250 Section 170CG(3)(d) only arises where the termination of employment was related to unsatisfactory performance by the employee. Where the termination is upon grounds other than unsatisfactory performance s 170CG(3)(d) will not be a relevant consideration.[277]

251 In this case Mr Barclay's employment was terminated because of his conduct, not unsatisfactory performance. Hence s 170CG(3)(d) is not relevant in the circumstances of this case.

252 However, I note here that whether Mr Barclay had been warned in respect of the conduct which led to the termination of his employment is a matter to which I have had regard pursuant to s 170CG(3)(e).

---

273 Transcript, 20 March 2003 at paras 2510-2511.

274 See Ex A1 at para 20.

275 Transcript, 19 March 2003 at paras 619-620; transcript, 25 March 2003 at paras 6943 and 7510.

276 Transcript, 25 March 2003 at paras 6944 and 6962.

277 *Kehagias v Unilever Australia Ltd (t/as Unifoods)*, Print Q0498, 29 April 1998 per Watson SDP, Williams SDP and Larkin C.

Other matters

253 Pursuant to s 170CG(3)(e) I have had regard to the fact that the relevant statutory regime is intended to ensure that "in the consideration of an application in respect of a termination of employment a 'fair go all round' is accorded to both the employer and the employee concerned" (see s 170CA(2)).

254 In *Windsor Smith v Liu*[278] a Full Bench of the Commission said:

> Under the *Workplace Relations Act 1996* the principal question is whether the termination was harsh, unjust or unreasonable. In considering that question the Commission is to ensure that a "fair go all round" is accorded to both the employer and the employee concerned.

255 Having regard to all the circumstances I am not satisfied that Mr Barclay was given "a fair go".

256 In my view the question of whether Mr Barclay was warned that if he slept at work his employment would be at risk, is a relevant consideration.

257 For the reasons given at [60] – [73] of this decision I find that Mr Barclay was *not* warned that if he slept at work his employment would be at risk.

258 While Mr Barclay did not receive a warning in relation to sleeping at work it is apparent that he was told to stop sleeping:

> Mr Levin: So you have admitted now that you were sleeping during the shift up to March and a couple of weeks of July, correct?
>
> Mr Barclay: A couple of occasions in July, yes.
>
> Mr Levin: That other people knew that you were sleeping during those periods of time?
>
> Mr Barclay: Some of them might have known, yes.
>
> Mr Levin: And you remember at least one discussion with Gerd about it?
>
> Mr Barclay: Yes, just the one occasion.
>
> Mr Levin: In late December, November/December 2001?
>
> Mr Barclay: Well, whenever it was, yes.
>
> Mr Levin: And then do you recall with Nick and Carl on 25 March, where you say you stopped sleeping, yes?
>
> Mr Barclay: Mm.
>
> Mr Levin: And then on 3 April, you signed you wouldn't sleep any more, yes?
>
> Mr Barclay: Yes.
>
> Mr Levin: I put it to you that if people were saying you were sleeping, you have admitted you were sleeping at the relevant times, management were calling you into meetings about sleeping, that surely that those meetings were about telling you to stop, correct? That is a fair point, isn't it?
>
> Mr Barclay: A fair point.[279]

259 The evidence shows that the respondent's policy in respect of warnings was not clearly communicated to employees. A number of employees who gave evidence in the proceedings believed that the respondent's general practice, at least in respect of non-managerial employees, was to provide an escalated series of warnings prior to terminating an employee's employment. For example,

278 Print Q3462, 13 July 1998, per Giudice P, Polites SDP and Gay C.

279 Transcript, 20 March 2003 at paras 2525-2531.

Mr Neuman was not aware of any employee being terminated without being given a written warning, but he had only been involved in dismissals of day shift employees.[280]

260 Mr Steer gave evidence as to his belief that all employees at Nylex are entitled to three written warnings prior to termination,[281] but he was unaware of the respondent's procedure for the termination of management staff.[282] This general approach seems to be reflected in a standard form used to record written warnings (see Ex A10).

261 Mr Guglielmino's evidence as to the warning procedure in place at Nylex is also set out at paras 7619-7625 of the transcript. In effect he said that the approach adopted depended on the circumstances. In some instances — of serious misconduct — an employee would be terminated without being given a prior warning.

262 Mr Waddell's evidence is to similar effect. In his evidence he said that there was "no hard and fast rule. It depends on the circumstances".[283]

263 There is also considerable confusion as to whether the warning procedure which a number of the witnesses believed operated in respect of non-managerial employees applied to supervisors such as Mr Barclay.

264 In his evidence Mr Jansons said that the warning procedure in place at Nylex did not differentiate between different levels of employees.[284]

265 Mr Coates' evidence was that the written warning document (Ex A10) is used in respect of all employees including supervisors such as himself.[285]

266 Mr Sawyer said, in effect, that whether a Nylex employee received a written warning prior to termination depended on the severity of the incident.[286]

267 Mr Sawyer also acknowledged that employees at all levels, including supervisors, were issued warnings.[287]

268 However, according to Mrs Pegrum the warning document only applied to factory workers and she had never known it to apply to leading hands, foremen and upwards.[288] But she did not know if the document was used to discipline supervisors.[289]

269 Messrs Guglielmino and Waddell maintained that the warning form was not used in relation to supervisory or management employees.[290]

270 The applicant contended that the respondent had failed to follow its own procedures for dealing with misconduct in terminating Mr Barclay's employment. But in my view it is not at all apparent what those procedures were and the evidence before me is insufficient to substantiate the applicant's contentions as to differential treatment.

---

280 Transcript, 20 March 2003 at paras 3282, 3524, 3539.

281 Transcript, 21 March 2003 at paras 6058-6063.

282 Transcript, 21 March 2003 at para 6075.

283 Transcript, 21 March 2003 at para 4811.

284 Transcript, 21 March 2003 at paras 5212-5213.

285 Transcript, 21 March 2003 at paras 6185-6191.

286 Transcript, 25 March 2003 at paras 6722-6725.

287 Transcript, 25 March 2003 at paras 6726-6727.

288 Transcript, 25 March 2003 at paras 6379-6383.

289 Transcript, 25 March 2003 at paras 6406-6407.

290 Transcript, 25 March 2003 at para 6840.

271 However, I do regard management's failure to clearly articulate its disciplinary procedure as a relevant consideration in the circumstances of this case.

272 I have also had regard to the fact that Mr Barclay's immediate supervisor — Mr Jansons — did not object to Mr Barclay's sleeping provided it was confined to his meal break. Hence to a certain extent Mr Barclay's sleeping at work was condoned by his immediate supervisor. In this context it seems to me that management's tolerance of Mr Barclay's conduct underwent a sharp change over a relatively short period. This change was a consequence of new management being appointed. Mr Jansons dealt with the difference in approach of the "new" and "old" management in the course of his evidence:

> Mr Jansons: You know, these people have to — and you have got to remember we just had new management then and their views are a lot different to the previous management's views. The previous management I would discuss things with them and, you know, and I think this is why they don't want to sort of get in a role like this, right.
>
> Mr Carter: Well, I think we are coming to the heart of it. The new management that you are talking about, who is that, from your point of view?
>
> Mr Jansons: Well, it is the new management that is in there at the moment.
>
> Mr Carter: Well, the names?
>
> Mr Jansons: Well, Colin Waddell is one of them. …
>
> Mr Carter: In what way, from your perspective, having been Mr Barclay's supervisor for 20 years, may the matter have been sorted out under previous management?
>
> Mr Jansons: How would it have been?
>
> Mr Carter: Mm?
>
> Mr Jansons: I would say he probably would have got a first warning.
>
> Mr Carter: At least?
>
> Mr Jansons: Yes. That is only my belief, mind you.[291]

273 In referring to this issue I do not mean to suggest that the new management was not entitled to take a different view of Mr Barclay's conduct; clearly they were so entitled. But the context in which they sought to assert a different approach is important. In particular:

- Mr Barclay's immediate supervisor had condoned sleeping during breaks.
- The EEO agreement incorporated a warning in relation to Mr Steer's conduct but did not include any statement as to the consequences which would flow from a breach of Mr Barclay's undertaking not to sleep at work.
- Mr Barclay was not warned that if he continued to sleep at work his employment would be at risk. It would not have been unreasonable for Mr Barclay to assume that he would have received a warning prior to the termination of his employment. Mr Jansons clearly thought this would be the case and management had failed to clearly articulate its disciplinary procedure.

291 Transcript, 21 March 2003 at paras 5323-5325, 5332-5334.

274 In such circumstances I think it would have been more appropriate to provide Mr Barclay with a final warning, rather than terminating his employment.

275 I have also had regard to the fact that the support given to Mr Barclay by his immediate supervisor and other members of management in responding to the difficulties he was encountering with Mr Steer and others, was inadequate. I think this goes some way to explaining the disingenuous answers given by Mr Barclay to management when asked about sleeping at work. I do not think it excuses Mr Barclay's deceptive conduct but it is a relevant consideration.

276 Against these considerations is the fact that Mr Barclay knew that management viewed the issue of sleeping at work as serious and that he knew he had to stop and had undertaken to do so.

277 The other matters which I regard as relevant and which I have taken into account are:

- Other than in respect of the matters identified in this decision Mr Barclay was a dedicated employee with some 25 years service. In his evidence Mr Waddell conceded that Mr Barclay was "extremely dedicated in terms of him responding to the company's request to work longer shifts".[292]
- Mr Barclay has been financially devastated by the termination of his employment, his health has suffered and he has been prescribed anti-depressant medication.[293]
- Mr Barclay was 60 years of age at the time the decision to terminate his employment was taken, that fact is likely to adversely affect his prospects of finding employment.

Conclusion

278 I have had regard to the matters identified in s 170CG(3) and make the following findings:

- there was a valid reason for the termination of Mr Barclay's employment;
- Mr Barclay was not notified of the reason for the termination of his employment before a decision was taken to terminate his employment; and
- Mr Barclay was provided ith a limited opportunity to respond to the reason for the termination of his employment, before a decision was taken to terminate his employment.

279 On the basis of these findings and having regard to the matters I have identified pursuant to s 170CG(3)(e) and all of the evidence before me I have determined that the termination of Mr Barclay's employment was harsh. In my view, having regard to all of the circumstances, Mr Barclay's conduct warranted a final warning rather than termination.

280 I have found the determination of this matter to be particularly difficult. In other circumstances — and absent the matters I have identified pursuant to s 170CG(3)(e) — conduct of the type engaged in by Mr Barclay would have led me to conclude that termination of employment was *not* harsh, unjust or unreasonable. But there are a number of particular features of this case which render the termination harsh. In particular, Mr Barclay's age, service and the

292 Transcript, 21 March 2003 at para 4879.

293 Exhibit A1 at para 25.

personal consequences of the termination, and the conduct of management in failing to warn Mr Barclay or support him in the performance of his role.

Remedy

281 Section 170CH of the WR Act 1996 deals with the remedies available in the event that the Commission determines that a termination of employment was "harsh, unjust and unreasonable".

282 Two general observations may be made about s 170CH. *First*, the decision to make an order that provides for a remedy is discretionary. It is a discretion which "may" be exercised, but only in the circumstances set out in s 170CH(1). Before an order can be made to provide for a remedy the Commission must have determined, on completion of the arbitration, that the termination in question was "harsh, unjust or unreasonable".

283 *Second*, the Commission must not make an order that provides for a remedy unless it is satisfied, having regard to all the circumstances of the case including the matters set out in s 170CH(2)(a) to (e), that the remedy ordered is appropriate. Section 170CH(2) is couched in mandatory terms. It should be construed as requiring the Commission to take all circumstances into account and in particular to take into account each of the particular circumstances specified in s 170CH(2)(a), (b), (c) and (d), as well as any relevant matter within the scope of s 170CH(2)(e). These matters are to be taken into account as fundamental elements in determining whether to make an order providing for a remedy.[294]

284 I propose to deal with each of the matters identified in s 170CH(2) in turn.

285 Section 170CH(2)(a) requires the Commission to have regard to "the effect of the order on the viability of the employer's undertaking, establishment or service". In this case there was no material (ie submissions or evidence) before the Commission about the impact of any order on the viability of the respondent. In such circumstances there is no need to make findings about this issue. As a Full Bench held in *Thompson v Kingston Kids Pre-School and Childcare Centre*:

> The Commissioner made no specific findings as to the effect of her order on the viability of the respondent s 170CH(7)(a) and made no reference to any other matter thought to be relevant [s 170CH(7)(e)]. This involves no error. Such findings would only be required insofar as the paragraphs are relevant to the factual circumstances of a particular case [*Ellawalla* at [59]].
>
> The effect of an order for compensation on the viability of the respondent business was not the subject of evidence or submissions before the Commissioner. There is no basis on the material before us to suggest that the Commissioner failed to have regard to relevant material in relation to this consideration.[295]

286 Section 170CH(2)(b) requires the Commission to have regard to "the length of the employee's service with the employer". Mr Barclay worked for the respondent for a very long period, about 25 years. The length of Mr Barclay's service favours the granting of a remedy.

287 Section 170CH(2)(c) requires the Commission to have regard to "the remuneration that the employee would have received, or would have been likely

294 *Queensland Medical Laboratory v Blewett* (1988) 16 ALD 440 per Gummow J; *R v Hunt; Ex parte Sean Investments Pty Ltd.* (1979) 180 CLR 322 at 330 per Mason J; *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21.

295 Print S5189, 19 April 2000, per Watson SDP, Williams SDP and Holmes C at [18] – [19].

to receive, if the employee's employment had not been terminated". This paragraph requires an assessment of the applicant's lost remuneration as a result of the termination of his employment.

288 Such assessments are often difficult, but they must be done.[296] As the Full Bench observed in *Sprigg v Paul's Licensed Festival Supermarket*:

> … we acknowledge that there is a speculative element of [sic] involved in all such assessments. We believe it is a necessary step by virtue of the requirement in s 170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law.[297]

289 Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. I refer to this period as the "anticipated period of employment". This amount is then reduced by deducting moneys earned since termination. Only moneys earned during the period from termination until the end of the "anticipated period of employment" are deducted.

290 Mr Barclay's evidence was that he aspired to work for the respondent until retirement.[298] On his evidence his anticipated period of employment would be several years. But Mr Barclay's aspirations are not the only consideration.

291 I think that it is also relevant to have regard to the fact that Mr Barclay never accepted that by sleeping on his breaks he was setting a bad example for his subordinates,[299] indeed that is still his position.[300] Mr Barclay's failure to acknowledge that there was any problem with his conduct in this regard has led me to conclude that had his employment not been terminated at the meeting on 29 July 2002, he would have eventually returned to his past pattern of behaviour and resumed sleeping at work.

292 My view in this regard is supported by Mr Barclay's past conduct. In early April 2002 he gave an undertaking not to sleep at work. At that time he was aware that senior management held the view that it was highly inappropriate for him to be sleeping at work.[301] He knew he had to stop sleeping at work and for a short period of time he did stop. But on 8 and 10 April 2002 Mr Barclay slept in his office for a period of at least 15 minutes. He went on leave on 24 April and returned to work on 1 July 2002. On 11 July 2002 Mr Steer found Mr Barclay asleep in the granulator room. On at least two other occasions in the second week of July Mr Barclay slept whilst at work.

293 Had Mr Barclay been given a final warning at the meeting on 29 July 2002 I think he would have refrained from sleeping for a period (certainly longer than the period referred to in the previous paragraph), but would have eventually returned to his past practices. In all the circumstances I have concluded that it would be reasonable to assume that but for his termination Mr Barclay's employment would only have continued for another eight weeks. Hence the

---

296 See *Ellawala v Australian Postal Corporation*, Print S5109, 17 April 2000 per Ross VP, Williams SDP and Gay C.

297 *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21 at 32.

298 Transcript, 19 March 2003 at para 642.

299 Transcript, 19 March 2003 at paras 1861, 1903; transcript, 20 March 2003 at paras 3848-3850.

300 Transcript, 20 March 2003 at paras 3851-3852.

301 Transcript, 19 March 2003 at para 1199.

remuneration he would have been likely to receive if his employment had not been terminated would have been limited to eight weeks pay plus superannuation.

294 At the time his employment with the respondent was terminated his weekly remuneration was $1,173.81 comprising of an ordinary time wage of $1,086.86 per week and $86.95 in superannuation. Hence Mr Barclay's "lost remuneration" is $9,390.48.

295 Section 170CH(2)(d) requires the Commission to have regard to "the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination". In his witness statement Mr Barclay says:

> I have been looking for full-time employment but it is extremely difficult to find anything suitable at my age. I have an interest in a sandwich shop, R&K's Corporation trading as Bruce Street Takeaway, which I purchased in about September 2000 with my then de facto spouse, Ms Kaye Klarenbeck. I have continued to work part-time in the shop, as I did during the time I was employed by the respondent. We have always employed a number of casual staff to do most of the work. Ms Klarenbeck works part-time in the business as well, and she is also employed full-time by the respondent on a permanent nightshift. The business has never traded profitably to date, mainly because we have a loan to service.[302]

296 Mr Barclay was not cross-examined about this aspect of his evidence. I accept Mr Barclay's evidence in this regard and I am satisfied that he has made a reasonable effort to mitigate his loss.

297 There are no other matters which I consider relevant.

298 Having regard to the matters identified in s 170CH(2), insofar as they are relevant, and to all of the circumstances of this case, I have decided that it is appropriate to make an order providing for a remedy.

299 The remedies available are reinstatement and the payment of an amount in lieu of reinstatement. Each of these is dealt with below. It is apparent from the terms of s 170CH that in determining the question of a remedy the Commission must first consider reinstatement.[303]

300 If the Commission considers it "appropriate" it may make an order requiring the employer to reinstate the employee by:

- reappointing the employee to the position in which the employee was employed immediately before the termination (s 170CH(3)(a)); or
- appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination (s 170CH(3)(b)).

301 Section 170CH(4) provides that if a reinstatement order is made then the Commission may also make orders to maintain the continuity of the employee's employment and to require the employer to pay the employee an amount in respect of the remuneration lost, or likely to have been lost by the employee because of the termination.

302 Mr Barclay seeks reinstatement to his former position or to an equivalent position pursuant to s 170CH(3)(a). He also seeks orders requiring the respondent to pay him an amount equivalent to the remuneration he has lost by

---

302 Exhibit A1 at para 26.

303 *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1; *Re Newtronics Pty Ltd*, Print R4305, 29 April 1999 per Polites SDP, Acton DP and Smith C; *Wark v Melbourne City Toyota* (1999) 89 IR 132 per Williams SDP, Acton SDP and Tolley C.

reason of the termination of this employment and to have his continuity of service maintained. Mr Barclay's written submission advances the following points in support of his claim for reinstatement:

> 55. Reinstatement should not be refused by reason of the vague assertions of Mr Waddell and Mr Guglielmino as to the breakdown of the working relationship: see *Wark v Melbourne City Toyota* (1999) 89 IR 132. And compare, in any event, the evidence of Mr Jansons, Mr Ruecroft, Mr Neumann and Ms Klarenbeck.
>
> 56. Reinstatement is the only just remedy for this harsh, unjust and unreasonable termination …

303 In reply the respondent made two primary submissions in respect of remedy. First, the respondent opposed reinstatement on the following grounds:

- Mr Barclay does not deserve to be reinstated be ause of his deceptive and dishonest conduct and his wilful sleeping during working hours;
- it would polarize the entire workplace and set an example that would tell all other employees that you can just about get away with anything and still get your job back if the company doesn't follow the perfect procedural steps in your dismissal; and
- there has been a clear and irreconcilable loss of trust and confidence between the company and Mr Barclay.

304 Second, the respondent argued that no amount should be ordered in lieu of reinstatement or, in the alternative, any such amount should be "extremely low". The respondent submitted that such an outcome was necessary so that Mr Barclay would not be seen to have been rewarded for his deceptive and dishonest conduct, and his longstanding unlawful sleeping. The respondent also urged the Commission to have regard to the termination payments the company made to Mr Barclay.

305 In my view the question of whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate. It is one factor to be taken into account but it is not necessarily conclusive.[304]

306 In *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 the Full Court of the Industrial Relations Court said:

> … we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.
>
> At the same time it must be recognised that, where an employer, or a senior officer of an employer, accuses an employee of wrongdoing justifying the summary termination of the employee's employment, the accuser will often be reluctant to shift from the view that such wrongdoing has occurred, irrespective of the Court's finding on that question in the resolution of an application under Division 3 of Part VIA of the Act.
>
> If the Court were to adopt a general attitude that such a reluctance destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement impracticable, an employee who was terminated after an accusation of wrongdoing but later succeeded in an application under the Division would be denied access to the primary remedy provided by the legislation. Compensation, which is subject to a statutory limit, would be the only available remedy.

304 *McLauchlan* at 17.

> Consequently, it is important that the Court carefully scrutinise any claim by an employer that reinstatement is impracticable because of loss of confidence in the employee.
>
> Each case must be decided on its own merits.[305]

307 While *Perkins* was decided under the former statutory scheme the above observations remain relevant to the question of whether reinstatement is *appropriate* in a particular case.[306]

308 The respondent's witnesses generally opposed reinstatement. When asked about the appropriateness of reinstatement Mr Waddell said:

> I would be very unhappy about that. I wouldn't like to have Ray back on the site. From the investigation that we have done and the hearing I believe that Ray has lied and I would have a lot of difficulty in trusting him. He has his fellow workers, Jack, for example, who is giving evidence against him, they would find it very difficult to work together and I really think that the site would be worse off with him there.[307]

309 Mr Guglielmino expressed similar sentiments.[308] Mr Siakallis said "… after we came to this point. I don't think we would be able to run the shift".[309] Mrs Pegrum said that Mr Barclay's reinstatement would cause "a lot of discontent".[310] Mr Sawyer, a supervisor on the nightshift, said that there would be difficulties if Mr Barclay was reinstated:[311] "I just don't think anybody could work with him really after everything that's gone on."[312]

310 The only management witness not opposed to Mr Barclay's reinstatement was Mr Jansons. This issue was canvassed with Mr Jansons in his cross-examination:

> Mr Carter: Do you understand his application in this matter is for this Commission to order that he be reinstated to the workforce?
>
> Mr Jansons: I believe so, yes.
>
> Mr Carter: If that is the ultimate order do you foresee yourself having any difficulty in once again working co-operatively with Ray?
>
> Mr Jansons: I am not in that area any more, I have been relocated.
>
> Mr Carter: All right. Well, it is perhaps hypothetical then but you wouldn't have any difficulty with?
>
> Mr Jansons: I personally wouldn't.[313]

311 While Ms Klarenbeck and Messrs Ruecroft and Neuman were not asked about the appropriateness of reinstatement I accept that from the general character of their evidence they would support Mr Barclay's reinstatement.

312 I agree with the applicant's contention that the mere assertion by an employer that a working relationship has broken down does not justify a refusal of

---

305 *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191-192.

306 *McLauchlan* at 18.

307 Transcript, 21 March 2003 at para 4094; see also paras 4891-4893.

308 Transcript, 25 March 2003 at paras 6877-6879; 7629-7638.

309 Transcript, 21 March 2003 at para 5609.

310 Transcript, 25 March 2003 at para 6390.

311 Transcript, 25 March 2003 at para 6584.

312 Transcript, 25 March 2003 at para 6585.

313 Transcript, 21 March 2003 at paras 5231-5233.

reinstatement.[314] But this is not a case of mere assertion. In this case Mr Barclay slept at work despite undertaking to senior management that he would not do so. Further, at the meeting on 17 July 2002 he told management representatives that since signing the EEO agreement he had not slept during a shift. Mr Barclay accepted that this statement "wasn't strictly correct" and that he had lied to management.

313 It also needs to be borne in mind that Mr Barclay was the senior employee on the nightshift, a position of significant trust and responsibility.

314 In all the circumstances I am satisfied that reinstatement is not appropriate in this case.

315 Section 170CH(6)provides that if the Commission thinks that reinstatement is inappropriate it may, if it considers it appropriate in all the circumstances of the case, make an order requiring the employer to pay the employee an amount in lieu of reinstatement. In determining an amount for the purposes of an order under s 170CH(6) the terms of s 170CH(7) are relevant, it states:

> (7) Subject to subsection (8), in determining an amount for the purposes of an order under subsection (6), the Commission must have regard to all the circumstances of the case including:
> (a) the effect of the order on the viability of the employer's undertaking, establishment or service; and
> (b) the length of the employee's service with the employer; and
> (c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and
> (d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and
> (e) any other matter that the Commission considers relevant.

316 I propose to deal with each of the matters in s 170CH(7) briefly:

- there is no material before me which leads me to think that the order I propose to make will affect the viability of the respondent's undertaking;
- Mr Barclay was employed for about 25 years and I have taken his lengthy service into account;
- given the circumstances which led to the termination of his employment and the fact the remuneration Mr Barclay would have been likely to receive if his employment had not been terminated would have been limited to eight weeks pay plus superannuation; and
- I am satisfied that Mr Barclay made a reasonable effort to mitigate his loss.

317 Having regard to all of the circumstances of this case, including the matters particularised in s 170CH(7)(a) to (d), I have decided to make an order requiring Nylex Corporation Pty Ltd to pay Mr Barclay $9,390.48 less applicable tax. I do not consider it appropriate to make any discount for contingencies. Further, Mr Barclay did not earn any monies in the eight weeks immediately following the termination of his employment hence there is no deduction for moneys earned since his termination. I note that Mr Barclay is the part owner of a sandwich shop business. The business is running at a loss[315] and

314 *Wark v Melbourne City Toyota* (1999) 89 IR 132 at 137.

315 Transcript, 19 March 2003 at para 645.

he is not paid a salary from the business.[316] In determining the amount specified I have regard to the payments made to Mr Barclay consequent on the termination of his employment.

(PR932226.)

ANDREW EDGAR

316 Transcript, 19 March 2003 at para 646.