TRANSCRIPT OF PROCEEDINGS
*Fair Work Act 2009*

**VICE PRESIDENT ASBURY**
**DEPUTY PRESIDENT BEAUMONT**
**DEPUTY PRESIDENT ROBERTS**

**C2023/8091**

**s.604 - Appeal of decisions**

**Appeal by Sydney Trains**
**(C2023/8091)**

**Sydney**

**10.00 AM, TUESDAY, 12 MARCH 2024**

PN1

VICE PRESIDENT ASBURY: Good morning. Can we take appearances, please.

PN2

MR J DARAMS: May it please the Commission, my name is Darams, initial J. If permission hasn't been granted, I would seek permission to appear on behalf of the appellant, Sydney Trains.

PN3

VICE PRESIDENT ASBURY: Thank you.

PN4

MR L SAUNDERS: May it please the Commission, Saunders, initial L. I seek permission to appear for the appeal respondent.

PN5

VICE PRESIDENT ASBURY: Thank you. I don't think there is any issue with permission given the matter will involve some complexity, so permission for both parties to be legally represented is granted to the extent it's necessary. Thank you.

PN6

MR DARAMS: May it please.

PN7

VICE PRESIDENT ASBURY: Mr Darams.

PN8

MR DARAMS: Thank you, your Honour. As the Full Bench will no doubt have appreciated, in the decision below the Deputy President found that my client, the appellant, had a valid reason to dismiss the respondent arising from what I might say broadly stated was his breach of its drug and alcohol policy.

PN9

The Deputy President also found that the appellant below had complied with both section 387(b) and section 387(c) - a matter I will come back to later in the submissions today, a matter of some importance - and that the factors in section 387(b) through (g) were either not relevant or, to the extent that they were relevant, they were neutral, if I could use that terminology, in the overall consideration.

PN10

What the Deputy President did find was that he had identified a number of matters which he said were relevant to his consideration under section 387(h) and based upon those matters, and his findings in relation to those matters, found that the dismissal was in the circumstances unfair. It is in this appeal that my client seeks to challenge a number of those matters that were relied upon by the Deputy President.

PN11

What I propose to do today is to deal with the appeal grounds in three groups. I will deal with appeal grounds 1, 2 and 3 together, appeal ground 4 separately and

then appeal ground 5 together with appeal ground 6. The Full Bench probably realises it is, in effect, a catch-all; that if one or more of the other appeal grounds are made out, then the overall decision we would submit is in error.

PN12

Could I just briefly identify in the decision - the Full Bench is probably aware of all this, but in paragraphs 1 through 11 of the decision the Deputy President provided some background information about the issue at hand, then in paragraphs 12 through 63, the Deputy President sets out some of the evidence of both parties, including the evidence that was given under cross-examination.

PN13

Could I just observe at this stage that if one looks at the recitation of the factual matters, there isn't any findings one way or the other where the Deputy President has said that he prefers the evidence of one witness over another or he has made any credit findings or the like. That's a matter that I will come back to later in my submissions, but, in effect, what the Deputy President does is just set out the evidence of the parties.

PN14

Then, in paragraphs 64 through 79, the Deputy President sets out the parties' respective submissions that were made below. From paragraph 80 onwards, the Deputy President sets out some consideration principally in the first part of the Full Bench decisions in Toms, Sharp and Hilder. He does that in paragraphs 80 to 94. I will come back during the day to some of those matters, but could I now go to the appeal grounds. As we indicated, I'll deal with appeal grounds 1, 2 and 3 together.

PN15

Very broadly stated, these deal with the issues relating to the identification of the risk that the respondent was impaired when he attended for work arising from his use of cocaine in the period before 4 June 2022, when he underwent the random test at work. In dealing with these appeal grounds, could I now ask the Full Bench to go to paragraph 136 of the decision. This is at appeal book page 42. The Full Bench will see at paragraph 136 the matters that the Deputy President identified or said he considered to be relevant. You will see from 136(c):

PN16

*The absence of any risk that Mr Goodsell was impaired when he attended work in the circumstances.*

PN17

Could I then ask the Full Bench to go to paragraph 141. I just ask the Full Bench to consider this paragraph. This is the part of the decision where the issue of the risk of impairment was analysed. It's not entirely the extent of the consideration, which I'll come to in a moment, but it's where it's analysed under this section 387(h) reason.

PN18

In terms of 141, on this appeal the appellant doesn't take issue with what is set out there. We accept those propositions, but what we submit about that is that those decisions, and understanding those decisions, gives the following propositions. The reasonableness of a policy - a workplace policy - depends upon a number of factors. One, there is a risk that an employee might attend impaired by drugs. Secondly, a difficulty in identifying and proving that impairment. Thirdly, the risk of impairment cannot be eliminated.

PN19

I will come back in these submissions to identify why we say that is important in the particular findings of the Deputy President that are challenged, but, in my respectful submission, the Bench should have full regard to the reasoning of those Full Bench decisions in that respect. Then could I draw your attention to paragraph 142 just to give it some context. Here the Deputy President sets out:

PN20

*As I have considered in more detail above, I am not satisfied that there was any risk* -

PN21

and just pausing there, the finding is a lack of risk -

PN22

*that Mr Goodsell attended work on 4 June 2022 impaired by cocaine* -

PN23

and then he refers back to paragraphs 100 to 109, then he also says -

PN24

*and also paragraphs 110 to 118 regarding the actual risk of impairment in ... circumstances.*

PN25

Could I then just identify paragraph 145 because this is, in effect, the finding that is relied upon in the section 387(h) circumstances where he has found:

PN26

*The absence of a risk of impairment* -

PN27

again it's this consideration of risk of impairment that the Deputy President has fixed on -

PN28

*supports the conclusion that his dismissal was harsh, unjust and unreasonable.*

PN29

The point we make about that is that it's clear that that finding is significant in the terms of the consideration of whether the dismissal was otherwise harsh, unjust or unreasonable. If we go to the circumstances which are the particular paragraphs that are challenged, and if I could ask the Full Bench to go to paragraph 115. In 115, the Deputy President makes these findings and in the first sentence he says:

PN30

*To be clear, by the reasoning in Toms, Sharp and Hilder, Sydney Trains does not have to prove that Mr Goodsell was in fact impaired when he attended work.*

PN31

We accept that. We say that does follow or flow from those decisions, properly understood. The second sentence is also accurate, we would embrace that:

PN32

*Those decisions recognise the inherent difficulty for employers in testing for or otherwise proving impairment.*

PN33

The third sentence, however, we say is wrong and doesn't come from any of those decisions, nor in our research any other decision of the Commission. As we have indicated before, we say this is a factor that was relied upon by the Deputy President under the section 387(h) reasoning.

PN34

VICE PRESIDENT ASBURY: Is there an argument that that is a broad statement similar to the Full Bench, for example, in Toms, whereby it's just a statement to the effect that in the event that there is an incident such as there was in Toms, the risk is that the employer will be in a position where it has to - it's not only dealing with the incident that occurred, which in that case was significant, it's also dealing with an argument about testing that it has done on the particular employee involved and whether there was any argument even that that person was impaired. Is that the kind of risk that's being discussed there?

PN35

MR DARAMS: The proper answer to that is possibly. You can't tell from the decision whether or not in fact that is what the Deputy President had in his mind. Could I answer the question this way: it seems obvious that the Deputy President is extracting something from those decisions. That's clear by the first two sentences. The third sentence that 'the employer must', that's an obligation that -

PN36

*the employer must establish that there was a risk that ... impaired at work.*

PN37

In my submission, it doesn't come from any one of those decisions. Answering the question more directly, it's possible, but it seems unlikely in this circumstance.

PN38

VICE PRESIDENT ASBURY: Well, does it implicitly come from those decisions, because Toms - again, the Full Bench said the passage that's often quoted that, you know, Sydney Ferries did not - or Harbour Ferries, whatever they were called, did not need to have a discussion with the media, with anybody, about whether Mr Toms was impaired. That was the risk.

PN39

MR DARAMS: Sure.

PN40

VICE PRESIDENT ASBURY: If you're working in a pie shop, for example, and you get randomly tested, it's probably not going to be an issue, but if you're driving a ferry into a pier and you're tested afterwards and there is some substance, you know, the risk is the employer is going to be arguing about that and being implicated for not managing its workplace to avoid people with any trace of any substance in their blood or their system.

PN41

MR DARAMS: I accept that's certainly an observation of the Full Bench in Toms, that when looking at the reasonability of drug and alcohol policies, what the Full Bench observed is that what the - I think the wording in Toms was, 'What the employer wants is compliance with the policy.' It doesn't want to have to have debates later on from the uninformed that centre about whether or not in Toms, for instance, the accident occurred because someone was impaired or not.

PN42

Hilder and Sharp weren't of that same position, in my respectful submission. They weren't delving into the proposition as to whether or not there was an accident or possible accident, so, in my submission, that sentence there is not explicable based upon Toms. What it does, in my submission, it creates an obligation, in effect - almost an impossible obligation - for an employer to comply with, particularly in the context of what we currently know and what's accepted by Toms, Sharp and Hilder about the lack of current tests for impairment; that's the first thing.

PN43

The second thing - and this is a slightly different point, but it's a point that we do make in our submissions - it must be implicit in the finding that the drug and alcohol policy in this case was fair and reasonable, and I'll come to the paragraphs in a moment. It must be implicit in that finding of the Deputy President that he accepted that there must have been a risk of impairment, because the policy is not fair and reasonable unless there is a risk arising from the previous use of the drug which cannot be eliminated.

PN44

It's a rather circular argument, but we use the findings that the policy was fair and reasonable - that is, there was a valid reason - to support the proposition that in fact there was a risk. So, it's a slightly different aspect to it and I'm moving to a slightly different point on this ground of appeal. The first point is those cases don't support that proposition.

PN45

If there was an obligation on an employer - which we don't accept - then necessarily it's complied with or met through a finding that the policy that was imposed was fair and reasonable because the fair and reasonability of these policies depend upon a finding or an acceptance that there is a risk arising from the past use, and that that risk of impairment can't be removed. That's the point.

PN46

Just on that last aspect, could I just ask the Full Bench to go to paragraphs 121 and 122. Paragraphs 121 and 122 are the findings about valid reason. Again, the appellant doesn't cavil with what the Deputy President sets out in paragraph 121. Then, in paragraph 122, again obviously the appellant accepts them, but it reflected the evidence.

PN47

VICE PRESIDENT ASBURY: On your argument do you accept the last sentence in 122?

PN48

MR DARAMS: Sorry, I was just getting to that proposition.

PN49

VICE PRESIDENT ASBURY: Sorry.

PN50

MR DARAMS: Yes. So the first sentence is accepted. That was the evidence and I don't think there's any issue to cavil with there. Then it says:

PN51

*In this context, Sydney Trains' policies can impose on conduct outside of the workplace if that conduct -*

PN52

can I just pause here, if it -

PN53

*compromises safety in the workplace - the most obvious example being the consumption of drugs or alcohol ... that causes an employee to attend work impaired.*

PN54

Now, it's a little troubling, that statement there. When I say 'troubling', our submission about Toms, Sharp and Hilder is that none of those decisions support the proposition that one has to establish - again, I'm repeating a little bit. You don't have to establish that an employee was impaired at work because of the, can I say, problems or issues with establishing that from the perspective of an employer.

PN55

What we draw out of 122 that is important, however, is the proposition that the Deputy President has found the drug and alcohol policy and a breach of it gave rise to a valid reason, but it's implicit in that that there was a risk arising from the use that couldn't be eliminated. That's the point that, in our submission, seems to have been lost on the Deputy President in terms of the finding that he came to that my client was required to establish that there was a risk of impairment arising from the use.

PN56

Also in relation to those paragraphs of the decision - and again this is the last point I just wanted to reinforce in relation to our assessment of Hilder, Toms and Sharp - if we go to paragraph 100, you can see here the consideration of the Deputy President where he puts it under the heading 'Consideration: connection to risk of impairment'. Paragraph 100 is correct, that is as a statement of fact. None of the experts said that the testing established an impairment. In fact both of the experts were quite clear in their evidence in that respect.

PN57

Then I just want to skip over the next paragraphs. Not because there is anything detrimental to my client, but a point that I wanted to draw to the attention is paragraphs 104 and 105. Again, this really encapsulates the point that I've been making orally where the Deputy President says:

PN58

*In workplaces the fundamental link between consumption of alcohol or drugs out-of-hours and the employer's testing regime is the risk that the employee might be impaired when they attend for work. The conduct that breaches these kinds of policies is the attendance at work and testing positive to certain substances. In a safety critical environment the testing regime authorised by the policy is a fair and reasonable measure to address this risk.*

PN59

Now, the risk that he is talking about is the risk of attendance at work impaired. Then the Deputy President goes on in 105 and says:

PN60

*As can be seen from Toms, Sharp and Hilder, policies that rely on testing may be lawful and reasonable when the employer is -*

PN61

so just breaking this down -

PN62

*not otherwise able to assess whether employees are impaired by drugs or alcohol when they attend the workplace.*

PN63

So it's an acceptance that in this circumstance an employee can't test for impairment. Then he says:

PN64

*Testing for use rather than impairment is a blunt instrument, however, as the authorities say, may nonetheless be fair and reasonable if there is not an effective way to test for impairment.*

PN65

Now, the submission we made before is that - and we accept 104 and 105. That's an accurate statement of Toms, Hilder and Sharp, in our submission, or the principles derived from those authorities, but because the Deputy President has accepted there was a valid reason, that necessarily comes with the finding that the

policy was fair and reasonable, and it was fair and reasonable in these circumstances.

PN66

Dotting the i's and crossing the t's to the last bit of the submission is that there must have been a risk of impairment on attending for work in circumstances where the respondent returned a test that didn't comply with - when I say 'didn't comply', it didn't comply with the drug and alcohol policy in the circumstances because of those findings. Could I now go back to paragraph 117. When I say 'go back', can I please ask the Full Bench to go to that paragraph. In this paragraph the Deputy President says:

PN67

> *In Mr Goodsell's particular circumstances there is no proper basis upon which I could find that there was a risk that Mr Goodsell attended work on 4 June 2022 under any impairment arising from his consumption of cocaine during approved leave.*

PN68

Just a couple of observations that I make about that finding. The first is that it's a finding that there was no proper basis; that is, there was no evidence before the Deputy President. That's the first proposition. The second thing is couldn't find that there was a risk. Again it's not talking about actual impairment, it's talking about the risk of impairment.

PN69

In our submission, that doesn't sit comfortably in the circumstances where the Deputy President has found a lawful and reasonable policy, a reasonable policy, a policy being reasonable in circumstances where implicit in that finding is a risk that cannot be eliminated. By virtue of that fact, in our submission, that finding cannot stand. That's the first submission we make about that.

PN70

The second is directed more specifically to the actual evidence before the Deputy President. Now, as I indicated before, at the outset the Deputy President in setting out the evidence of the parties, he didn't make any findings that one witness was to be preferred over another witness, particularly in relation to the experts. But, in our submission, as we've set out in more detail but more specifically in paragraphs 15 and 16 of the written submissions, there was evidence before the Deputy President that not only could, but did, establish that there was a risk of impairment when the respondent attended for work on 4 June 2022.

PN71

I think it's put against us that this is a factual finding and some caution should be applied by the Full Bench in assessing those findings. I think the authority relied upon by my learned friend is - I'm going to butcher it, but Blagojevic. In our submission, if I need to deal with it in more detail in reply, I will, but the point I wanted to say it that the caution is about findings based upon credit or assessments of credit.

PN72

These findings, in my respectful submission, aren't based upon the credit of any witness and that comes from - well, perhaps I'll take the Full Bench - does the Full Bench have the appellant's list of authorities?

PN73

VICE PRESIDENT ASBURY: Yes.

PN74

MR DARAMS: It's the authority second on the list. I'll just call it AGL Macquarie Pty Ltd. The extract of the Full Bench decision relied upon is paragraph 48. When I say 'relied upon', this is relied upon by the respondent. The context for that finding in paragraph 48 - do the Members have paragraph 48?

PN75

VICE PRESIDENT ASBURY: Yes.

PN76

MR DARAMS: The context of that is what is set out in paragraph 47. My learned friend says 46, but then in 47:

PN77

> *More recently, in Short v Ambulance Victoria, the Full Court of the Federal Court summarised the principles to be applied by an appellate court or tribunal when considering challenges on appeal to findings of fact made at trial -*

PN78

so findings of fact made at trial where those findings rested on the assessments of credibility. The appellant restraint is about those findings based upon credibility. If I could just make that point good, better or supported by the High Court in *Lee v Lee*(?). That is in the authorities of the appellant. It's a tab 5, paragraph 55. I won't read it, but I just draw to the Full Bench's attention paragraph 55 which we say again supports the proposition that a *Fox v Percy* line of authority is directed to those findings based upon the credit or assessments of credit of witnesses.

PN79

We don't actually accept that the impugned finding here was a credit based finding in any event. It's a, should I say, blunt finding that there was no proper basis upon which to find that there was a risk. In our submission, not only was there a proper basis in the evidence - and I think that evidence wasn't rejected. As I said before, some of the evidence is referred in paragraphs 15 and 16 in the footnotes, giving effect to the footnotes in those paragraphs to the actual evidence itself - but that evidence actually supported the risk of impairment when attending on 4 June 2022.

PN80

Could I also just add at this juncture - and I might come back to this when I move to appeal ground 4. I've almost finished appeal grounds 1, 2 and 3 - there is another inherent risk when an employer is dealing with the circumstances of an employee who returns a test which results in them breaching a drug and alcohol

policy. This is a matter that is touched upon by the Full Bench in Sharp, but it's this risk about the truthfulness or otherwise of the explanation given by an employee.

PN81

What I mean by that is that there would be, as a matter of human nature, a concern or a risk that an employee would want to protect themselves as much as possible by giving as much, can I say, time between when they say they have engaged in the conduct and the testing. In this case here the evidence of the respondent was that it was some three and a half days before the test that he consumed the cocaine.

PN82

An employer, particularly at the stage of dealing with those allegations, has no real way of testing that veracity at all. All they can do, and the best position they are in, is to make an assessment as to what they are being told by the employee, but there is a risk inherent in what the employee tells them that that's not true, so, therefore, the risk of the timing between taking the drug or the alcohol and the testing again would be a matter of, I think in this evidence, supported by the evidence. A risk that that's not true and, therefore, a risk that taking the drug occurred closer in time to the test and, therefore, increasing the risk of impairment.

PN83

Now, the reason I have raised that as a risk which is necessarily implicit is because Professor Weatherby - and we set his extract out in our written submissions, if you go to paragraph 15 of our written submissions. In paragraph 15 we set out an extract of what Professor Weatherby's evidence was, but he was giving some evidence about the reading that was returned. What Professor Weatherby said is that, 'Look, what I was told' - I'm paraphrasing, but it's an accurate paraphrase. What Professor Weatherby was told was that the respondent took the drug some three and a half days before the test.

PN84

Professor Weatherby said, 'Look, that's consistent with that explanation', but he says, 'You can't tell whether it was - the result here could have been one day, two days, three days beforehand.' So that, in our submission, is another risk that was present in the circumstances of the case and should have, in my respectful submission, led to the Deputy President finding that in fact there was a proper basis in the evidence.

PN85

Secondly - again this is all risk - what Dr Lewis said in his evidence - again not rejected, but he said that an impairment from the use of cocaine could be experienced by an individual anywhere between two and four days after they had used the cocaine. We give the citation in paragraph 16 and what he has referred to is with the withdrawal effects. Again, one doesn't have any ability to test with any certainty whether or not someone is impaired three days later or four days later or two days later, but it's a risk that they are that can't be removed.

PN86

In our submission, there certainly was evidence before the Deputy President - not evidence that could be said to be based upon the assessments of credibility - which, in our submission, demonstrates that the finding in paragraph 117 is erroneous. Just bear with me. Subject to any questions, I think that's all I wanted to draw the Full Bench's attention to orally.

PN87

Sorry, there is one further extract of Professor Weatherby's which we haven't referred to in our submission. Could I ask the Full Bench to go to page 1351 of the court book.

PN88

VICE PRESIDENT ASBURY: The appeal book?

PN89

MR DARAMS: Sorry, did I say court book?

PN90

VICE PRESIDENT ASBURY: Yes.

PN91

MR DARAMS: I apologise.

PN92

VICE PRESIDENT ASBURY: If there is a court book - - -

PN93

MR DARAMS: Sorry, there is - no, I apologise. The appeal book.

PN94

VICE PRESIDENT ASBURY: Okay. 1351?

PN95

MR DARAMS: Yes. Do you have the - it's the extract of the transcript.

PN96

VICE PRESIDENT ASBURY: Yes.

PN97

MR DARAMS: PN219. We have referred to this extract in our submissions as being relevant to this particular question. Then in PN220:

PN98

*So the question I was really putting to you is that whether someone is still suffering the effects of the impairments on the previous use that's not picked up by the standard testing; correct?---No, because it's not picking up cocaine because it's not looked for. It's only picking up the inactive -*

PN99

and then over in PN221:

PN100

*In terms of some of the things you've talked about that could be experienced one or two days later that could be experienced -*

PN101

that's a bad question -

PN102

*more than two to three - or one two days later and it would depend upon the individual's makeup -*

PN103

he said:

PN104

*It's unlikely to be more than one or two days.*

PN105

Again, this is this differences in how long someone might experience the effects after taking the drug. The reason we say that's relevant is because, you know, if the veracity of someone's explanation to an employer at the time they're investigating these matters - the veracity of explanation will impact upon that. If an employee says, 'Well, I took it three and a half days ago', one might be inclined to think, 'Well, there are no risks that you're impaired at that stage', but if the employee is not being truthful and they took it a day or a day and a half before, you're now squarely into this territory - even on best case scenario the respondent's expert was one to two days, on the appellant's expert it could be two to four days.

PN106

Again, it's this whole variability in the experiences of individuals that cannot be eliminated that, in our submission, gave rise to the factual basis upon which there could have been a risk that is contrary to that finding in paragraph 117. That is all I wanted to say on grounds 1, 2 and 3 before moving on to ground 4. If I can move now to appeal ground 4. Could I ask the Full Bench to go to paragraph 146 of the decision. It's page 44 of the appeal book.

PN107

Just orientating the Full Bench to this part of the decision where the Deputy President is considering submissions and analysis as to, I guess, the decision-making process of the appellant. Could I ask the Full Bench to have a look at paragraph 147. Pausing over the - with respect to the Deputy President - gratuitous comment about the appellant, the first sentence, the Deputy President notes:

PN108

*As stated above, Mr Bugeja's evidence is the closest Sydney Trains comes to evidence from the decision-maker.*

PN109

Then he says this:

PN110

*At least when he gave his evidence Mr Bugeja was honest enough to say his default position is that anyone who tests positive for drugs is likely to be terminated. For completeness -*

PN111

so when I say 'completeness', he is just properly identifying that in fact it wasn't a statement that everyone would be terminated -

PN112

*in the absence of any compelling evidence to persuade me otherwise, my view is that their employment should be terminated, irrespective of their length of service.*

PN113

Just pausing for a moment, I just observe to the extent that we're talking about credit findings in this decision, that seems to be the only finding in the decision that is based upon credit. It's an assessment of the honesty of Mr Bugeja as a witness. I don't make that submission flippantly, because part of our challenge on appeal in ground 4 is the criticisms of my client and the evidence that Mr Bugeja gave before the Commission. As I say here, this is an express finding of his honesty or credibility and there's no subsequent finding that he isn't a credible witness.

PN114

The consideration of these matters continues over and then can I ask you to go to paragraph 156, and I'll come back to this paragraph in a moment. I will come back to 156 in a moment, but I just want to pause here and observe these matters about 156. The Deputy President says this:

PN115

*In his evidence in the proceedings Mr Bugeja described his reasoning for recommending that Mr Goodsell be dismissed.*

PN116

Now, that needs to be approached with some caution and I'll come to the evidence in a moment. He said:

PN117

*He referred to four particular matters that a reasonable person would regard as points in Mr Goodsell's favour. However Mr Bugeja found a way to see each point as a positive reason to dismiss Mr Goodsell. Mr Bugeja's view was -*

PN118

and he sets out those matters there. We take issue with those matters there and I will come to the evidence in a moment, but the critical finding challenged is in paragraph 158. This is almost the culminating finding. The Deputy President says:

PN119

*I am satisfied that Sydney Trains' approach to Mr Goodsell's breach of the D&A Policy was procedurally unfair. Even though Mr Goodsell was given the opportunity to provide a response to the breach -*

PN120

he says here -

PN121

*there is no evidence at all to suggests that anyone involved in the process fairly considered the Applicant's response or was open to the possibility that Mr Goodsell could remain in employment.*

PN122

Two points from that. Firstly, there was someone involved and quite significantly involved in the process who gave evidence; that is Mr Bugeja. Secondly, Mr Bugeja - and I'll go to this sentence in a moment - gave evidence about his consideration of the mitigating factors that the respondent put forward in what I call the investigation stage of the process.

PN123

Could I go to Mr Bugeja's evidence and it starts at appeal book page 242. Just before I do that and so it's clear, the first point we make is to the extent there's a finding that no one involved in the process gave evidence, that's just wrong; Mr Bugeja did. Could I then I ask the Full Bench to go to paragraph 29, which is at appeal book page 248. You see here what Mr Bugeja's evidence was, he sets out in paragraph 29 - he says:

PN124

*At Sydney Trains we work through a DRP process that enables an employee to provide information which they would like to be taken into account before a final decision about their employment is made.*

PN125

He says:

PN126

*Before we follow a DRP, I ensure that I read my material that has been provided by the employee in response to the preliminary decision that has been made about the employment, as this is my practice. I would have done this when sitting on the final DRP. When Mr Goodsell's matter was considered, in preparing this statement I revisited the decision Mr Goodsell made -*

PN127

and he sets out - just to orient the Full Bench, PB10 is at appeal book page 384. One will see, if one goes there in consideration, that there are just some short points that the respondent referred to and these are the points addressed by Mr Bugeja in his evidence. Then he says:

PN128

*I make the following comments about the matters raised by Mr Goodsell in that document being what I'll call to be my thoughts on those matters at the time.*

PN129

Then he sets out his consideration of those matters at the particular time. Now, the point we make about that - and we've done this in the written submissions, but just dealing with the first point, the Deputy President criticises really the assessment process that Mr Bugeja went through, but the first point is that it's clear that Mr Bugeja considered that explanation. He has given some reasons why he didn't find in the circumstances that to be a - or why it counted against him rather than for me. We have said this in the written submissions.

PN130

That proposition, that is the long period of service, actually has been relied upon in other decision of the Commission as, if I can use the vernacular here, counting against the employee, so to the proposition that it wasn't fairly considered, in our submission, that can't hold on the evidence. The fact that you might have come to a different decision doesn't mean that a decision-maker hasn't fairly considered the explanation that has been given to them. It's clear it was considered and when I say it's clear it was considered, that's the evidence of Mr Bugeja.

PN131

None of this was put to him in cross-examination. When I say 'none of this', there's one point I will come to in a moment that was put to him, but it was never put to him in cross-examination that this factor here wasn't taken into account or that his evidence here was wrong and that he's not being truthful about that there. That was never put to him in cross-examination.

PN132

Then if we move to (b), again one needs to see or consider the evidence in its totality as to what Mr Bugeja was saying here. I just pause, the Deputy President in his decision says in relation to 29(b) that again this was a factor that counted against the respondent and, in our submission, that's not accurate or correct. Again, what Mr Bugeja is doing is he is explaining this question or this issue of impairment and he's setting out what he understood to be the case under the applicable policy. Again, it's correct, the policy didn't require someone - to be established that they were impaired. Then he says:

PN133

*My understanding was that the policy required employees to return test results in accordance with the applicable Australian Standards.*

PN134

Again, that's accurate.

PN135

*In Mr Goodsell's case he returned a positive test which was not in accordance with the Australian Standards because an illicit drug was present in his sample above the cut-off limits for that drug. I was of the view that he had breached the drug and alcohol policy and code of conduct.*

PN136

Just on that last sentence, as a matter of fact that's right and found ultimately by the Deputy President. What seems to have been the criticism of Mr Bugeja is this

proposition that the respondent had illicit drugs in his system. Now, what Mr Bugeja's evidence is, it was about the Standard and the applicability of the Standard. Can I take the Full Bench to the Standard and to argue that his finding or his explanation there is completely consistent with what the Standard talks about in terms of drugs in the circumstances. Could I just ask the Full Bench to go to page 394 of the appeal book. Does everyone have the Standard?

PN137

VICE PRESIDENT ASBURY: Yes.

PN138

MR DARAMS: Could I next go to page 405 and just identify clause 1.1, the Scope. Then just to pick up the last sentence:

PN139

*The procedures are intended for but not limited to medico-legal, workplace, correctional services or court directed testing of any or all of the following classes of drugs -*

PN140

and then you can see in (c):

PN141

*Cannabis metabolites.*

PN142

The standard is talking about metabolites as being the drug for the purposes of the Standard. Then if we could go over to page 406, down the bottom of the page, 1.3.11:

PN143

*Cocaine metabolites, benzoylecgonine and ecgonine methyl ester.*

PN144

Now, benzoylecgonine is the metabolite that was identified in the respondent's sample. I'm just drawing your attention, because this is a definitional section. Then if we go to the next page, 1.3.20:

PN145

*Drug-free -*

PN146

again using the terminology 'drug-free':

PN147

*A urine specimen demonstrated to be free of all drugs and/or metabolites as related to this standard.*

PN148

Page 416, paragraph 4.1, so this is the laboratory screening procedures in section 4:

PN149

*This section sets out the laboratory procedures for screening of drugs in human urine as follows -*

PN150

and then you can see again cocaine metabolites. Then page 418, clause 4.10:

PN151

*Confirmatory testing. If a result is less than the screening cut-off, then the drug class shall be reported in accordance with 4.11.11.*

PN152

Then you see table 1 that cocaine metabolites - it's a cut-off level there. Lastly, page 424, table 2:

PN153

*Confirmatory test cut-off concentrations, as a total drug -*

PN154

then you see just over halfway down benzoylecgonine and the limit there. The point we make is that the criticism levelled against Mr Bugeja's evidence is completely unfair when you look at what he says in paragraph 29(b) and what he refers to in terms of - because he's giving evidence about what he understood the Standard required and therefore how that related to the drug and alcohol policy, and why he came to the view that he returned a level of drug at above the particular cut-off limit. Completely understandable in the context of the Standard that he was giving evidence about.

PN155

I won't repeat or go over what we say in paragraphs 24(c) and (d) of our written submissions, but again they address the points that were made or the criticism of Mr Bugeja's evidence. One point that is put against us is our submission in paragraph 23 and can I ask the Full Bench just to go to paragraph 23. I'm not going to take the Full Bench to all of the transcript references, but this is a point that I was submitting before.

PN156

Mr Bugeja explained all this evidence. It wasn't put to him that again he didn't properly considered them, he didn't - notwithstanding what he said in writing, it wasn't true. What is said against us is, however, these matters that were put to Mr Bugeja. Could I just ask the Full Bench to go to page 1366. What is relied upon is the questions in PN402 and 403. In my submission, this is a slightly different point that was being put to Mr Bugeja and this is the part that's relied upon. So you can see from 402 the question was put:

PN157

*You personally have a zero tolerance policy towards this type of - kind of conduct?---No.*

PN158

*That's certainly the approach you took for Mr Goodsell, isn't it, right?---No.*

PN159

In my submission, that's a different point than an attack on his consideration, or his fair consideration, of the matters that were relied upon by the respondent in the show cause process - the disciplinary review process. The last thing I wanted to say about the criticisms of Mr Bugeja's consideration and the matters that he gives his evidence on - that is in paragraph 29 - one shouldn't lose sight of the circumstances that exist at the time that this is being undertaken. What I mean by that is that we're at the stage in a process where an employer is hearing or listening to what an employee tells them at the time that they - in this circumstance - had returned a test which indicated and at this time admitted - and I think by this stage he had conceded that he had taken the drugs.

PN160

The employer at this stage doesn't have, in my respectful submission, nor should be required to have, detailed expert evidence about impairment, about risk, before it, like we have or might have now in this proceeding in making the assessment as to the explanation given by an employee at this particular point in time. So, in my submission, the proposition of the consideration of the information given by the respondent and Mr Bugeja's response to that or his consideration of those factors, needs to be seen in that context. The last point is that in those circumstances, in my submission, it was wrong for the Deputy President to find that there was no fair consideration of those matters by Mr Bugeja.

PN161

In relation to that, we also rely upon the fact that the Deputy President made the positive finding that the respondent was given an opportunity to respond to the allegations that were made of him. We have referred to, in our written submissions, *Federation Training v Sheehan*, in paragraph 25. Could I ask the Full Bench to just go to the decision in Ingleburn. It's *Bartlett v Ingleburn Bus Services*, the relevant paragraph is 25 that I wanted to draw to your attention. This is where the Full Bench says:

PN162

*Third, as we read the decision, the Deputy President proceeded on the basis that any finding of a denial of procedural fairness concomitant upon the findings made pursuant to section 387(b) and (c) could not weigh in favour of a finding of unfair dismissal unless the applicant can point to something they might have said, or did say, that could have made a difference to the outcome. However, paragraphs (b) and (c) of section 387 are concerned with the observance -*

PN163

just pausing there -

PN164

*of fair decision-making procedures, and not necessarily with the character of the decision that emerges from those procedures.*

PN165

I don't want to go to Federation Training, but that picks up the point from Wadey that employers - this is my paraphrasing here, but I think it's accurate enough to

say this: an employee doesn't comply with section 387(c) if they are merely giving lip service to the response that has been given. Here we have a positive finding that the respondent did comply with section 387(c) which, in my submission, is inconsistent with the finding in paragraph 158 that in fact the decision was the process was unfair - procedurally unfair. In my submission, those two can't stand together.

PN166

VICE PRESIDENT ASBURY: Well, it might be that the finding with respect to 387(c) is not correct, because if the conclusion that the mind of Sydney Trains was closed to any other - regardless of what the respondent might have said, then arguably the respondent wasn't given an opportunity to respond. If the position really is that no response that could have been given would have changed the outcome, then it's arguable that there has not been an opportunity to respond.

PN167

MR DARAMS: Sure. There are a couple of answers to that. The same answer could go the other way. It's an invidious position because we have the express finding that there was compliance with section 387(c) and what that actually means. That is, it's a real opportunity. There has been no cavilling with that. Secondly, it's an unsatisfactory position - let's say that observation your Honour makes is correct. That's a completely unsatisfactory position to support a decision, in my respectful submission, at first instance. That would just demonstrate why permission ought be granted and a rehearing occur.

PN168

The third point we make about that is that's why we started with the proposition that the finding in 158 about the unfairness of the procedure, in my submission, and the challenge to Mr Bugeja's evidence can't stand in light of Mr Bugeja's evidence. The point is the fact that Mr Bugeja might have come, or someone else might have come, to a different decision doesn't mean that Mr Bugeja didn't fairly consider at the time those explanations that were being given to him in the context of what Mr Bugeja knew at that time. It didn't mean Mr Bugeja didn't fairly consider those matters. That's our point.

PN169

The observation your Honour makes about 387(c), if we're right about this error, then it would have no impact upon the finding of 387(c) because in fact an opportunity was given, the opportunity was considered - it was fairly considered. The fact that the result didn't go the respondent's way doesn't mean that it wasn't properly considered.

PN170

Could I now move very briefly to appeal ground 5. It's really in short compass; paragraphs 161 to 164 at page 47 of the appeal book. The point we make about these findings is that in the circumstances of this case they were just not relevant to this dismissal, because at no stage did the respondent below say anything to the effect that, 'Look, I didn't understand what was required of me, what I had to do, and, therefore, that's why I breached the policy.'

PN171

If that point had been run and it should have been expressly or explicitly indicated in the respondent applicant below - his case at the outset, it could possibly have quite easily have been met by evidence of the training. It could have been easily met by evidence of questions in cross-examination about what the respondent applicant below understood or knew about it all.

PN172

It just wasn't a part of the proceedings below and in that sense to the extent that other people may or may not have been trained - again, we don't accept any of that, it wasn't an issue below - it's completely irrelevant, in my submission, in relation to this dismissal which is what the limitation of the matters that are relevant is relevant to the dismissal.

PN173

The fact that training in policies - I raise the point that training in policies in certain case is relevant, that's absolutely correct, and we don't cavil with that proposition, but it depends on up the case and it depends upon the circumstances of the case. I might say more in reply about that, but in this case here we're not talking about anything about the training or the lack of training, for want of a better description, that the applicant below but the respondent here had received, so, in our submission, that's an irrelevant factor.

PN174

That's all I wanted to say orally, Members of the Bench, unless there are any other questions. I mean, we have dealt with why permission to appeal ought be granted. We set that out in writing. There's nothing more that we can say about all that. We say this case does involve a question of general application and importance, particularly those issues about a risk of impairment. I mean, if we're right about the errors, as well, that would be another ground.

PN175

VICE PRESIDENT ASBURY: In terms of disposition, do you say that the matter should be reheard or should we rehear and redetermine it ourselves?

PN176

MR DARAMS: I think the Bench is in a position to redetermine or rehear it itself.

PN177

VICE PRESIDENT ASBURY: Understood. Thank you. Mr Saunders.

PN178

MR SAUNDERS: Thank you, Vice President. Before I turn to the three heads of appeal, let's call them that, it is useful in this case to spend some time focusing on what the decision is, what it stands for and, more importantly, what it doesn't do. The appeal really does confuse two issues; the macro question of drug and alcohol policies generally as a safety mechanism regulating an entire employee cohort and the micro question of the factual findings in this particular case about this particular employee based on the particular evidence that was before the Deputy President.

PN179

The first macro question is the appropriateness of a drug and alcohol policy that tests for past use, which everyone accepts what testing to the Australian metabolite standard does, not present impairment. It's a complex policy question and that question, that is the level where these general submissions about the uncertainty of risk and uncertainty of employees' statements come in. Everything my friend has said today about the position of the employer is in at the time a test result is returned is directed at that macro level.

PN180

The fundamental proposition that this kind of policy is reasonable to manage the risk associated with employee drug and alcohol use globally, because it addresses that. It's not undermined. If the risk is not present in all individual circumstances, it's a broader question. That proposition is in no way the focus of this decision. Easton DP wholly accepted that approach and to the extent the appeal - particularly the first ground - is focused on it, it misdirects attention.

PN181

This isn't a test case about cocaine use, it's not a test case about impairment testing, it says nothing new about Sydney Trains' policy or drug and alcohol policies generally. It is a single unfair dismissal and attention on the appeal needs to be directed at that micro level because nothing of global significance is in fact set, which is of course fatal to the question of public interest which relies on it being this global proposition about drug and alcohol testing. It isn't, that argument has been run in previous cases.

PN182

Micro level, which is what we're really talking about and what the impugned findings are about, are the particular circumstances of Mr Goodsell, who the evidence in respect of him that was placed before the Deputy President which like many unfair dismissals went beyond the material that was necessarily available to Sydney Trains, although not excessively in this case. The decision has to be read in full. It's a point I'll return to, but this idea of just picking out and attacking individual paragraphs or individual sentences or individual parts of sentences within paragraphs misses the full force and effect of the decision and tends to misdirect the Bench.

PN183

What the decision found principally is that there was a valid reason - Sydney Trains had a valid reason for dismissing Mr Goodsell based on his conduct. That conduct was identified as returning a non-negative urine sample. Attending work with a pharmacological inactive metabolite in his system is another way of putting that. That's it, that's the conduct that was relied on, that's the conduct that has been previously in the chain of cases that my friend has referred to found to constitute the 'at work conduct' relevantly and that's what is adopted here.

PN184

There is some looseness in the submissions in this respect that the conduct is described as an illicit substance or he took cocaine; they are different propositions. There is a very narrow specific form of conduct that has been held to breach this policy. It's what was relied on below, it's what the Deputy President

found was sufficient. It matters, because of course having had this policy, this line of authority, Sydney Trains made no effort - and it's not a criticism - to justify reliance on pure out of work conduct below and it can't be allowed to back door that in now.

PN185

To put that in a different way, what the Deputy President has accepted, as urged by Sydney Trains, is that a breach of the policy simpliciter without proving risk was sufficient. Without proving the individual risk as opposed to the more global concept of risk that the policy is directed at, there is no finding that Sydney Trains needed to prove that Mr Goodsell proposed a risk work while impaired for the policy to have been breached and a valid reason for dismissal to be found.

PN186

If I could ask the Bench to go to appeal book page 41, paragraphs 121 and 122. They have to be read together and they have to be read in full, and they have to be read with the earlier clear finding that Mr Goodsell individually - there was no risk that he individually attended work impaired at any point. It doesn't matter for the purposes of the breach of policy, it doesn't matter for valid reason and what it means is all these general propositions that my friend is alluding to are not disturbed. They continue to apply at that level of generality and the decision is in absolute conformity with Toms, with Sharp, with Hilder. It is as simple as that.

PN187

The at work conduct that was found to justify Mr Goodsell's dismissal was the non-negative test and that was held to be misconduct, and the Bench would recall also led to a reduction in compensation ordered. The idea that risk is factored into that policy aspect, the nature of the policy, is not sustainable. At that macro level the decision says nothing new about drug and alcohol policies generally.

PN188

It says nothing new about Sydney Trains' policies specifically, which conveniently has been considered in detail by another Full Bench in a close to, but for the nature of the drug, identical case. It does not impose a requirement that risk be established in the instant case as opposed to being available at large for this policy to be reasonable.

PN189

The Deputy President then correctly continued the exercise and considered the various factors weighing for and against the fairness of this particular dismissal of this particular employee, and here there was significant mitigating factors, which is unsurprising when one considers the nature of the breach. It is the smallest possible breach of a drug and alcohol policy possible. That doesn't mean it's not serious. Obviously it is, the decision recognises that, but - yes, Deputy President.

PN190

DEPUTY PRESIDENT BEAUMONT: How do you distinguish it's small? So what is a large and what is a small?

PN191

MR SAUNDERS: A large breach of the policy would be, for example, consuming illegal drugs while at work.

PN192

DEPUTY PRESIDENT BEAUMONT: Right.

PN193

MR SAUNDERS: A deliberate knowing breach of the policy. It's about intention - - -

PN194

DEPUTY PRESIDENT BEAUMONT: So if you present to work but you test positive for a drug, that's small?

PN195

MR SAUNDERS: It is a breach of the policy significant enough to form a valid reason for dismissal. That's not a small - - -

PN196

DEPUTY PRESIDENT BEAUMONT: You refer to, I think, a small though, so I'm trying to get an understanding of what small is compared to large.

PN197

MR SAUNDERS: Yes. An unfair dismissal exercise is obviously a broad valuative assessment. That involves weighing the valid reason against a range of other matters, mitigating factors, and so one looks at the scale of the valid reason for dismissal - - -

PN198

DEPUTY PRESIDENT BEAUMONT: But if the suggestion that if you come to work and you present for work, and you undergo a random test and that tests positive in accordance with the Australian Standard, that that's a small because you didn't consume drugs in the workplace. Because you've referenced the word 'small' - - -

PN199

MR SAUNDERS: I understand.

PN200

DEPUTY PRESIDENT BEAUMONT: - - - and I'm trying to understand what does small mean in this context by way of example. What is a small breach of the drug and alcohol policy?

PN201

MR SAUNDERS: The word 'small' is perhaps inapt.

PN202

DEPUTY PRESIDENT BEAUMONT: I accept that.

PN203

MR SAUNDERS: Yes, it is. The reason it's inapt is because I make no challenge to the idea that turning up to work, doing nothing more than returning a

non-negative sample does not form a valid reason for dismissal. A valid reason is inherently something that means dismissal is within the range of acceptable outcomes, just not that it is necessarily so. It's a weighing exercise and someone looks at the degree of misconduct - the point of the submission is there is no ancillary misconduct surrounding it. It is that one piece of identified conduct. We then look at everything else. Does that address your question, Deputy President?

PN204

DEPUTY PRESIDENT BEAUMONT: Yes. Thank you.

PN205

MR SAUNDERS: When the Deputy President in the decision below turned to that broad evaluative exercise, that of course required focus away from that macro policy question into the specifics of Mr Goodsell's - the evidence as to Mr Goodsell himself. It is a broad evaluative, often called discretionary, decision. Impugning it at this point requires *House v The King* error, as the respondent appropriately accepts.

PN206

There are six grounds of appeal that I agree with my friend that they distil to three propositions. One is the question of impairment and the role that plays, the second is the question of procedural fairness and the third is the question of training. Each, we say, is really a complaint about weight or an ancillary attack on factual findings made below.

PN207

In respect of factual findings, it is correct that a particularly high bar is imposed in challenging factual findings made on the basis of both credit and the evaluation of oral witness testimony. It does not mean that every other fact is a low bar, there still is some degree of appellate deference to the fact-finding below. The Full Bench was taken to paragraph 46 of the AGL decision, to the relevant extract from *Fox v Percy*, which makes it abundantly clear that it is a broad impressionistic evaluation that can't be discounted.

PN208

Turning to the impairment grounds, what the Deputy President's finding was was that Sydney Trains had not established, having put it forward, that there was an actual risk in fact that emerged that Mr Goodsell was impaired at any point while he was at work. When I say 'impairment', I should say it's used in these cases a little indiscriminately. There are two forms of impairment. The fundamental idea is that your normal functioning has been deranged in some way in the technical sense, either because there is an active intoxicant in your system or because of the hangover effect of whatever has been consumed. They are both available and I'm referring to both when I say impairment at large.

PN209

The Deputy President found that there was no risk. It did not affect, as I have said, his finding that the conduct was a valid reason for dismissal. It cleared that seriousness threshold. The entire appeal in this respect is, to a degree, misdirected. It cannot be sustained on a fair reading of the decision that the Deputy President found that the employer needs to prove a risk of impairment for

an individual employee before a valid reason for dismissal will emerge. Dismissal is at least potentially justified before the impairment conversation is even had.

PN210

It is simply that here it has correctly simply been taken into account as a relevant factor in the particular circumstances of this case under section 387(h), as the Bench made clear in Hilder is available. It's characterising the nature of the conduct in the manner that your Honour Deputy President Beaumont and I were exploring a moment ago. Everything that has been put forwards today by the appellant, all the submissions, are at that macro level and would have some force if there had been a finding that there was no valid reason for the dismissal; there was not. It only mattered here at the micro level.

PN211

In terms of the structure of the appeal, there appear to be two challenges. Firstly, that impairment was not a relevant consideration under 387(h) at all, and, secondly, that the particular factual findings should not have been made. In terms of relevance, the submission that the risk of impairment is not a relevant consideration is based on the particular paragraph in Toms that your Honour Vice President Asbury referred to.

PN212

If I could ask the Bench to go to the appellant's bundle of authorities at page 74. The particular paragraph that I think your Honour was referring to was at 27. That is what is drawn out at my friend's submissions. It needs to be read with, firstly, 28. It's really dealing with questions of weight and that becomes much clearer when one looks at the full context of the decision in its post-incident testing. That's where that public outcry aspect becomes relevant because it is hard to avoid people noticing that you have run your ferry into a pier, particularly if someone is injured.

PN213

It is quite a different proposition to random testing. It doesn't make a random test result less serious, but it's the nature of the considerations that matter, that become important. It is also in this case, going back a page to 73, in the context of what is set out at paragraphs 21 and 22. The situation with Mr Toms, as the Bench would recall, is that he was working an overtime shift. He had consumed cannabis the night before. He did not have to accept the shift, but he did.

PN214

As the Bench recalls, he was consciously aware that there was a risk he would in breach of the policy when he did so. That's a very significant factor and correctly coloured the conduct that the Bench was considering on redetermination, and the comments at 27 and 28 are made in that light. It's not a general proposition that the question of impairment is never relevant in drug and alcohol cases as part of the broader evaluative exercise. It just means that the lack of impairment here did not outweigh the nature of the conduct in these particular circumstances.

PN215

Rationally, for the reasons I went into earlier with your Honour Deputy President Beaumont, it has to be. High risk behaviour of this sort, of the sort that Mr Toms

engaged in, deliberate misconduct or reckless misconduct, is more serious. It needs to be taken into account in weighing up and the identifying the nature and extent of the valid reason to weigh it against what else exists. My friend's submissions also missed the - *Sydney Trains v Hilder* [2020] FWCFB 1373, which we find at tab 7 of the bundle of authorities starting at page 117 - paragraph 32, page 127.

PN216

The reason that section 137 has the catch-all at (h) is because it is not possible to state with closed particularity what will and won't be relevant in any particular unfair dismissal. What is depends on the nature of the case, the nature of the facts that confront the Commission. Certainly it is clear that depending on the circumstances that can include the question of impairment in the context of the broader evaluative exercise that his Honour was engaged in.

PN217

DEPUTY PRESIDENT BEAUMONT: I have got another question, sorry. To say it can include impairment - - -

PN218

MR SAUNDERS: Yes.

PN219

DEPUTY PRESIDENT BEAUMONT: - - - how has one assessed impairment when the decision appears to be saying - and I'm happy to be corrected - that there is no reliable test for evaluating impairment?

PN220

MR SAUNDERS: There are two parts to that, in fact. As I read the finding, it's not quite that there's no reliable test for establishing impairment, it's the test that Sydney Trains relies on as it is entitled to do. We don't challenge that in any way. It does not itself test for impairment. There are reasons for it. The evidence in the case below that came out in cross-examination is you can test for the active drug, it's an option, but there are sound policy reasons that Sydney Trains does not. In terms of assessing - - -

PN221

VICE PRESIDENT ASBURY: Sorry to cut you off again, but there are cases where the probability of impairment is much greater.

PN222

MR SAUNDERS: Exactly.

PN223

VICE PRESIDENT ASBURY: So, for example, a supervisor observes a person visibly under the effects of alcohol or the person has attended for work within a space of time, as did Mr Toms - - -

PN224

MR SAUNDERS: Exactly.

PN225

VICE PRESIDENT ASBURY: - - - where impairment really was likely or probable in the circumstances.

PN226

MR SAUNDERS: Or, as in Sharp, where the nature of the test itself leads to a much higher apprehension of closer use. The answer to your question, Deputy President Beaumont, is that it's going to vary on the evidence between the case. There is no clear matrix. The question is an evaluation of the various matters, various pieces of evidence, that are put before the Commission, which is what happened here.

PN227

Before I turn to those, can I just draw the Bench's attention to how this became relevant in the proceeding before. It's explained in the decision. If we go to appeal book 166 - I apologise. Yes, sorry, I'll come to the decision in a moment, 166 is the submission I wanted to draw your Honours' attention to. Paragraph 29of the appellant's submissions below, it's acknowledged that it's at least potentially relevant, which does create a difficulty for the appellant in now saying that in looking it at all the Deputy President fell into error.

PN228

In the decision itself - we find it at page 39 of the appeal book, which my friend took your Honours to. It's the paragraph above 114 - it was contested. It's a matter I'll return to. There was some confusion below as to whether this was being put in issue by Mr Goodsell. The proceedings were adjourned to allow Sydney Trains to lead evidence as to this question of risk, which it did, and I will take your Honours to that shortly. It's relevant under 387(h) because it has become an issue in the proceedings. If the Deputy President had been satisfied on that evidence that Mr Goodsell had worked in a risky manner, that is something that would rationally weigh against the dismissal being unfair. That's the manner in which it works, your Honour. That's all I wanted to say about the question of the relevance of impairment.

PN229

Turning now to the issue of whether it was (audio malfunction) to his Honour. It is a factual finding. It is distinct from the conceptual proposition that underpins the global drug and alcohol policy, but it is in a finding in respect of Mr Goodsell here. There is some quibble about the evidence only being set out and clear findings not being made. If I can ask the Bench to turn up page 41 of the appeal book, paragraphs 120(a) and (b). These are the factual findings that the Deputy President has made at large about Mr Goodsell, but (a) and (b) are the findings in respect of his out of work conduct.

PN230

From that, the Deputy President had very relevant experts talk about what that means, the effect that kind of usage has, and that's the basis upon which the finding is able to be made. Absent that evidence it couldn't, but it was here in this case. There are two parts to it. There is the acceptance of Mr Goodsell's evidence and my friend says employers have this uncertainty as to how self-serving their employees will be. It's a general policy statement.

PN231

Here we have actual evidence in a court proceeding. The Commission is in a different position to the employer. The Deputy President had consistent contemporaneous statements, Mr Goodsell's response to the test, that it was the evening four days before he returned to work. That incidentally, in case anyone was wondering, is why it slipped slightly between 3.5 and 4 days; it's because it's quite late at night. The Deputy President also had a test result consistent with this history.

PN232

If your Honours go to appeal book 89, this is an email exchange between a Transport for New South Wales investigation officer and Dr Armand Casolin. Dr Casolin is Sydney Trains' chief health officer. He gave evidence in the proceeding. This was his view at the time. It is true that it is unlikely that employers will have access to three experts and are required to conduct a full-scale hearing before making this kind of judgment call. Sydney Trains is in a slightly different position. It does have the ability to assess and verify these tests, as I've set out in the written submissions. Dr Casolin, when he doesn't agree with a result, will say so. He accepted that in cross-examination. The third more detail expert evidence backed this up. I think that all three of them are in agreement it's not a precise science, but it's one of a collection of factors.

PN233

Importantly, here what the Deputy President also had was sworn testimony. Mr Goodsell gave evidence, got in the witness box, took an affirmation and was cross-examined. The Deputy President had the opportunity to assess him and was entitled - which is the question on appeal - to accept his evidence in this regard. It doesn't mean an employer always has to, but that's not the question we're dealing with here. The idea that the Deputy President could have made alternative findings or an employer might have made alternative findings, takes the matter nowhere where you're talking about whether it was open to Easton DP to make the findings as to the precise out of work conduct that was engaged here, and here it was.

PN234

The second issue which goes more to your Honour Deputy President Beaumont's earlier question as to what that means, is if one takes the scientific evidence that was before the Commission and applies it to that timing, the evidence was again that the test result could not be correlated with direct impairment, it could not be correlated with any hangover effect. To the extent that the active drug would have been in no way still in his system - it was a very short half-life - Sydney Trains is left with the idea of the hangover effect.

PN235

In a large part that was put forward in its post-adjournment evidence of Dr Lewis that matters that had been referred to in the written submissions are high level statements and said in writing in his written report. His evidence was then tested. The Deputy President had the opportunity to assess him and some context was given to those remarks. If the Bench could go to appeal book 1439, the exchange carries through - I don't require your Honours to read it all now, but the relevant exchanges from PN479 through to 553, so across to page 145.

PN236

As one goes through it, one sees that the various withdrawal effects are talking about habitual users, that the withdrawal effect is about substance withdrawal. They are all conclusions reached in completely different circumstances to what the Deputy President had found Mr Goodsell did. In those circumstances it was entirely open to the Deputy President to conclude - I should say he also had the evidence that a trained pathology tester assessed Mr Goodsell and saw no signs of impairment. Mr Goodsell has been trained in fatigue management. He genuinely felt fine. They are not perfect tests, but it's part of the puzzle. It was open to his Honour to make the finding that he did.

PN237

If I could just ask the Bench to return to the decision, appeal book page 39, paragraph 115, to address a submission made earlier this morning. The final sentence, your Honour Vice President Asbury and my friend had an exchange about it. It is pretty plainly, in this context, directed at this high level of generality. It can't possibly be read as meaning that the Deputy President is saying that the employer has to prove the individual is impaired before a valid reason for dismissal will arise. His Honour clearly didn't mean that and this is why I say the decision has to be read cognitively with each other, not - - -

PN238

DEPUTY PRESIDENT BEAUMONT: He doesn't say 'must establish is impaired', he says 'must establish there was a risk'.

PN239

MR SAUNDERS: I apologise, I misspoke. That's what I meant. The submission I meant to make, Deputy President, is as well as no finding that impairment is needed, it is not a finding that an employer needs to establish there is a risk of impairment before there will be a valid reason for dismissal. The idea that this policy can be relied on globally is not challenged by this decision. It's quite different to the proposition that if an employer wants to, in running its case before the Commission, posit that there was for this employee a risk. It needs to prove that and Sydney Trains did here. It does identify the broader problem with the appeal that it picks these sentences and paragraphs in isolation, and asks the Bench to read them contextually.

PN240

The other submission that was made that was because of that valid reason finding, he must have found there was a risk. It is circular, as my friend said. It's distinct between the broad policy finding, what's reasonable in that global sense, and a particular factual finding made for this individual for the purpose of that broader evaluative exercise. You can't bootstrap a challenge to a factual finding via that policy statement. They are quite different questions and that failure to distinguish is the real problem with this ground of appeal. That's all I wanted to say about the risk of impairment question unless there are any further questions.

PN241

Turning to procedural fairness, as I understand the complaint it is that a challenge to the Deputy President's finding that nobody gave real consideration to Mr Goodsell's response that there was a process, but with no substantial

consideration. To put it another way, that it has in truth applied a zero tolerance approach in the same way that it did in Hilder. The phrases are interchangeable; if you do not tolerate in any circumstances, you are rationally not prepared to consider any circumstances. There is no difference between the two concepts.

PN242

It's not said, as I understand it, that this wasn't a relevant consideration. As I understand it, three issues are - obviously substantive procedural fairness is classically relevant. The procedure of three heads of appeal, I should say, are instead put. Taking them in reverse order that my friend put them, one is the idea that there is technical error because it was considered under 387(h), not subsection (c). The second, as the alternative, that it's inconsistent with the findings at subsection (c). The third is that, again, as a factual finding, it simply wasn't open.

PN243

In respect of 387(c), these differ on whether this is focused on substance or form. It doesn't need to be resolved because it doesn't matter. It would be error not to take the substantive procedural fairness into account at all, but it doesn't really matter under what heading one does it. The Act doesn't require these decisions to be structured as enumerated loosely. It just tends to be a convenient way to do it to ensure all the considerations are met.

PN244

VICE PRESIDENT ASBURY: I don't know if *Herc v Hays* is exactly saying that, Mr Saunders.

PN245

MR SAUNDERS: You're certainly required to take and give substantive consideration to every consideration required by section 387. I'm not suggesting anything different to that. The point is here that has happened and, if the Deputy President has put it in a different part of the decision, it's not substantive error.

PN246

DEPUTY PRESIDENT BEAUMONT: You can't conflate though, for example, serious misconduct. You perhaps wouldn't consider under 387(a). It's accepted, it's understood or referred to under section 387(h), so surely when you say it doesn't matter as to where you consider it, whether it sits within 387(a), (b) or (c) - - -

PN247

MR SAUNDERS: I apologise, Deputy President, I did not hear the first part of your question. Would you remind repeating it.

PN248

DEPUTY PRESIDENT BEAUMONT: So what I'm saying is that what I think that you are saying is that even though it may have been considered under 387(h) - - -

PN249

MR SAUNDERS: Yes.

PN250

DEPUTY PRESIDENT BEAUMONT: - - - it doesn't really matter where it was considered, it's just that it was considered.

PN251

MR SAUNDERS: Yes.

PN252

DEPUTY PRESIDENT BEAUMONT: What I'm saying is, well, that may not necessarily follow when you consider by analogy the consideration of serious misconduct, which is understood to be a consideration of other relevant matters in 387(h) rather than (a) with respect to valid reason.

PN253

MR SAUNDERS: Yes.

PN254

DEPUTY PRESIDENT BEAUMONT: Do you see where I'm coming - - -

PN255

MR SAUNDERS: I do, and it's a different proposition because of the particular nature of the considerations involved in considering a valid reason, and the lower threshold that the bifurcation of section 387 has created.

PN256

DEPUTY PRESIDENT BEAUMONT: So you're suggesting with a procedural deficit that that can also be considered under 387(h)?

PN257

MR SAUNDERS: Yes, I am.

PN258

DEPUTY PRESIDENT BEAUMONT: All right.

PN259

MR SAUNDERS: But I do want to complete the answer to the first part of your Honour's question. The difficulty with considering importing the serious misconduct thresholds into 387(a) is it applies the pre-Fair Work Act test of valid reason that incorporated matters peculiar to the employee. The bifurcation of the factors introduced by the Fair Work Act did directly move those factors peculiar to the employer into 387(h).

PN260

Section 387(a) is specifically and peculiarly within the section considered only from the perspective of the employer. It is in that sense different from the other sections as (b), (c) and (d) in Australia Post makes clear.

PN261

VICE PRESIDENT ASBURY: Depending on what factors you conflate, might or might not affect the balancing exercise?

PN262

MR SAUNDERS: Yes, and it's going to depend on a case by case basis reading the decision as a whole.

PN263

VICE PRESIDENT ASBURY: Yes.

PN264

MR SAUNDERS: Here we see the Deputy President found in substance that there was a, at least, form of opportunity to respond given. It wasn't totally neglected from the procedural perspective, but nevertheless it wasn't substantive. In this case it doesn't matter.

PN265

VICE PRESIDENT ASBURY: Yes.

PN266

MR SAUNDERS: I'm not saying it never will, but it's just - - -

PN267

VICE PRESIDENT ASBURY: So if you have made that finding under (c) or (h), it doesn't really change the overall balancing.

PN268

MR SAUNDERS: Yes.

PN269

VICE PRESIDENT ASBURY: Because if you put the finding in (c), it wouldn't have changed the outcome. You would have said that procedurally you were given an opportunity, but it needed to be a proper opportunity and it wasn't; so whether you consider that under (h) or (c), the second part doesn't really change the outcome.

PN270

MR SAUNDERS: Yes, in the context of those two particular versions and these particular reasons, that's apparent.

PN271

VICE PRESIDENT ASBURY: Yes, understood.

PN272

MR SAUNDERS: Even if it is error, the second - to consider it under the wrong head of consideration, I suppose, it's not a material one for those reasons - and it's not in the bundle of authorities, but we'll have copy provided. The relevant authority in that respect is *Inner West Towing v Maynard* [2017] FWCFB 757 which concerned a Small Business Fair Dismissal Code issue in which the first instance decision-maker had misaligned the considerations and had looked at one thing under the section. The Bench, nevertheless, found that there was no utility in granting permission to appeal because it was apparent from the text of that decision that it would not have made as difference, and that is the circumstance here. Even if my friend is technically correct, it's not material error justifying permission to appeal.

PN273

Can I turn now to the idea that - and it's related to what I'm about to say - the finding is inconsistent with the findings his Honour made in respect of 387(c). It is a form of legal and reasonableness as a proposition. I know it's not framed that way. It's put, as I understand it, that by saying that there was an opportunity to respond there was a tacit acceptance because of the preferable approach to section 387, that it concerned substance rather than form. To the extent that it is said that the Deputy President actually did that, it just is wrong.

PN274

If I could ask the Bench to go to appeal book 41. The reasoning starts at paragraph 126 and it continues over the page. It's a deliberate decision by his Honour to limit his findings in respect of 387(c), contrary to the approach urged by the appeal respondent below, but, nevertheless, considered the proper proposition and give it weight in the overall evaluative exercise. It just cannot be said that a finding has been made and that substantive procedural fairness was provided.

PN275

Turning now to the question of whether it was open to his Honour to make these findings, Sydney Trains in this respect has simply taken your Honours to Mr Bugeja's written evidence and the submissions go no further than findings that it is as the Deputy President ought to have made in their view. It then veers a little in the written submissions as to general arguments as to why the dismissal is not unfair. To the extent that that is an attempt to (Indistinct) on the case, it should be disregarded.

PN276

It doesn't direct attention to the critical question: was this finding open? Procedural fairness was very much in contest below. The Deputy President was presented with not the person who made the decision, but a person who was involved in the decision-making process with several others who couldn't recall a thing that was said in the meetings in which recommendations were formed, who could not identify a single mitigating factor, who had in fact a default position of dismissal following a failed drug test, is entitled to have it, and had never been persuaded that someone who failed a drug test should not be dismissed.

PN277

It is true, as my friend took your Honours to, that in his written witness statement, polished to a high sheen by his skilled legal team, he had said that he had seriously weighed things up. He had said that he had lost true and confidence, the usual. It is easy to say in writing. Could I ask your Honours to return to appeal book 248. The relevant paragraph even read by itself is pretty consistent with his Honour's findings. It's wholly negative.

PN278

The chapeau is relatively unpersuasive. He thinks he probably would have read the material. He had read it again and here are all his thoughts about why it's wrong. It's not indicative. It's argumentative in the usual way. It's not the complete picture of Mr Bugeja's evidence. It's not everything the Deputy

President had because, of course, he came along and answered some questions and his Honour got to have a look at him.

PN279

Could I ask the Bench to go to appeal book 1336. The exchange in this respect runs from 401 through to 421. In particular we see at 408 to 409 the training question and I'll come back to it with the third head. The exchange from 410 to where the Deputy President intervenes at 421 is indicative of the kind of - how this evolved at hearing. If I could draw the Bench's attention to - I do apologise for going back and forward in the book - appeal book 25, the decision, paragraph 56, in which the Deputy President sets out the aspects of the cross-examination that his Honour plainly considered significant and they are the parts that don't come out in the usual way in the written document.

PN280

Returning to this criticism of the summary of evidence and lack of findings, it again is a problem with reading the decision piecemeal. This isn't a he said/she said case. There is not a lot of factual contest. Where there is the findings in respect of Mr Bugeja dealt with in that part of the decision, in which his Honour reaches the conclusions as to procedural fairness, the evidentiary picture is more complex.

PN281

In those circumstances Sydney Trains may disagree with the finding that it was plainly open to his Honour and it was plainly informed by his impression of the witness. His evidence that he took this all into account, was rejected. That's the effect of the finding. The idea that there has been some credit finding, that everything he said in writing is correct, isn't sustainable on the text. In these circumstances it is not available to be disturbed on appeal, particularly on the basis of a preference for a different result.

PN282

A point was raised today for the idea that a finding was made - my friend said this earlier - that nobody involved gave evidence and then saying Mr Bugeja did, he was involved. No such finding was made. It's plain at page 47 of the appeal book, 158, after the extensive consideration of Mr Bugeja's evidence that precedes it, of course, the sentence is:

PN283

*There is no evidence at all to suggests that anyone involved -*

PN284

the evidence he had was Mr Bugeja, which has been rejected clearly previously, and nobody else. Not even a hint as to those other people. If your Honours could go to appeal book 1359, here Mr Bugeja is talking about the first meeting with the decision to ask Mr Goodsell to show cause. We see, from 312, a process at 16 minutes, and, over to 325, particularly at 318, Mr Bugeja just doesn't remember what was said, but we do know that a decision was made without knowledge of Mr Goodsell's disciplinary record at this stage; unusual but not a difficulty because it's show cause.

PN285

The second process is at AB1363, PN365 through to 371. This is the meeting in which it was decided to recommend to the decision-maker at Mr Goodsell be dismissed. No minutes and Mr Bugeja can't remember what was discussed. Then at 1364, at 377, doesn't know if he discussed it with Mr Burton, 383, and doesn't know whether Mr Burton said any of these documents. What the Deputy President had before him was Mr Bugeja whose evidence that he had an open mind was rejected, as it was open to him to do, and silence as to everyone else. The finding that the corporate mind was closed was available. Unless there was anything further on the procedural fairness point, that takes me to training.

PN286

It was said today that training comes as a surprise in the decision, that it was no part of the applicant's case below. I can't agree with that, I'm afraid. This was an issue in the proceeding. During the cross-examination of Mr Bugeja, who gave evidence as to the training that Mr Goodsell had received in this respect, an objection was taken. We see at AB1377 is the end of the quite lengthy exchange, but it starts at 1372. I apologise for the error.

PN287

VICE PRESIDENT ASBURY: Sorry, 137 - - -

PN288

MR SAUNDERS: 1372.

PN289

VICE PRESIDENT ASBURY: 1372.

PN290

MR SAUNDERS: Yes. The objection is taken. Sydney Trains is surprised that questions are being asked about training; don't understand it to be part of the case. PN478, it continues and the whole exchange should be read, but it concludes at PN508:

PN291

*This is of particular significance in this matter due to Sydney Trains' total failure to actually explain its policy to staff -*

PN292

and what I am doing there is reading my reply submissions aloud. I accept - and the Bench will see that from the end of the transcript of the first day - we accepted at that point that notwithstanding we disagreed that it was necessarily surprising that Sydney Trains was genuinely surprised by both this and the idea that valid reason was at that point an issue. The proceeding was adjourned and Sydney Trains then proceeded to lead extensive written evidence about the training that Mr Goodsell has received. That's how the statement of Mr McDonald - which the Full Bench will find starting at page 627 - emerges.

PN293

The extensive evidence which Mr McDonald was cross-examined on, the adequacy of the training, was squarely an issue. We in fact have Mr McDonald

log onto the Intranet, cast it onto the screen. We all went through the documents together. It was an issue in the proceeding and to the extent that it's suggested that the Deputy President erred by taking it into account, on that basis it's not sustainable.

PN294

In terms of its relevance, there doesn't seem to be any contest that the training does not explain that past use is not tested for. It does not explain that 'drug-free' means no level of drug or inactive drug metabolites at sufficient concentration to be detected in urine at the threshold set by the Australian Standard, which Mr Casolin confirmed was its meaning at appeal book 1392, PN692.

PN295

There is no contest, it appears, that in contrast to alcohol there is no guidance whatsoever about what level of out of work conduct will be detected. Nothing has changed since the Full Bench discussion in Hilder. The criticism, as I understand it, is that nevertheless notwithstanding it being a significant part of the appellant's case, that it's not a relevant consideration. It arises. It's not the idea that Mr Goodsell was not aware of the drug policy, it's about the attack on his genuine belief that he was not in breach of the policy when he attended for work. The Deputy President additionally explains how it arose at appeal book 47, at paragraph 161.

PN296

The part of the case, they're saying - and it's related to the point my friend took your Honour Vice President Asbury to about long service counting against an employee - it's the 'should you know better' argument and training is critical to that. In circumstances like this where the proposition is not inherently obvious, it's complex. It's an issue that the presence of drug metabolites in the human body is not something that the average Sydney Trains worker can be expected to comprehend, as the Full Bench accepted in Hilder.

PN297

It's relevant in that sense, because it goes to undermining a limb of attack and an argument put before by Sydney Trains as to why the dismissal was not unfair. It's classically relevant. If you want to hold someone to an expectation, you have to tell them what it is and, where necessary, how to comply with it. If that expectation is no drug use outside of work, so be it. There is no inherent obstacle to an employer saying that. They just have to say that and they have to justify it. Where you are relying on this training, it was perfectly appropriate for the Deputy President to consider this training, as the Full Bench did in Hilder. It's one of several relevant considerations. Unless there is anything on the training point, those are the submissions.

PN298

We fundamentally say that the appeal should be dismissed because it does not attract the public interest. It is one unfair dismissal, it is functionally identical to a previous Full Bench. Nothing has changed and the state of play is - it could be said that a policy that affected a wide range of employees that needed to be considered did attract the public interest. That was the case in Hilder. This particular policy has already been reviewed by a Full Bench.

PN299

We're not even talking about the abstract concept of drug and alcohol policies. In that sense it's an unremarkable decision in that notwithstanding recognising that Mr Goodsell engaged in misconduct of a significant enough nature of potentially justify termination, it was outlaid as part of the Deputy President's broader consideration of these significant mitigating factors that existed here. Unless there's anything further, those are the submissions.

PN300

MR DARAMS: Just briefly a few points in reply. Just to pick up the last point about the training, our point is that there might have be submissions, there might have been evidence about the training, but the point of whether something is relevant for a dismissal is whether a lack of training was relevant for this dismissal. It certainly wasn't run as a case that the respondent's contravention or conduct occurred because he didn't understand and wasn't trained in the policy. The fact about training for other persons or other people, in our submission, is relevant on this dismissal.

PN301

Could I go to paragraph 115 of the judgment. In our submission, it's clear that the Deputy President was making a finding in the third sentence of an obligation on an employer to establish the risk in this case. In my submission, that wasn't limited only to this issue of valid reason. The reason it's not limited to the valid reason, which I understood was the submission, is because it appears in 115 which is explicitly picked up in this proposition in paragraph 136(c), but in paragraph 142.

PN302

That's how the Deputy President has reasoned - so the Deputy President has reasoned from Toms, Hilder and Sharp that an employer must establish a risk of impairment. He has then applied that under section 387(h) and relied upon that, in our respectful submission, to find paragraph 145:

PN303

> *The absence of a risk of impairment supports the conclusion that his dismissal was harsh, unjust and unreasonable.*

PN304

In our submission, it's clear that the Deputy President placed an obligation on the appellant. Could I just ask the Full Bench to go to page 1366 of the appeal book, and 1367. My learned friend referred the Full Bench to the transcript of the questioning of Mr Bugeja and there are a couple of points I want to make about this. In my submission, there is no finding that Mr Bugeja's evidence was rejected, with respect.

PN305

If it's suggested that somehow there were credit findings made or you were to divine credit findings out of the exchange that ends at 419, just against this proposition if it's being suggested that intervention by the Deputy President somehow reflects on Mr Bugeja's evidence, the submission I would make about that is that the Deputy President's question there that, 'You're not answering the

question', in 419, in my submission it's quite unfair when one looks at what Mr Bugeja was doing.

PN306

Mr Bugeja was actually answering the questions, but what he wasn't accepting in the transcript before is that it was single fact. It's accepting, yes, it's one of the factors, but it's not the only consideration. Now, it's clear that he was providing an answer to those questions, so in our submission if the submission is just left hanging there that somehow you would read that there was a criticism of him because of that - I'm being told that's not a point, but in any event if the Full Bench goes away and looks at it, that's our point about that; it was quite an unfair criticism.

PN307

Can I ask the Full Bench to go to paragraph 120. The submission I want to make is we accept that the Deputy President had before him the evidence of Mr Goodsell, but in the context of this finding - that is paragraph 120(a) - in some respects the finding there only goes as high as the uncertainty in the evidence that was explained by both experts; that is, when this drug was taken or consumed. What the Deputy President says here is it was 'several days before he was due to return to work.' There is no express finding that it was on this particular day, at this particular point. Again, it brings it into this period of time of the uncertainty as to when it occurred.

PN308

A more salient point, in our respectful submission, is when you're assessing an employer and their response through an explanation given to an employee - this is the 'fairly considered' point - when you're considering their position at the time that the explanation is being given to them, they're not going to be in any position to be able to ascertain one way or the other what the employee is telling them. As we have indicated before, that in and of itself creates an addition risk in the circumstances.

PN309

The last point I wanted to make is - we have made this point orally - the point about paragraph 158 and the finding in paragraph 158 is a challenge to the 'fairly considered the explanation'. 'Considered the explanation' was the explanation given during the process by the respondent and the fact that you might come to a different finding, in our submission, does not result in a finding that is even open that there was no fair consideration given the evidence of Mr Bugeja.

PN310

The last point we wanted to just challenge is the submissions that Sydney Trains somehow chooses not to test for impairment and has adopted some policy which relies upon the Standard, which all the experts say isn't a test for impairment. In our submission - I won't go to it - Dr Casolin gave evidence about the impracticability of an employer being able to test for impairment arising from drugs. If it's somehow suggested that there is a valid choice being made by Sydney Trains, but it has decided not to test for impairment, somehow that would count against him in this case, then we would reject that submission if it has been

suggested for that reason. Unless there is anything further, they are our reply submissions.

PN311

MR SAUNDERS: Maybe I should clarify that. Given the submission - and apparently I was confusing - there is no criticism in this appeal of the approach Sydney Trains takes to drug and alcohol testing, it's not raised in that way. It was purely a discursus into the how do you test for impairment. There was evidence that it was possible, but I'm not saying that is of any significance in determining this appeal. That's the point.

PN312

VICE PRESIDENT ASBURY: We indicate that we will reserve our decision and issue it in due course, and we will adjourn. Thank you.

**ADJOURNED INDEFINITELY** **[12.13 PM]**