DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Melisa Morgan
v
Heritage Motels and Restaurants
(U2015/12263)

DEPUTY PRESIDENT DEAN SYDNEY, 9 AUGUST 2016

Application for unfair dismissal remedy – whether dismissal was harsh, unjust and unreasonable – compensation ordered.

Introduction

[1] On 13 October 2015 Ms Melisa Morgan **(**the Applicant**)** made an application to the Fair Work Commission (the Commission) pursuant to section 394 of the *Fair Work Act 2009* **(**the Act**)** for a remedy in respect of her dismissal by Heritage Motels and Restaurants (ABN 45 310 844 897) (the Respondent). The Respondent operated the Goulburn Heritage Motel and Restaurant (the Motel), located in Sydney Road, Goulburn NSW.

[2] The Applicant was employed in a full time capacity as the Manager of the Motel. She commenced employment with the Respondent in March 2014, and was pregnant at the time of her dismissal on 30 September 2015.

[3] For the reasons set out below, I have found that the Applicant was unfairly dismissed and have awarded compensation in the amount of $6101.30.

Background

[4] This matter was listed for conciliation in November 2015, together with an application for remedy for unfair dismissal made by Mr Wayne Smith against the same Respondent.

[5] The Respondent did not file an employer response.

[6] A Directions Hearing by telephone was listed on 18 December 2015. The transcript reveals that Mr Victor Ollis, Manager of the Respondent and the father of the director of the Respondent (Mr Mark Edwards) participated in the early part of the hearing. Mr Ollis stated:

> "I'm not here for the company and I have been told by Mr Edwards, who is the company director, that I am not to give any information or to answer or to participate as a company representative."[1]

[7] Mr Ollis was advised that he should not participate on that basis, which he did.

[8] The Applicant was directed to provide a chronology of her employment, all employment documents, contracts or correspondence, group certificates or payslips that she had been provided with, to the Commission by early February 2016. Some material was provided to the Commission in mid-May 2016.

[9] I held a further Directions hearing by telephone on 8 June 2016 to list the matter for hearing. The Notice of Listing was sent to the Respondent by both email and post and with a request to contact the Commission if there was any change of contact person or telephone number listed. The Respondent did not do so.

[10] Consequently the unfair dismissal application was set down for a hearing. The Notice of Listing for this hearing was sent to the Respondent by registered mail to the 'Address for service of documents' listed in the ASIC database for the Respondent. It was also sent by email to the email address provided in the Employers Response.

The hearing

[11] Both the Applicant and Mr Smith's applications were listed before me in Canberra on 21 June 2016. The matters were listed separately as the circumstances of each dismissal differed. The Applicant's application was listed at 10.30am and Mr Smith's at 1.00pm.

[12] There was no appearance by the Respondent at 10.30am. At this time further attempts were made to contact the Respondent. This included contacting Mr Ollis, who refused to provide any contact details for Mr Edwards. The current operators of the Motel were contacted, and were able to provide a mobile number for Mr Edwards. At approximately 11.00am Mr Edwards answered the phone. My associate explained who she was and why she was calling. Mr Edwards indicated that he was formerly a director of the Respondent, that he was personally bankrupt and the company in liquidation, and that he would not be attending any hearings. My associate explained that an order could be made in his absence, however he confirmed he would not attend, even if the hearings were deferred to another date. My associate asked Mr Edwards to provide details of the liquidator, however he refused to do so. He then stated that any further correspondence should be in writing to his email address, which he supplied, and he then ended the call.

[13] Based on the conversation with Mr Edwards, I was satisfied that the Respondent:

a. had been served with and was aware of the Application;

b. knew about the hearing and the consequences of non-attendance; and

c. made a decision not to attend or participate in the proceedings.

[14] I decided in the circumstances that it was fair and reasonable to proceed in the absence of the Respondent.

The Respondent

[15] It is appropriate at this juncture to deal with the assertion that the Respondent was in liquidation.

[16] There was no evidence from ASIC searches of the ABN of the Respondent, conducted in June and August 2016, that the Respondent was in liquidation.

[17] The Applicant tendered a copy of an undated letter addressed to 'staff'[2] which stated:

> "This letter is to notify you that effective Monday 16 February 2015 you will no longer be employed by Goulburn Heritage Lodge PTY LTD as this business has been abandoned by its Director. Your employment will remain as it currently is, however you will be employed by Heritage Motels and Restaurants as they are the new lease holders of the motel and restaurant. All entitlements (annual leave, sick leave and time in lieu) will be carried across to the new business.
>
> This change of business ownership will have no impact on you other than your employer on paper. Business is as usual as far as the restaurant and motel are concerned.
>
> Kind regards
>
> Management
> Heritage Motels and Restaurants"

[18] When asked, Mr Edwards refused to provide any evidence (ie. name or contact details) of a liquidator.

[19] Other entities, which might have been related to the Respondent (eg Goulburn Heritage Lodge Pty Ltd), were identified in ASIC searches as being in liquidation or administration, however there was no evidence that the Respondent was in liquidation.

[20] I am satisfied, based on the material outlined in the above paragraphs, that the Respondent was not in liquidation.

The Evidence

[21] At the hearing the Applicant was self-represented and gave evidence on her own behalf.

[22] The Applicant submits she was unfairly dismissed and seeks remedy of compensation.

[23] Her unfair dismissal application set out in detail the circumstances of her dismissal and the reasons why she considered her dismissal unfair. This was confirmed in her evidence during the hearing. Her evidence was as follows:

> "I was 18 weeks pregnant but was still working full time in capacity as Manager of the Motel and Restaurant. Mr Ollis was aware of my pregnancy and was also aware I intended performing my role until January, 2016 before taking annual and maternity leave.

On Friday 25 September, I was feeling nauseous and had aching muscles so I availed myself of sick leave. I obtained a Doctor's certificate for this absence. I notified my 2IC, Stacey Mellross that I would not be at work on the Friday. When Stacey relayed this to Mr Ollis, he replied, 'Right, so she's going to use all her sick leave before she goes off.'

On Saturday 26 September, 2015 my back muscles seized up and I collapsed. I was subsequently admitted to Goulburn Base Hospital for treatment. I immediately notified Stacey Mellross that I would not be at work for the next few days due to this and told her I had sufficient sick leave to cover this and would provide a doctors certificate.

On Wednesday 30 September, I was in a position to ring Mr Ollis and update him on my progress and intended return to work date. Mr Ollis responded with the following words, 'This isn't a job for a pregnant person. I would hate for you to have a miscarriage here so I think you should finish up.'

I said, 'No, this has nothing to do with the pregnancy. Working is not a problem.'

He said, 'Oh, no I think you need to organise to finish up.'

I said, 'No, I'm not going to finish up. I've still got 4 months before I stop working and go on maternity leave. I'll be out of Hospital tomorrow and back to work on Tuesday.'

He said, 'No, I think you should finish up now.'

I said, 'No I won't finish up. Are you firing me.'

He said, 'Yes, your employment is terminated as of now.'

I said, 'Are you serious, you're firing me because I'm pregnant.'

He said, 'Yep,'

I said, 'You're unbelievable, you can't do that.'

He said, 'Well, I have'

At this point, I broke down emotionally and terminated the phone call.

I have never had any adverse comments or reports from Mr Ollis. The only feedback Mr Ollis ever gave me was that the business had never run so well and he saw me as a long term Manager. Only 2 weeks prior he had mentioned that he would be re negotiating my salary as I had just taken over the management of the Tour company associated with the motel and restaurant. This attitude changed upon notifying him I was pregnant."

[24] I found the Applicant to be a credible witness and I accept her evidence.

Protection from Unfair Dismissal

[25] An order for reinstatement or compensation may only be issued where the Commission is satisfied the Applicant was protected from unfair dismissal at the time of the dismissal.

[26] Section 382 of the Act sets out the circumstances that must exist for the Applicant to be protected from unfair dismissal:

> "**382 When a person is protected from unfair dismissal**
>
> A person is *protected from unfair dismissal* at a time if, at that time:
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
> (b) one or more of the following apply:
> (i) a modern award covers the person;
> (ii) an enterprise agreement applies to the person in relation to the employment;
> (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold."

[27] There is no dispute and I am satisfied that the Applicant has completed the minimum employment period, and her annual rate of earnings is less than the high income threshold. Consequently, I am satisfied the Applicant was protected from unfair dismissal.

[28] I will now consider if the dismissal of the Applicant by the Respondent was unfair within the meaning of the Act.

Was the dismissal unfair?

[29] A dismissal is unfair if the Commission is satisfied, on the evidence before it, that all of the circumstances set out at s.385 of the Act existed. Section 385 provides the following:

> "**385 What is an unfair dismissal**
> A person has been *unfairly dismissed* if the FWC is satisfied that:
> (a) the person has been dismissed; and
> (b) the dismissal was harsh, unjust or unreasonable; and
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
> (d) the dismissal was not a case of genuine redundancy.
> Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388."

Was the Applicant dismissed?

[30] A person has been unfairly dismissed if the termination of their employment comes within the definition of "dismissed" for purposes of Part 3–2 of the Act. Section 386 of the

Act provides that:

> "**386 Meaning of *dismissed***
> (1) A person has been *dismissed* if:
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

[31] I am satisfied, based on the evidence of the Applicant, that the Applicant was dismissed within the meaning of s.386(1)(a).

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[32] A person has not been unfairly dismissed where the dismissal is consistent with the Small Business Fair Dismissal Code (the Code).

[33] To be satisfied that a dismissal was consistent with the Code, the Respondent must be a 'small business employer' for the purposes of the Act, which is defined at s.23(1):

> "**23(1) Meaning of small business employer**
> A national system employer is a *small business employer* at a particular time if the employer employs fewer than 15 employees at that time."

[34] The Respondent did not file any response to the Application, and there was no evidence before me regarding the number of employees employed by the Respondent at the time the Applicant was dismissed.

[35] I note, however that the Respondent did file an Employers Response in relation to Mr Smith's application which was heard on the same day. That Employer Response indicated that there were 30 employees as at 28 August 2015, with six employees subsequently dismissed. That Employer Response was signed by Mr Ollis on 14 October 2015. The Applicant was dismissed on 30 September 2015. I can reasonably infer that there were more than 15 employees as at the date of the Applicant's dismissal.

[36] However, if I am wrong about this and the Respondent was a small business employer, for the reasons set out below I find that there is no evidence of compliance with the Code.

Was the dismissal a genuine redundancy?

[37] There is no suggestion or evidence to support a finding that the Applicant's dismissal was a genuine redundancy.

Harsh, unjust or unreasonable

[38] Having been satisfied of each of s.385(a),(c)-(d) of the Act, the Commission must consider whether it is satisfied the dismissal was harsh, unjust or unreasonable. The criteria the Commission must take into account when assessing whether the dismissal was harsh, unjust or unreasonable are set out at s.387 of the Act:

"**387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
(b) whether the person was notified of that reason; and
(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(h) any other matters that the FWC considers relevant."

[39] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd*[3] as follows:

".... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[40] I am under a duty to consider each of these criteria in reaching my conclusion[4], which I now do.

Valid reason - s.387(a)

[41] The Respondent must have a valid reason for the dismissal of the Applicant, although it need not be the reason given to the Applicant at the time of the dismissal.[5] The reasons should be 'sound, defensible and well founded'[6] and should not be 'capricious, fanciful, spiteful or prejudiced'.[7]

[42] The question I must address here is whether there was a valid reason for the dismissal related to the Applicant's capacity or conduct (including its effect on the safety and welfare of other employees).

[43] The reason proffered by the Respondent for the Applicant's dismissal was that he did not want her to have a miscarriage here, and this workplace was 'no place for a pregnant woman'.[8]

[44] I have already found that the Applicant was a credible witness and I accept her undisputed evidence which is set out earlier in this decision.

[45] Clearly, the pregnancy of the Applicant, in the circumstances outlined above, could not possibly be a valid reason for her dismissal. I find that there was no valid reason for the Applicant's dismissal relating to the Applicant's capacity or conduct.

Notification of the valid reason - s.387(b)

[46] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made,[9] in explicit terms[10] and in plain and clear terms.[11] In *Crozier v Palazzo Corporation Pty Ltd*[12] a Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations Act 1996* stated the following:

> "[73] As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."[13]

[47] No reason (let alone a valid reason) was provided to the Applicant *before* a decision was made to terminate her employment. I therefore find the Applicant was not notified of a valid reason for her dismissal.

Opportunity to respond - s.387(c)

[48] An employee protected from unfair dismissal must be provided with an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the person. This criterion is to be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.[14]

[49] The evidence in this case clearly demonstrates that the Applicant was dismissed during a telephone conversation with Mr Ollis.

[50] While I am satisfied and find that the Applicant did not have an opportunity to respond to the reason for the dismissal, this is a neutral consideration as her dismissal did not relate to her capacity or conduct.

Unreasonable refusal by the employer to allow a support person - s.387(d)

[51] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.

[52] The Applicant was not provided with any indication prior to the telephone conversation with Mr Ollis that her employment was in jeopardy. She was therefore unaware that she could have had a support person with her.

[53] While the Respondent did not refuse to allow a support person, the manner in which the dismissal was effected meant that the Applicant had no opportunity to have a support person present.

Warnings regarding unsatisfactory performance - s.387(e)

[54] Where an employee protected from unfair dismissal is dismissed for the reason of unsatisfactory performance, the employer should warn the employer about the unsatisfactory performance before the dismissal. Unsatisfactory performance is more likely to relate to an employee's capacity than their conduct.[15]

[55] There was no evidence that the dismissal related to unsatisfactory performance, and accordingly this consideration is not relevant.

Impact of the size of the Respondent on procedures followed (s.387(f)), and the absence of dedicated human resources management specialist/expertise on procedures followed (s.387(g))

[56] The size of the Respondent's enterprise, and the absence of dedicated human resource management or expertise in the Respondent's enterprise, may have impacted on the procedures followed by the Respondent in effecting the dismissal.

[57] The Applicant gave evidence (which I accept) that the Respondent did not have a dedicated human resource specialist and was not a large organisation.

[58] While these factors may often weigh in favour of a finding that the dismissal was not unfair, this is balanced out in this case by the manner in which the Applicant was dismissed by Mr Ollis. I therefore consider this to be a neutral factor.

Other relevant matters - s.387(h)

[59] Section 387(h) provides the Commission with a broad scope to consider any other matters it considers relevant. I do not consider that there are other relevant matters that I should have regard to in this matter.

Conclusion

[60] Having considered each of the matters specified in s.387 of the Act, I am satisfied that the dismissal of the Applicant was harsh, unjust and unreasonable. Accordingly, I find the Applicant's dismissal was unfair.

Remedy

[61] Section 390 of the Act sets out the circumstances in which I may make an order for reinstatement or compensation:

> "**390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The Commission may make the order only if the person has made an application under section 394.
>
> (3) The Commission must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
>
> Note: Division 5 deals with procedural matters such as applications for remedies."

[62] I have already dealt with the issues at s.390(1)(a)–(b) above. I am satisfied that the Applicant was protected from unfair dismissal pursuant to s.382 of the Act and the Applicant was dismissed unfairly. Accordingly, I am required to determine whether to order the reinstatement of the Applicant or, in circumstances where reinstatement is inappropriate, to order for compensation if it is satisfied such an order is appropriate in all the circumstances.

Reinstatement

[63] The Applicant seeks compensation as the primary remedy. Regardless of the remedy sought by the Applicant, s.390 of the Act requires that I first determine whether reinstatement is appropriate before I may consider an order for compensation.

[64] The Applicant submits that reinstatement would be inappropriate because the Respondent no longer operates the Motel. It is clear from the evidence that the Respondent ceased operating the Motel from 4 November 2015. On that basis, I find that reinstatement is inappropriate.

Compensation

[65] Section 390(3)(b) provides the Commission may only issue an order for compensation to the Applicant if it is appropriate in all the circumstances.

[66] I am satisfied, based on the evidence above and my findings relating to the unfairness of the Applicant's dismissal, that an order for compensation is appropriate in all the circumstances of this case.

[67] Section 392 of the Act sets out the circumstances that must be taken into consideration when determining an amount of compensation, the effect of any findings of misconduct on that compensation amount and the upper limit of compensation that may be ordered:

"**392 Remedy—compensation**

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

Note: subsection 392(5) indexed to $69,450 from 1 July 2016

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[68] I will now consider each of the criteria in s.392 of the FW Act.

Effect of the order on the viability of the employer's enterprise: s.392(2)(a)

[69] The Respondent is no longer operating the Motel, however there is no evidence that the Respondent is in liquidation.

[70] I find an order for compensation in the amount proposed will not affect the viability of the Respondent's enterprise.

Length of service: s.392(2)(b)

[71] I find that the Applicant's period of service with the Respondent, being 1.5 years should not affect the amount of compensation to be ordered.

Remuneration that would have been received: s.392(2)(c)

[72] The Applicant's remuneration with the Respondent was $1,256.15 gross per week. This was evidenced by a payslip tendered by the Applicant.

[73] I find that the Applicant would likely have remained employed by the Respondent until 4 November 2015, being the date upon which the Respondent ceased to operate the Motel. There is no evidence of unsatisfactory performance or conduct by the Applicant, or any other evidence to suggest that the Applicant's employment would have ended prior to this date.

[74] The amount the Applicant would have received is therefore $6101.30.

Mitigating efforts: s.392(2)(d)

[75] In considering whether the Applicant has taken steps to mitigate the loss suffered as a result of the dismissal I should take into account whether the Applicant acted reasonably in the circumstances.[16]

[76] The evidence of the Applicant, which I accept, is that she obtained employment with the new operators of the Motel from 4 November 2015.

[77] I find that the Applicant has taken reasonable steps to mitigate her loss suffered as a result of the dismissal.

Remuneration earned: s.392(2)(e)

[78] There was no evidence that the Applicant earned any remuneration between her dismissal on 30 September 2015 and her employment with the new Motel operators on 4

November 2015. I find that no deduction should be made to my order for compensation in consideration of this criteria.

Income likely to be earned: s.392(2)(f)

[79] The Applicant secured alternative employment prior to the making of any order, and so this criteria is not relevant.

Other matters: s.392(2)(g)

[80] I find that there are no other matters which might affect an order for compensation.

Misconduct: s.392(3)

[81] I have not found any misconduct by the Applicant that contributed to the dismissal.

Shock, Distress: s.392(4)

[82] I note that the amount of compensation calculated does not include a component for shock, humiliation or distress.

Compensation cap: s.392(5)

[83] I must reduce the amount of compensation to be ordered if it exceeds the lesser of the total amount of remuneration received by the Applicant, or to which the Applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, or the high income threshold immediately prior to the dismissal.

[84] The amount the Applicant would have earned, or to which the Applicant was entitled, for the 26 week period immediately prior to the dismissal was $32,670.

[85] The amount of compensation I will order does not exceed the compensation cap.

Conclusion

[86] I am satisfied that:

a. the Applicant was protected from unfair dismissal;

b. the dismissal was unfair; and

c. it is appropriate to order that the Respondent pay the Applicant compensation in the amount of $6101.30, less applicable tax. This amount is to be paid within 14 days of the date of this decision.

[87] An order will be issued with this decision.

DEPUTY PRESIDENT

Appearances:
M Morgan, on her own behalf.

Hearing details:
2016.
Canberra:
June 21.

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[1] Transcript PN16.

[2] See Exhibit 2.

[3] (1995) 185 CLR 410 at 465 per McHugh and Gummow JJ.

[4] *Sayer v Melsteel* [2011] FWAFB 7498.

[5] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-378.

[6] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373.

[7] Ibid.

[8] Transcript PN30.

[9] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41].

[10] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[11] *Previsic v Australian Quarantine Inspection Services* Print Q3730.

[12] (2000) 98 IR 137.

[13] Ibid at 151.

[14] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[15] *Annetta v Ansett Australia Ltd* (2000) 98 IR 233, 237.

[16] *Biviano v Suji Kim Collection* PR915963 at [34].