DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

City of Stirling
v
Mr Kevin Emery
(C2018/843)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT COLMAN
COMMISSIONER BISSETT

SYDNEY, 20 APRIL 2018

Appeal against decision [2018] FWC 914 of Deputy President Binet at Perth on 9 February 2018 in matter number U2017/2986.

[1] The City of Stirling ('City') has lodged an appeal, for which permission is required, against a Decision[1] issued by Deputy President Binet on 9 February 2018, in which she determined that Mr Kevin Emery had been unfairly dismissed. She ordered that Mr Emery be reinstated and paid lost remuneration from the date of dismissal within 14 days, namely by 23 February 2018.

[2] The City of Stirling sought a stay of the Deputy President's order. On 22 February 2018 Deputy President Colman granted the stay,[2] suspending the City's obligation to reinstate Mr Emery and pay lost remuneration, pending determination of the appeal.

[3] The application for permission to appeal and the appeal were listed before us on 4 April 2018. For the reasons set out below, we have decided to grant permission to appeal, quash the Decision and remit Mr Emery's application for an unfair dismissal remedy to Commissioner Bissett for rehearing.

Decision at first instance

[4] Mr Emery was employed as a beach inspector with the City of Stirling in Perth. He was dismissed for having modified the air-conditioning units in two beach inspector vehicles owned by the City. Mr Emery received a termination letter from the City, stating that the unauthorised modifications to the vehicles were in breach of policy and had resulted in substantial damage. The modifications were also said to have affected the capacity of the City to provide life-saving services to the community.

[5] Mr Emery claimed that his dismissal was unfair. In particular, he said that he made the modifications to the vehicles with the authority of his supervisor, Mr Snook. Although he was

[1] [2018] FWC 914, ('Decision').
[2] [2018] FWC 1112; PR600622.

employed as a beach inspector, Mr Emery said that he possessed the required expertise to perform the modifications, and that he had performed similar tasks for the City during his employment. Mr Emery also contended that the investigation into his conduct was unfair, as it was undertaken by Mr Snook, whose role in the matter was at issue.

[6] Mr Emery gave evidence in the proceedings before the Deputy President, as did another beach inspector. Six witnesses gave evidence for the City of Stirling, including Mr Snook.

[7] A centrally important and contested fact was whether Mr Snook authorised Mr Emery to make the modifications to the vehicles. Mr Emery gave evidence that Mr Snook approved the modifications. Mr Snook denied this.[3] The Deputy President preferred the evidence of Mr Emery and concluded that she was 'not satisfied that the modifications were unauthorised.'[4]

[8] In the course of her analysis of the evidence, the Deputy President stated that Mr Emery had given uncontested evidence that Mr Snook was on a last warning. She stated that this 'would provide a clear motivation for Mr Snook to deny authorising the modifications'.[5] She also considered that Mr Snook's failure to exclude himself from the investigation lent credibility to the 'assertion that Mr Snook had something to hide'.[6]

[9] The Deputy President further found that the auto-electrical modifications Mr Emery made to the vehicles were not so far removed from the tasks he was expected to perform as to constitute a valid reason for dismissal. She considered that he had been encouraged by the City to perform similar tasks, given his prior training and experience in auto-electrics.[7]

[10] The Deputy President was not satisfied that Mr Emery's conduct constituted a valid reason for his dismissal. She concluded that, even if there was a valid reason for the dismissal, the lack of procedural fairness afforded to Mr Emery rendered his termination harsh, unjust and unreasonable.[8]

Permission to appeal

[11] An appeal under s.604 of the *Fair Work Act 2009* ('FW Act') is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[9] There is no right to appeal and an appeal may only be made with the permission of the Commission. Section 604(2) of the FW Act states:

> "Without limiting when the FWC may grant permission, the FWC must grant permission if the FWC is satisfied that it is in the public interest to do so."

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[3] Decision at [67].

[4] Decision at [78].

[5] Decision at [74(f)].

[6] Decision at [77], [165].

[7] Decision at [96].

[8] Decision at [135], [172].

[9] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[12] This appeal is one to which s.400 of the FW Act applies. Section 400 provides:

> "(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact."

[13] In *Coal & Allied Mining Services Pty Ltd v Lawler and others* the Federal Court characterised the test under s.400 as 'stringent'.[10] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[11] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> '... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.'[12]

[14] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[13] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[14]

[15] We have concluded that permission to appeal should be granted in this matter. For the reasons given below, the propositions that Mr Snook had a motivation to deny authorising the modifications because he was on a final warning, and that he had something to hide, were not put to Mr Snook and no opportunity was afforded to the City to contest or resist them. The City was thereby denied procedural fairness. This constituted appealable error, going to the Deputy President's jurisdiction in determining whether Mr Emery was unfairly dismissed. It manifested an injustice. Accordingly, we find that the public interest for the purposes of granting permission to appeal under s.400(1) has been enlivened. Permission to appeal is granted.

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[10] (2011) 192 FCR 78 at [43].

[11] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44] -[46].

[12] [2010] FWAFB 5343, 197 IR 266 at [27].

[13] *Wan v AIRC* (2001) 116 FCR 481 at [30].

[14] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28].

The Appeal

[16] The City of Stirling advanced 12 grounds of appeal, variously contending that the Deputy President's Decision was affected by errors of law or significant errors of fact, that these enliven the public interest such as to warrant permission to appeal being granted, and that the appeal should be upheld. At the hearing before us, the City sought leave to amend its notice of appeal to add a thirteenth ground of appeal concerning the question of Mr Emery's mitigation of loss. This was not opposed, and leave to amend was granted.

[17] The first ground of appeal contends that the Deputy President made findings on two matters in respect of which the City had no notice, and that it was thereby denied procedural fairness.

[18] First, at paragraph 74(f) of the Decision, the Deputy President stated:

> "Mr Emery gave unchallenged evidence that Mr Snook was on a last warning and therefore Mr Snook was "loathe (sic) to commit any instructions to writing"[50]. This would also provide a clear motivation for Mr Snook to deny authorising the modifications."

[19] The footnote refers to the following passage from transcript, where Mr Emery is asked in cross-examination whether there is any document recording Mr Snook's authorisation of the modifications to the vehicles:

> "PN1030
>
> There is no document in relation to it? --- No. My understanding is Mr Snook is on his last warning and therefore is very loathe (sic) to commit anything to writing. Most things are done verbally over the phone."

[20] Mr Emery had not previously referred in his evidence or written materials to Mr Snook being on a final warning, or that Mr Snook was loath to commit instructions to writing. Further, Mr Emery had not contended, either directly or through his counsel, that this would provide a motivation for Mr Snook to deny authorising the modifications. Mr Emery did not raise this with the City of Stirling during the investigation, nor did he or his counsel raise the matter before the Deputy President.

[21] The City of Stirling submitted that Mr Snook was the first witness to give evidence before the Deputy President. There was an order that witnesses remain out of the courtroom until they had given evidence. Mr Snook did not hear the assertion about him allegedly being on a final warning or being loath to commit instructions to writing, and it was not put to him in cross-examination. Against this, Mr Emery contended that the City of Stirling's counsel heard the evidence of Mr Emery, and that the City chose not to address it either through evidence or submissions.[15] He contended that the Deputy President was entitled to make the finding she did, having heard and observed the witnesses in the witness box.

[22] It is necessary to distinguish between Mr Emery's evidence under cross-examination that he believed Mr Snook was on a final warning and loath to commit instructions to writing,

[15] Respondent's submissions on appeal, paragraph 13.

and the Deputy President's inference that this provided a "clear motivation for Mr Snook to deny authorising the modifications".

[23] Mr Emery's evidence that Mr Snook was on a final warning and loath to commit instructions to writing was, as the Deputy President says, uncontested. Counsel for the City of Stirling is presumed to have heard Mr Emery's evidence to this effect, in answer to his question in cross-examination. Theoretically, counsel for the City could have brought this to Mr Snook's attention. The City's counsel might have expected Mr Emery's counsel to put the matter to Mr Snook in cross-examination, if the matter was to be relied on. This did not occur. In the ordinary course, new evidence is not to be adduced from a witness under re-examination, the latter being confined to issues arising from cross-examination. Accordingly, it would have been unorthodox for the City's counsel to raise the matter of the final warning with Mr Snook in re-examination. Neither side appears to have seen this evidence as significant. Mr Emery made no further use of it in his case. Nevertheless, one can say that Mr Emery gave evidence about the final warning, and his belief that Mr Snook was reluctant to put instructions in writing, and that this evidence was not contradicted. Further, once the statement fell from Mr Emery, the City was, most belatedly, on notice of this matter.

[24] However, the inference that the Deputy President drew from this evidence, namely that the warning provided a motivation for Mr Snook to deny authorising the modifications, was a matter in respect of which the City of Stirling had no notice. We note that, during the cross-examination of Ms Watts, the City's Employee Relations Coordinator, the Deputy President asked the witness whether it would not be "natural for (Mr Snook) to put the blame somewhere else", if in fact he had authorised modifications that had damaged the vehicle.[16] The witness says no. Mr Snook was not asked about this. However, this question concerns a different proposition to the one in respect of which the Deputy President drew an inference, namely that, because Mr Snook was on a final warning, this would give him a motivation to deny approving the modifications. The City had no notice of this proposition. Furthermore, this proposition was not put to Mr Snook either.

[25] Counsel for Mr Emery confirmed before the Full Bench that it was not part of Mr Emery's case that Mr Snook had a motivation to deny authorising the modifications because he was on a final warning.[17] No such contention was made in Mr Emery's written submissions, including the final written submissions filed after the conclusion of the proceedings before the Deputy President, nor was it raised in Mr Emery's evidence or in oral argument before the Deputy President. Further, had Mr Emery's counsel sought to make such a contention, he would have been expected to put the proposition to Mr Snook in cross-examination, consistent with the principle in *Browne v Dunn.*[18] He did not do so, not by oversight, but because it was not part of Mr Emery's case.

[26] The rule in *Browne v Dunn* is not just a rule of evidence, but a dimension of procedural fairness.[19] It requires that a party give appropriate notice to the other party and its

[16] Transcript of Proceedings dated 30 November 2017 at PN2335.

[17] Transcript of Proceedings dated 4 April 2018 at PN183, PN184.

[18] (1893) 6 ER 67.

[19] See *Hughes v Momentum Wealth Pty Ltd*, [2017] FWCFB 759 at [25].

witnesses of any imputation that it intends to make against them, whether as to their conduct relevant to the case, or to credit.[20]

[27] Although Mr Emery's counsel did not contend, or put to Mr Snook, that the final warning provided a motivation for him to deny authorising the modifications, it would have been open for the Deputy President to do so herself, if she thought such an inference might be drawn. If the potential inference occurred to her after the conclusion of proceedings, she could have raised it with the parties in correspondence and allowed them to make any submissions or lead evidence in relation to it. This would have provided the City of Stirling an opportunity to respond to the proposed inference or finding. However, this did not occur. As it was, the City did not have an opportunity to contest the inference (or resist the finding) that, because of the alleged final warning, Mr Snook had a motivation to deny authorising the modifications. In our view, this amounted to a denial of procedural fairness.

[28] Further, we have some doubt whether the inference drawn by the Deputy President was sound. A fact may be proved by inference if according to common experience it is the more probable inference.[21] The circumstances must do more than give rise to conflicting inferences of equal degrees of probability.[22] In this case, a directly contrary inference appears to be open, namely that a person who has received a final warning would heed it and exercise due caution, such that Mr Snook would not approve inappropriate modifications to vehicles, much less lie about having done so afterwards.

[29] The second finding in respect of which the City of Stirling claims to have had no notice, and in respect of which it claims to have been denied procedural fairness, was the Deputy President's conclusion that Mr Snook had 'something to hide'. Two such references appear in the Decision. At paragraph 77, the Deputy President states:

> "**[77]** Mr Snook conducted the investigation so there was no independent assessment during the course of the investigation as to whether in fact Mr Snook did give approval for the modifications to occur. The minutes for the Investigation Meeting reveal that Mr Snook did not seek to challenge the veracity of Mr Emery's allegation that he authorised the repairs by asking Mr Emery to provide particulars of when and where that authorisation occurred. Instead at the Investigation Meeting Mr Snook simply denied the authorisation was given and avoided any forensic investigation of the veracity of Mr Emery's assertion. The opportunity for forensic analysis was shut down further by the manner in which Mr Snook conducted the investigation in breach of the City of Stirling Employee Discipline Management Practice. Mr Snook's failure to exclude himself from conducting the investigation, his failure to test the veracity of Mr Emery's defence and his failure to prepare and tender any written statement in the course of the investigation gives some credibility to the assertion that Mr Snook had something to hide." (Emphasis added).

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[20] The rule in *Browne v Dunn* was described in *MWJ v The Queen* [2005] HCA 74 at paragraph 38 in the following way: *"The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit.*"

[21] *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 6; See also *United Group Resources Pty Ltd and Ors v Calabro and Ors* (2011) 198 FCR 514 at [71].

[22] *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 6.

[30] The above paragraph is largely restated at paragraph 165 of the Decision, save that the last sentence of [165] concludes that the series of matters cited '*gives credibility to Mr Emery's assertion that Mr Snook had something to hide*'. (Emphasis added)

[31] Mr Emery did not make such an assertion. So much was confirmed by his counsel before the Full Bench.[23] It was not part of Mr Emery's case that such an assertion had been made. There is no reference to it in the written submissions or the proceedings before the Full Bench. It was not put to Mr Snook in cross-examination.

[32] The Deputy President's statement that Mr Emery had made an assertion that Mr Snook had something to hide was an error.[24] It overstates Mr Emery's case. As is apparent from the passage of the Decision extracted above, there *was* a question in the proceedings below about whether Mr Snook should have been involved in the investigation. From the outset of the investigation, Mr Emery had claimed that there was a conflict of interest in Mr Snook investigating his conduct, in circumstances where Mr Emery's position was that Mr Snook approved it. Further, in Mr Emery's closing submissions there is a contention that Mr Snook had a 'vested interest' to deny that he authorised the modifications, because they subsequently became controversial.[25] It was put to Mr Snook in cross-examination that he had a conflict of interest between his role as an investigator into Mr Emery's conduct in making the modifications, and his personal interest as someone who might be blamed if indeed he had authorised the work.[26] In these circumstances the Deputy President may have considered that there was an implicit contention by Mr Emery that Mr Snook had something to hide. But this was not the case.

[33] There is a significant difference between a proposition that a person should not have conducted an investigation because they had a conflict of interest, and a suggestion that a person had something to hide. Unlike the former, the latter does not necessarily imply that a person has done anything wrong. A conflict of interest could indicate, for example, that Mr Snook did not have an objective perspective on his own actions. But a proposition that a person had 'something to hide' carries an imputation of impropriety.

[34] It was not put to Mr Snook that he was lying or not being candid about the question of whether he authorised the modifications, or that there was an 'assertion' (or potential inference) that he had 'something to hide'. Mr Emery did not make any such assertion, either personally or through his counsel, and there is nothing in the material before the Full Bench to suggest otherwise. To the extent that the Deputy President considered that an inference might nevertheless be drawn that Mr Snook did have something to hide, she could have put this to Mr Snook or raised it with the parties after the hearing in correspondence. But this did not occur. The City was not afforded an opportunity to contest the inference (or resist the finding) that Mr Snook had something to hide. This was a denial of procedural fairness.

[35] What then is the significance on appeal of the City having been denied procedural fairness in the two respects we have identified?

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[23] Transcript of Proceedings dated 4 April 2018 at PN213, PN214.

[24] As noted below, it is not necessary for us to consider whether this constituted a significant error of fact, or deal with the other appeal grounds.

[25] Paragraph 88 AB459.

[26] Transcript of Proceedings dated 30 November 2017 at PN2632.

[36] Mr Emery contended in his appeal submissions that, quite apart from the Deputy President's inferences or findings that Mr Snook had a motivation to deny authorising the modifications and had something to hide, there was ample evidence for her to properly conclude that the City had not established that the modifications were unauthorised.[27]

[37] In *Stead v State Government Insurance Commission*[28] the High Court stated that "*not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial.*" The Court noted that it is relevant to consider whether further information that might have come before the Court if natural justice had been afforded would have made any difference.[29] The Court went on to state:

> "Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. …It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact."[30]

[38] In our view, these observations are relevant to the approach of a Full Bench of the Commission in considering a contention on appeal that a party has been denied procedural fairness, this being a component of natural justice.

[39] The Deputy President's inferences that because Mr Snook was on a final warning he had a motivation to deny the authorisations, and that he had something to hide, are found at paragraphs 74 and 77 of the Decision. They related to her consideration of whether Mr Snook had authorised the modifications to the vehicles. She concluded that she was 'not satisfied that the modifications were unauthorised.'[31] This in turn was relevant to her consideration of whether the City of Stirling had a valid reason for dismissal. However, whether there is a valid reason for dismissal is only one of the considerations that the Commission must take into account in deciding whether a dismissal was harsh, unjust or unreasonable. At paragraph 172 of the Decision, the Deputy President stated that she did not consider Mr Emery's conduct to constitute a valid reason for dismissal, but even if it had, she was satisfied that the dismissal was unjust and unreasonable, because of the 'lack of procedural fairness afforded to him'. Earlier in her Decision, the Deputy President had concluded that Mr Emery was notified of some but not all of the reasons for dismissal and had an opportunity to respond to some but not all of these reasons,[32] and also that the City had failed to follow its own procedures.[33]

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[27] Respondent's submissions on appeal, paragraph 15.

[28] (1986) 161 CLR 141.

[29] (1986) 161 CLR 141 at 145.

[30] (1986) 161 CLR 141 at 145.

[31] Decision at [78].

[32] Decision at [140] and [146].

[33] Decision at [159] and [160].

[40] However, the Deputy President emphasises in her Decision that the evidence of Mr Snook was "central to the issues in dispute". These issues were not confined to the question of whether there was a valid reason for dismissal.[34] Had the City of Stirling been afforded procedural fairness in relation to the matters identified above, it is possible that the Deputy President might have formed a different view not only on the question of whether the modifications were authorised and whether there was a valid reason, but also on her overall assessment of whether the dismissal was unfair. This is not a case where a rehearing would 'inevitably result in the making of the same order' as that at first instance.[35]

[41] Members of the Commission are bound to act in a judicial manner and to observe procedural fairness in carrying out functions and exercising powers under the Act.[36] The requirements of procedural fairness are not prescribed in a fixed body of rules. What is required is judicial fairness.[37] The Deputy President's inferences (or findings) that Mr Snook had a motivation to deny authorising the modifications because he was on a final warning, and that he had something to hide, were not put to Mr Snook, and the City of Stirling had no notice of them. In our view, the City of Stirling was denied procedural fairness in this regard. This constituted appealable error.

[42] Our conclusions in relation to ground 1 in the notice of appeal are sufficient to uphold the appeal. However, we make some brief observations on one further ground of appeal.

[43] Ground 2 contended that the Decision did not contain adequate reasons concerning the weight that the Deputy President accorded to evidence, taking into account the parties' objections and the credibility of witnesses.

[44] At paragraph 16 of the Decision, the Deputy President stated, in relation to objections that had been raised by each representative to various parts of the witness statements filed by the other, that where 'those objections held any merit I adjusted the weight I attached to that evidence accordingly'. In relation to the matters objected to by the City, the Deputy President dealt with the objections and admitted the evidence, stating that she would give due weight to the relevant evidence.[38] However, the Decision does not indicate what weight has been attached to the evidence in question. Where there has been a contest as to whether the Commission should accept certain evidence or what weight should be afforded to it, it will ordinarily be appropriate for the member to state whether the evidence has been accepted (as did occur in this case), but also, if the evidence is relied on or significant, to provide an indication of what weight has been attributed to it.

[45] Further, at [72], the Deputy President stated that 'witnesses on both sides gave evidence which appeared to be exaggerated and/or inconsistent'. She then cited an example in

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[34] See Decision at [157] and [164].

[35] (1986) 161 CLR 141 at [145].

[36] *Coal and Allied Services Pty Ltd v Lawler* (2011) 192 FCR 78 at 83; see also *Kioa v Minister for Immigration & Ethnic Affairs* (1985) 62 ALR 321 at 347 per Mason J; *R v Commonwealth Conciliation and Arbitration Commission*; *Ex parte Angliss Group* (1969) 122 CLR 546; *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513; 29 IR 148.

[37] *Allen v Fluor Construction Services Pty Ltd* [2014] FWCFB 174 at [22].

[38] Transcript of proceedings dated 29 November 2017 at PN142.

Mr Gugiatti's evidence. In the following paragraph of the decision, the Deputy President states:

> 'I have made an assessment of the evidence of each witness and where I judged that it was less credible, because for example it appeared to be exaggerated, I have weighed it accordingly.'

[46] It is not apparent which witnesses' evidence the Deputy President considered to be less credible than others, or why. If a member considers a witness' evidence to be less credible than another, for example because it appears to be exaggerated, and if this is significant in the decision, the member should explain the basis for her or his assessment of the relevant evidence. Adequate reasons for the decision should explain how significant evidence has been weighed. This is necessary in order for the parties to understand the basis for a member's factual findings and conclusions. The nature and extent of the obligation to provide reasons has been addressed in other Full Bench decisions and it is not necessary to restate the relevant principles.[39]

[47] Given our conclusions in relation to ground 1 in the notice of appeal, it is not necessary for us to determine whether ground 2 is made out.

Conclusion and orders

[48] For the reasons given, we consider both that it is in the public interest to grant permission to appeal, and that the appeal should be upheld. We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The Decision ([2018] FWC 914) and Order (PR600330) are quashed.

(4) Mr Emery's application for an unfair dismissal remedy is referred to Commissioner Bissett for rehearing.

VICE PRESIDENT

Appearances:

T Caspersz for the City of Stirling

[39] See *Barach v University of New South Wales* [2010] FWAFB 3307 at [16]; and *Transport Workers' Union of Australia v WA Freightlines Pty Ltd* [2011] FWAFB 3863 at [10].

P Mullally for Mr Emery

Hearing details:

2018
Melbourne
Perth (VC):
4 April.

Printed by authority of the Commonwealth Government Printer

<PR602181>