# DECISION

*Fair Work Act 2009*
s.604—Appeal of decision

**Phillip Parker**
**v**
**Garry Crick's (Nambour) Pty Ltd as The Trustee for Crick Unit trust T/A Cricks Volkswagen**
(C2017/6725)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOOLEY
COMMISSIONER JOHNS MELBOURNE, 22 JANUARY 2018

*Appeal against decision [2017] FWC 4120 of Commissioner Spencer at Brisbane on 14 November 2017 in matter number U2016/12058 – permission to appeal refused.*

**Introduction**

**[1]** Mr Phillip Parker (the Appellant) was dismissed from his employment with Garry Crick's (Nambour) Pty Ltd (the Respondent) on 12 September 2016. The Appellant subsequently lodged an application for an unfair dismissal remedy.

**[2]** The Appellant's application was heard by Commissioner Spencer on 7 August 2017 and a decision issued on 17 November 2017[1] (the Decision). In the Decision the Commissioner determined that the Appellant had been dismissed (within the meaning of s.386); that there was a valid reason for the dismissal; and that the Appellant had been unfairly dismissed. The Commissioner ordered the Respondent to pay the Appellant the amount of $7,459.41, less taxation required by law.[2] The Appellant has appealed the Decision.

**[3]** An appeal under s.604 of the *Fair Work Act 2009* (Cth) (the 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.[3] There is no right to appeal and an appeal may only be made with the permission of the Commission. The matter was listed for hearing in respect of both permission to appeal and the merits of the appeal.

**The Decision**

**[4]** The Decision sets out the background to the proceeding (at [1]-[13]) and the relevant statutory provisions (at [15]-[17]), before turning to deal with the Respondent's jurisdictional objection that there had been no termination at the initiative of the employer. The Commissioner sets out the relevant evidence and submissions (at [18]-[61]) before turning to

consider whether the Appellant had been dismissed within the meaning of s.386 (at [62]-[74]) and concluded that:

> 'A termination had occurred at the initiative of the employer, as per s.386(1)(a). The jurisdiction of the Commission, in line with s.385 of the Act, is enlivened.'[4]

**[5]** There is no challenge to that aspect of the Decision which deals with (and rejects) the Respondent's jurisdictional objection to the Appellant's application.

**[6]** The Commissioner then considered whether the Appellant's dismissal was 'harsh, unjust or unreasonable' and for that purpose took into account the matters set out at s.387 (a) - (h), as follows:

- There was a valid reason for the dismissal relating to the Appellant's conduct on 20 July 2016 (the 'first incident') and 10 September 2016 (the 'second incident') (see [76]-[96]).

- As to whether the Appellant was notified of the reason for the dismissal (s.387(b)), the Commissioner held that the Appellant was denied procedural fairness in 'not being afforded the opportunity to respond to the first allegation at the time it was alleged to have occurred [and]…the allegations were not put to the [Appellant] first to allow his response and therefore, the Respondent to consider the outcome' (see [97]-[101]).

- As to whether the Appellant was given an opportunity to respond (s.387(c)), the Commissioner held that:

  'The process was procedurally flawed, however taking into account all of the evidence (including the Applicant's further evidence at the hearing), this would not have affected the finding of a valid reason for dismissal.'[5] (see [102]-[104])

- As to whether the Appellant had been warned (s.387(c)), the Commissioner noted that the dismissal related to conduct and that the Appellant 'had been trained in the relevant policies regarding conduct of this nature' (at [106]).

- As to the size of the Respondent's business and the absence of dedicated human resource management specialists of expertise (s.387 (f) and (g)) the Commissioner held that:

  > 'Whilst the Respondent operated a number of dealerships, they did not have dedicated human resources or industrial relations resources. The letters sent to the Applicant on 12 and 14 September 2016 reflected the absence of this specific advice in relation to the process utilised. The process as set out, was deemed to be a termination at the initiative of the employer, undertaken with some procedural deficiencies.
  >
  > However, the Respondent's assessment of the alleged comments as requiring action and response was correct. The Applicant's comments were serious, hostile, derogatory and sexual harassment, in line with the Respondent's policy.'[6]

- The Commissioner dealt with a range of other relevant matters (s.387(h)) (at [109]-[121]), including the impact of the dismissal on the Appellant's personal and economic situation.

**[7]** The Commissioner then concluded that the dismissal was unfair:

> 'Even if the procedural issues had been rectified, it would not have changed the decision to terminate the Applicant's employment. Given the gravity of the comments, dismissal was appropriate in all the circumstances. Taking into account the procedural flaws, a procedurally fair process allowing for an investigation and proper process of notification and response would have taken a longer period to be discharged. The termination was unfair on this basis.'[7]

**[8]** The Commissioner next dealt with the question of remedy and concluded that reinstatement was inappropriate, noting that the Appellant had not sought reinstatement.[8] There is no challenge to this aspect of the Decision and so it is unnecessary to say anything further about it. The Commissioner then turned to the issue of compensation and referred to the relevant authorities.[9]

**[9]** The amount ordered ($7,459.41) was the Appellant's total gross remuneration for three weeks ($8,267.10) less the *ex gratia* payment ($807.69). The central findings which underpinned the amount of compensation ordered were:

- a procedurally fair process would have resulted in the Appellant remaining in employment for a further three weeks; and
- the Appellant's total gross remuneration for three weeks was $8,267.10 (calculated at ordinary time gross earnings, plus car allowance, plus the average commissions earned between 13 April 2016 and 12 October 2016).

**The Appeal**

**[10]** The grounds of appeal fall into two broad categories. First, it is contended that the Commissioner showed bias towards the Appellant and, second, that the Commissioner made a number of 'significant errors of fact'. It is convenient to deal first with the bias point.

**[11]** The test for determining whether a Member is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the Member might not bring an impartial and unprejudiced mind to the resolution of the question they are required to decide.[10] The hypothetical reasonable observer of the Member's conduct is postulated in order to emphasise that the test is objective and that the observer is taken to be reasonable.

**[12]** The recent observations made on this topic by the Full Court of the Federal Court in *ALA15 v Minister for Immigration and Border Protection* bear repeating:

> '35. Although the application of the apprehended bias test can give rise to difficulties, the parties were in substantial agreement as to the primary elements of the test. That is hardly surprising because the test is relatively well settled. It is whether a fair-minded and appropriately informed lay observer might reasonably apprehend that the Court might not bring a fair, impartial and independent mind to the determination of the matter on its merits (see, for example, *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337; *Concrete Pty Limited v Parramatta Design*

*and Developments Pty Ltd* [2006] HCA 55; (2006) 229 CLR 577 and *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; (2011) 242 CLR 283.

36. Other relevant principles are:

(a) at least the following two steps are involved in a case involving an allegation of apprehended bias:

(i) there must be an identification of what it has said might lead a judge to decide a case other than on its legal and factual merits; and

(ii) there must be an articulation of the logical connection between the matter and the feared deviation from a course of deciding a case on its merits (*Ebner* at [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ);

(b) an allegation of bias against a judge on the basis of prejudgment is a serious matter not the least because it carries with it the suggestion that the judge has failed to honour his or her judicial oath as such might be questioned by the fair-minded observer. As is also the case where such an allegation is made against an administrative officer, the allegation must be "distinctly made and clearly proved" (*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 at [69] per Gleeson CJ and Gummow J); and

(c) as noted above, the test assumes that the hypothetical fair-minded lay observer is to be attributed with appropriate knowledge of relevant matters so as to be in a position to make a reasonably informed assessment of the likelihood of apprehended bias (see, for example, *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [13] per Gleeson CJ, Gaudron, McHugh and Gummow and Hayne JJ and at [53] per Kirby J; *British American Tobacco* at [47]-[48] per French CJ and at [144] per Heydon, Kiefel and Bell JJ and *Isbester v Knox City Council* [2015] HCA 20 at [23] per Kiefel, Bell, Keane and Nettle JJ and at [57] per Gageler J).'[11]

**[13]** The basis of the Appellant's bias allegation is said to be the Commissioner's conduct in not setting the matter for arbitration within a reasonable timeframe; in failing to accede to the Appellant's previous request to Deputy President Asbury that the matter be dealt with in Brisbane not Maroochydore; and in the Commissioner's directions regarding the conduct of the proceedings.

**[14]** The Appellant's first two contentions – that the delay in setting the matter for arbitration and the choice of venue exhibited bias – were abandoned during the course of oral argument.[12] This concession was entirely appropriate as it is apparent from a review of the relevant file that the Appellant's legal representative had concurred with the date of the hearing and raised no objection to the venue.

**[15]** The essence of the Appellant's complaint regarding the Commissioner's directions may be shortly stated. The initial directions were issued by Deputy President Asbury on 7 December 2016 which provided as follows:

1. The respondent (Garry Crick's (Nambour) Pty Ltd as The Trustee for CRICK UNIT TRUST T/A Cricks Volkswagen) is required to file with the Fair Work Commission, marked attention UNFAIR DISMISSAL ROSTERS, and serve on the applicant:

- the Respondent's Outline of Argument: objections;
- the Respondent's Statement(s) of Evidence; and
- the Respondent's Document List

by no later than noon on Monday, 19 December 2016.

2. The applicant (Mr Philip Parker) is required to file with the Fair Work Commission, marked attention UNFAIR DISMISSAL ROSTERS, and serve on the respondent:
   - the Applicant's Outline of Argument;
   - the Applicant's Outline of Argument: objections;
   - the Applicant's Statement(s) of Evidence; and
   - the Applicant's Document List

   by no later than noon on Thursday, 29 December 2016.

3. The respondent (Garry Crick's (Nambour) Pty Ltd as The Trustee for CRICK UNIT TRUST T/A Cricks Volkswagen) is required to file with the Fair Work Commission, marked attention UNFAIR DISMISSAL ROSTERS, and serve on the applicant:
   - the Respondent's Outline of Argument; and
   - Any other material it wishes to file in reply.

   by no later than noon on Tuesday, 3 January 2017.

Please refer to attached information for assistance with preparing for the proceedings.'[13]

**[16]** The matter was allocated to Commissioner Spencer following Deputy President Asbury's decision to recuse herself on 5 June 2017. As we have mentioned, on 9 June 2017 the Commissioner issued directions which provided, relevantly:

'APPLICANT'S MATERIAL

[5] The Applicant is required to file the following material with the Commission and serve a copy on the Respondent by 3:00pm Monday 26 June 2017:
- Submissions and affidavits in relation to the application relevant to s.387 (including submissions on the remedy sought).
- Any case authorities they rely on.

[6] Reply - The Applicant must file any material in reply by 3:00pm Monday 17 July 2016.

RESPONDENT'S MATERIALS

[7] The Respondent is required to file the following material with the Commission, and serve a copy on the Applicant, by no later than 3:00pm Monday 10 July 2017:
- Submissions and affidavits in response to the application and the Applicant's material relevant to s.387 (including submissions in reply as to remedy).
- Any case authorities they rely on.'[14]

**[17]** The Commissioner's directions change the order in which the parties were to file their material. The earlier directions had the respondent filing its material first, the Appellant filing his material, then the Respondent filing material in reply. In the Commissioner's directions of 9 June 2017 the Appellant was to file his material first (then the respondent, then the applicant in reply). The Appellant advanced the following submission in respect of the change:

'So that would suggest to me - if I may sort of frame it for you - that would suggest to me that Spencer C has immediately taken issue with the sexual harassment case, and instead of having

> the respondent file first for their jurisdictional matter which was raised by them, she has changed it to be a bias against me…'[15]

**[18]** The Appellant also relies on the fact that the Commissioner had allowed the Respondent to file the 'further statement' by Mr Holden.[16]

**[19]** We are not persuaded that the matters relied on by the Appellant are such as to establish an arguable case that a fair-minded lay observer might reasonably apprehend that the Commissioner might not bring a fair, impartial and independent mind to the determination of the matter on merit. The directions issued by the Commissioner were unexceptional and we fail to see how providing a witness (Mr Holden) with an opportunity to comment on the evidence of another witness (the Appellant) can properly be said to give rise to an apprehension of bias.

**[20]** Further, as we have mentioned, the Appellant was legally represented at first instance. The Appellant's legal representative took no issue with the Commissioner's directions and did not object to the tender of Mr Holden's further statement.[17] Nor did the Appellant's legal representative make a disqualification application at first instance on the basis of actual or apprehended bias on the part of the Commissioner.

**[21]** No arguable case of bias has been demonstrated by the Appellant and we are not satisfied that it would be in the public interest to grant permission to appeal in respect of this ground. We now turn to the alleged 'significant errors of fact'.

**[22]** The Appellant submits that a number of the factual findings which underpin the Commissioner's conclusions were wrong. Before turning to deal with each of these matters we propose to say something about the general approach to challenging factual findings on appeal.

**[23]** In the joint reasons in *Fox v Percy*,[18] in a passage which has been applied since,[19] Gleeson CJ, Gummow and Kirby JJ said:

> '[23] [An appellate court] must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceedings wholly or substantially on the record.[20] These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court reading the transcript, cannot always fully share.'[21]

**[24]** The judgment of the High Court in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd*[22] is also relevant in this context. In *Earthline* the trial judge had rejected the evidence of the State Rail Authority's principal witness, Mrs Page, whose testimony had been corroborated by the evidence of two other witnesses (Mrs Meek and Ms Packham), neither of whom had been cross examined. Gaudron, Gummow and Hayne JJ said the following in relation to these circumstances:

> '[62] The [State Rail Authority] contends that the trial judge was in error in three respects. First, the trial judge failed to give sufficient attention to all the evidence of the case, especially that of Mrs Meek and Ms Packham, as well as the extensive documentary evidence, in evaluating the evidence of Mrs Page. Secondly, the trial judge applied the incorrect standard of proof in analysing the evidence led by the [State Rail Authority]. And thirdly, the trial judge misdirected himself as to the relevant issue concerning the certification of the dockets. For the

reasons outlined above when reviewing the judgments of the trial judge and the Court of Appeal, the [State Rail Authority] has established each of these grounds.

[63] It is true that the trial judge, in determining whether to accept the evidence of Mrs Page, was heavily swayed by his impression of her whilst giving oral evidence. However, this circumstance does not preclude a court of appeal from concluding that, in light of other evidence, a primary judge had too fragile a base to support a finding that a witness was unreliable [their Honours cited *Apand Pty Ltd v Kettle Chip Co Pty Ltd* (1994) 52 FCR 474 at 496-7; ALR. See also *Voulis v Kozary* (1975) 7 ALR 126; 50 ALJR 59; *Chambers v Jobling* (1986) 7 NSWLR 1]. The documentary evidence in this case, comprising unchallenged affidavit material of Mrs Meek and Ms Packham, the wage records and related documents of Earthline and Nuline, the list of plant (at least in relation to machine No 59) and the analysis of Coopers & Lybrand (in respect of the duplicity claims), provides significant support to the allegations made by Mrs Page.

[64] As Kirby J and Callinan J point out in their reasons for judgment, these were matters to which weight was not given either by the trial judge or the Court of Appeal. The substance of the matter is that there has not yet been a determination of the SRA's case upon a consideration of the real strength of the body of evidence it presented. There must be a new trial at which this consideration will be undertaken.'

**[25]** And at [154] Callinan J said:

'The evidence of Mrs Page was therefore corroborated in material particulars by Mrs Meek and Ms Packham. It was given further force by the respondents' decision not to cross-examine those corroborators, the failure of the respondents to call any evidence in refutation, and by the attempts at subornation by Messrs Davies, matters to which neither the trial judge nor the Court of Appeal accorded any weight.'

**[26]** Kirby J was in general agreement with the approach of Callinan J.[23]

**[27]** It needs to be borne in mind that in *Earthline,* the witnesses (Mrs Meek and Ms Packham) had not been cross examined to suggest their account was incorrect, hence their evidence was uncontradicted corrobative evidence.

**[28]** A similar situation was considered by the Full Federal Court in *Director, Office of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union,*[24] in which Besanko and Perram JJ said:

'There are differences between the situation which obtained in *Earthline* and that obtaining in this case … Mr Bell's evidence did contradict the account given by each of Mr Sawyer, the foreman and the project manager. Indeed, it was on this basis that his Honour had rejected each of their evidence. *Earthline*, on the other hand, was a case where one could not dismiss Mrs Page's evidence without reconciling that finding with the uncontradicted evidence of Mrs Meek and Ms Packham. This led the CFMEU and Mr Bell to submit that *Earthline* was to be understood as 'a case of glaring improbabilities or uncontested evidence not brought into account'. This is, indeed, a distinguishing feature from *Earthline*. We would not accept that by itself, however, it is sufficient to make inapplicable the point that *Earthline* makes. That point is that a trial court must consider the evidence as a whole including, where relevant, how that evidence internally relates to itself.

Here the constellation of facts is a little different, although, we believe, not materially so. One of the strengths of the appellant's case was that the three witnesses all contended that Mr Bell

> had made statements to them of a particular kind. One finding consistent with that evidence was that they all gave that evidence because, in fact, it had been said. Further, if one were to accept that Mr Bell had said such things in one of the conversations, that made it much more likely that they had been said in the others. Consequently, as in *Earthline*, the evidence of each of Mr Sawyer, the foreman and the project manager was corroborative of the evidence of each of the others.
>
> For that reason it was necessary for the trial judge to consider that corroborative effect if he was to discharge his obligation to consider all of the evidence. The only difference between this case and *Earthline* is that the corroborative evidence in *Earthline* was uncontradicted. However, we do not think that is a sufficient reason to distinguish it.'[25]

**[29]** Applying the above observations to the matter before us, the Commissioner was obliged to consider the evidence as a whole. In discharging that obligation it was necessary for her to consider the corrobative effect of the evidence and how the evidence internally relates to itself. We now turn to the alleged 'significant errors of fact'.

**[30]** A number of the alleged 'significant errors of fact' relate to the Commissioner's findings in respect of the first and second incidents. It is convenient to deal first with the other alleged errors.

**[31]** First, the Appellant contends[26] that the Commissioner erred in describing Person A as a vulnerable individual who needed protecting, absent any submission to this effect. This submission is directed at paragraph [19] of the Decision:[27]

> 'It was submitted that the Respondent had consistently supported the Applicant in his employment, however the Applicant had caused frequent issues for the Respondent and in particular, Mr Holden. In terms of the events leading up to the cessation of the Applicant's employment, the Respondent stated that the Applicant was involved in two incidents concerning comments made to a young, female employee recently employed as a Sales Trainee (whom will be referred to as, "*Person A*," in this decision). Person A commenced employment with the Respondent in mid July 2016. The first alleged incident occurred only a few days into Person A's employment. The second incident was alleged to have occurred on 10 September 2016.' (emphasis added)

**[32]** It is clear from the above passage that the Commissioner was simply setting out the Respondent's submission and was not making any factual finding. There is no substance to the point advanced by the Appellant.

**[33]** Second, the Appellant contends[28] that the Commissioner made a 'blatant significant error of fact' in paragraph [91] of the Decision. Paragraph [91] states:

> 'Counsel for the Respondent also referred to the Applicant's previous interactions with Mr Stankiewicz. It was put the Applicant that he had applied for Mr Stankiewicz' position of, "*Cluster Business Manager*," however was unsuccessful. The Applicant subsequently sent an email to Mr Stankiewicz stating that he did not agree with his engagement. Mr Stankiewicz suggested that they discuss the matter with Mr Bohner on the following Monday, however the Applicant instead raised a formal grievance regarding his appointment, with Messrs Bohner and Holden the same day. The Applicant's evidence regarding Mr Holden's conduct was not borne out and was inconsistent with his reliance on Mr Holden.'[29] (emphasis added)

**[34]** The Appellant contends that the Commissioner's characterisation of the email he sent to Mr Stankiewcz is incorrect. As set out above the Commissioner observed that in the email the Appellant says that he did not agree with Mr Stankiewcz's engagement. The Appellant submits that while the email did include some criticism of Mr Stankiewcz it was 'primarily a complaint about [his] conditions of employment.'[30] The relevant email is set out at page 279 of the Appeal Book and states as follows:

> 'Hi Rob,
>
> I thought I would email you to voice my concerns and see if we can't find a way to resolve between us rather than involve Don and Sam.
>
> I worked without RDO's from the 5th of August – the 2nd of September at which point the over exhaustion has made me sick or at least more inclined to catch a cold.
>
> On the 1st of September I tried to explain I was feeling run down and needed a day off as I had been staying back late and even had come in on a Sunday. Instead of sending me home to rest you made me stay till 3pm. As a result of the over exhaustion I became extremely ill and required 2 days off. Instead of looking out for me and putting one day down as a RDO I was penalised 2 sick days and told I should have provided a medical cert. I felt like you were pretending that you did me a favour and covered me but as I actually have a cert all you have done is used up a sick day I shouldn't have had to. The exact same scenario occurred this week as I did not feel like I could have a RDO I tried to push through the week and tried again for a half day Thursday instead I got lectured about leaving early for another doctor's appointment. By Friday morning I was burnt out and asked for a rest day which you approved and I am told now it is a sick day not my RDO.
>
> Rob <u>while I was not happy about your engagement</u> I have grown to like you & help as much as possible, but my main concern that a few years out of a chair will have made you forget what it's like to be a BM along with most of the actual $$ writing habits has been confirmed. I say habits because you know how it's just not a habit anymore.
>
> <u>Your engagement has taken away some of my seniority and until you are up to speed with all of our processes you are slowing me down a bit. I previous would have had the clout to negotiate the issue with glen and Casey on that deal but I feel like now I have to waste my time getting you involved with something I am completely capable of.</u>
>
> Let's sit down work out what we can do about the RDO issue and ensure we are both on the same page with everything else as I'm sure if we clash it's not going to look good for either of us. One thing you will find with me is I may stick my nose in where it's not liked sometimes because I generally have the answer or solution needed. I'm not trying to be a smart ass I am genuinely here to help and just want to get shit done. If everyone performs the pressure falls off management and then there is less of a chain pressure down to me.' (emphasis added)

**[35]** We are not persuaded that there is any substance in the point advanced. At paragraph [91] of the Decision the Commissioner was not purporting to summarise the email of 10 September 2016 but simply noted, correctly, that the email was to the effect that the Appellant did not agree with Mr Stankiewcz's engagement.

**[36]** Third, the Appellant contends[31] that the Commissioner made a significant error of fact in paragraph [59] of the Decision. Paragraph [59] states:

> 'The Applicant submitted that the complaint concerning Mr Mason, which is accepted to have led to the Applicant being transferred to the Flinders Lane dealership, assists the Applicant as it was done so, "*presumably to keep him happy and in employment with Crick Auto Group. It seems he even gave him additional responsibility for training and assisting other business managers at the site.*"'[32] (emphasis added)

**[37]** The Appellant takes issue with the statement that his complaint concerning Mr Mason led to him being transferred to the Flinders Lane dealership and submits that the complaint did *not* lead to his transfer.[33] The Appellant's submission is inconsistent with both his evidence in the proceedings at first instance and his submissions in those proceedings.

**[38]** This issue is referred to at paragraph [99] of the Appellant's written submissions:

> 'The respondent also seeks to make something of the complaint the applicant made to Mr Holden about his then boss Mr Ian Mason. This evidence actually assists that applicant because after his complaint, instead of reprimanding the applicant for complaining about his boss without justification, Mr Holden arranged for him to be transferred to the Flinder's Lane dealership, presumably to keep him happy and in employment with Crick Auto Group. It seems he even gave him additional responsibility for training and assisting other business managers at the site.'[34] (emphasis added)

**[39]** The underlined passage in the above extract contains a footnote reference to paragraph [221] of the transcript of the Appellant's evidence at first instance, as follows:

> 'Indeed, not long after you sent this email to Mr Holden he organized for you to be transferred to the Flinders Lane dealerships. Isn't that correct?---Yes, I believe that initial discussion around the 19th.'[35]

**[40]** We are not persuaded that there is any substance in the point advanced.

**[41]** Fourth, the Appellant takes issue with the Commissioner's finding (at [108] of the Decision) that his comments to Person A 'were serious, hostile, derogatory and sexual harassment, in line with the Respondent's policy'. In particular, the Appellant submits that the relevant policy 'requires Person A to be humiliated, intimidated or offended by the alleged comments'[36] and that 'Person A has essentially shown worry or concern, however that doesn't necessarily and isn't necessarily offended hurt or humiliated.'[37] The relevant passage from the Decision is set out below:

> 'However, the Respondent's assessment of the alleged comments as requiring action and response was correct. The Applicant's comments were serious, hostile, derogatory and sexual harassment, in line with the Respondent's policy.'[38]

**[42]** The Employee Handbook is attached to the Further Statement of Mr Holden.[39] The relevant extracts are set out below:

> 'Sexual Harassment- is any unwanted, unwelcome or uninvited conduct of a sexual nature which humiliates, intimidates or offends. Sexual harassment includes any act, gesture, comment, written remark, physical contact, rumour, joke or taking advantage of a deserted workplace to act in a 'sexual manner'. Such conducts includes but is not limited to:
>
> - Leering, patting, pinching, touching or unnecessary familiarity
> - Requests or demands of sexual favours
> - Repeatedly being asked out, after continual refusals

- Display of offensive posters, magazines, pictures or graffiti
- Dirty jokes, derogatory comments, offensive written messages
- Offensive telephone calls, faxes, emails, text messages, electronic postings on social network sites, etc.

Bullying- is aggressive and unreasonable behaviour that intimidates, humiliates and/or undermines a person or group. The following types of behaviour, where repeated or occurring as part of a pattern of behaviour, may be considered bullying:

- Verbal abuse
- Excluding or isolating employees
- Criticism, sarcasm or insults
- Psychological harassment
- Assigning meaningless tasks unrelated to the job
- Giving employees impossible assignments
- Deliberately withholding information that is vital for effective work performance

Employees are protected by this policy whether they are harassed or discriminated against by another employee, client, contractor or customer.

Under this policy all employees are responsible for ensuring that they do not discriminate, harass, bully, victimise or threaten to use violence or attack others in the course of their employment.'

**[43]** We would observe at the outset that having determined that the Appellant made the statements to Person A which constitute the first and second incidents the issue to be decided was whether making such statements provided a valid reason for termination. Importantly, this task did not necessarily involve an inquiry into whether or not the Appellant had complied with the relevant parts of the Employee Handbook. The Appellant's knowledge of the Respondent's policies (as set out in the Employee Handbook) and the extent to which his conduct complied with those policies are relevant, but not determinative, of the question of whether there was a valid reason for dismissal.

**[44]** In any event, we are not persuaded that the Commissioner erred in the manner suggested by the Appellant. The Commissioner's finding that the Appellant's statements were 'serious, hostile, derogatory and sexual harassment' is accurate. Indeed in relation to the first incident, this point was conceded in the Appellant's written submissions at first instance:

> 'Everyone seems to agree that if Mr Parker made the threat to backhand [Person A] then it would be a very serious matter.'[40]

**[45]** We also discern no error in the Commissioner's observation that her description of the Appellant's statements were 'in line with the Respondent's policy.' The first incident involved a threat to use violence and the second was uninvited conduct of a sexual nature involving a derogatory comment which (it may be inferred from her complaint and her evidence) offended Person A.

**[46]** We are not persuaded that the Appellant has established an arguable case of error in respect of this point.

**[47]** Fifth, the Appellant takes issue[41] with the Commissioner's finding (at [137] of the Decision) that his average weekly wage was $2,755.70. The Commissioner's findings in

respect of the Appellant's remuneration are set out at paragraphs [135] – [137] of the Decision:

> 'In considering the relevant amount of compensation, payslips provided for the weeks of 24 August 2016 to 12 October 2016, set out that the ordinary time gross earnings represented $807.69 and a car allowance of $118.72 paid per week. In addition, it is noted that all prior commissions earned by the Applicant had been paid by agreement between the parties on finalising the employment relationship.
>
> Further deductions for contingencies or earnings after the dismissal are not considered appropriate, given the basis for the calculation of compensation. Further to this, the parties did not disagree on the inclusion of commission payments in the consideration of calculating a weeks' wages, however there was disparity on the amounts of such. These arguments have been taken into account. The average commissions earned (since the Applicant's recent commencement with the Respondent) are relied on.
>
> Accordingly, this represents a total gross remuneration figure for three weeks of $8,267.10 (calculated at ordinary time gross earnings, plus car allowance, plus the average commissions earned between 13 April 2016 and 12 October 2016), less the *ex gratia* payment of $807.69.'[42]

**[48]** At first instance the Applicant's submissions about his earning were quite short. Paragraph [105] of the 'Applicant's Outline of Submissions Following Trial' states:

> 'The applicant would have received income including commissions of approximately $3,446.07 per week or $179,195.64 per year.'

**[49]** No detail was provided as to how the figure of $3,446.07 per week was calculated.

**[50]** The Respondent's Final Written Submission in the proceedings at first instance states that the Applicant's average remuneration per week in the 26 weeks before his dismissal was $2,755.70,[43] calculated as follows:

- Base salary $807.69 per week
- Car allowance $118.72 per week
- $47,561.65 commissions over the 26 weeks divided by 26 = $1,829.29

($809.69 + $118.72 + $1,829.29 = $2,755.70)

**[51]** The Respondent also submitted that the Applicant's submission that his remuneration was $3,446.07 was wrong:

> 'The Applicant's submission at paragraph 34 of the Applicant's non jurisdictional submissions that his average remuneration was $3,446.07 per week is wrong. This figure is derived from calculations set out in paragraph 231 of Exhibit 1. The Applicant unfairly inflates his weekly average remuneration by only calculating his remuneration for a period of 10 weeks (from 1 July 2016 to 12 September 2016) and thus is not calculating his remuneration by reference to the remuneration to which the Applicant was entitled during the 26 weeks immediately before the dismissal – see section 392(6)(a) of the Act.'[44]

**[52]** The Applicant filed submissions in reply on 1 September 2017, in accordance with the Commissioner's directions of 14 August 2017, which address the issue of the Applicant's

average remuneration and reply to the Respondent's contention that the Applicant's average remuneration was $2,755.70 per week and that the Applicant's submissions that the average remuneration was $3,446.07 was wrong:

> 'The respondent submits at paragraph 129 of its submissions following trial that the applicant has miscalculated his average weekly salary as he '*unfairly inflates his weekly average remuneration by only calculating his remuneration for a period of 10 weeks (from 1 July 2016 to 12 September 2016) and thus is not calculating his remuneration by reference to the remuneration to which the Applicant was entitled during the 26 weeks immediately before the dismissal – see section 392(6)(a) of the Act.'*
>
> As to the requirement that s 392(6)(a) of the Act requires the applicant's remuneration for the whole of the 26 weeks before his dismissal to be take into account, this is incorrect for two reasons.
>
> Firstly, from a legal standpoint, s 392(6)(a) only requires the cap to be calculated '*for any period of employment with the employer during the 26 weeks immediately before the dismissal'*. The important word in that phrase is 'any'. This means that the Commission can look at any period of employment in the preceding 26 weeks immediately before the dismissal, it does not have to look at the whole of the period of the preceding 26 weeks.
>
> Secondly, from a factual standpoint, the Commission should look at the total amount of remuneration the applicant would have earned at the site he was working at. When the applicant first began employment with Garry Crick's (Nambour) Pty Ltd he was working at Wises Road, but he transferred to the Cricks Volkswagen site on 21 June 2016 (see exhibit 1 at paragraphs 14 to 15). The Crick's Volkswagen site had the potential to offer and more lucrative opportunities for Mr Parker, and so it is the money Mr Parker made working at this site that should be taken into account when determining the relevant amount of compensation. It is therefore not unfair, and it in fact entirely appropriate, for Mr Parker to calculate his remuneration from 1 July 2016.'[45]

**[53]** In support of the contention that the Commissioner made an error the Appellant referred to paragraph [49] of his first statement in the proceedings at first instance:

> 'On my transfer to the Volkswagen dealership, I was provided with a more favourable income agreement.'[46]

**[54]** The Appellant transferred to the Volkswagen dealership on 21 June 2016. The 'more favourable income agreement' was relied on by the Appellant in the proceedings at first instance in support of his contention regarding average remuneration, but the details of the new remuneration arrangements were not disclosed.

**[55]** We would observe that the reference in the submissions at first instance to s.392(6)(a) seems misconceived. Subsection 392(6) deals with the calculation of the 'compensation cap' prescribed in s.392(5) and is not directly relevant to the calculation referred to in s.392(2)(c).

**[56]** In determining the amount of compensation, s.392(2)(c) provides that the Commission must take into account, among other things, 'the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed'. This is sometimes referred to as the applicant's 'lost remuneration' and is usually calculated by estimating how long the employee would have remained in employment but for their dismissal (in weeks) multiplied by their likely weekly remuneration.

**[57]** As the Full Bench observed in *Ellawala* v *Australian Postal Corporation,*[47] such an assessment is often difficult, but it must be done. Further, as the Full Bench observed in *Sprigg* v *Paul's Licensed Festival Supermarket*:[48]

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

**[58]** The Commissioner's assessment of the remuneration the Appellant would have received had he not been dismissed was based on the remuneration the Appellant had received in the previous six months. That assessment included the period from 21 June 2016, when the Appellant was on the 'more favourable income agreement', until the date of his dismissal.

**[59]** The assessment of the remuneration an applicant would have received, or would have been likely to receive if they had not been dismissed, often involves a degree of speculation – particularly, where (as here) part of the applicant's remuneration is commission-based.

**[60]** In all the circumstances we are not persuaded that the Appellant has established an arguable case that the Commissioner made a significant error of fact in her assessment of his lost remuneration and, in any event, the Commissioner's conclusion was reasonably open to her.

**[61]** Sixth, the Appellant submits[49] that the Commissioner made a significant error of fact in deciding that his employment would only have lasted for a further three weeks. At paragraphs [129] and [130] of the Decision the Commissioner says:

> 'It is considered that if the Respondent had conducted a process whereby the first allegation was put to the Applicant at an early stage (rather than several months later) and a procedurally fair process of investigation with an appropriate period for a response being afforded (not in response to the nature of the letter that was provided), the Applicant would have remained employed for an additional period.
>
> The employment relationship was not stable, the Applicant's texts and emails, as referred to, show that the Applicant was frustrated with many of his colleagues and his lack of progression (on his terms) within the company. The Applicant's representative considered the employment relationship would have lasted a further 10 months. The Respondent assessed a further two weeks. It is considered that given these allegations and the issues in the employment relationship, a further three weeks would have allowed for the discharge of the proper process and brought the employment relationship to an end.'[50]

**[62]** The findings at paragraphs [118], [121] and [124] of the Decision are also relevant:

> 'The conduct of the Applicant was inconsistent with a continuing employment relationship. The Applicant had disregard for the policies of the Respondent, which he had received training in…[51]
>
> Taking into account the Respondent's business operating with a range of employees in an open retail space, the conduct was sufficiently serious that it required the Respondent to end the employment relationship. The decision was appropriate, particularly taking into account the nature of the business in engaging with the public. In addition, the fact that Person A was a

> young, female employee new to the business and the comments were sexist and dismissive of Person A's role and there was a degree of aggressiveness in the comments, that significantly undermined an ongoing employment relationship in circumstances, where the employee had seriously breached the Respondent's policy. The Applicant had also taped the meeting, adding to the breakdown in trust and confidence.[52]
>
> The prerequisites required under ss.390(1) and (2) have been met. Section 390 provides that compensation is only to be awarded as a remedy where the Commission is satisfied that reinstatement is inappropriate and that compensation is appropriate in all the circumstances. The Applicant has not sought reinstatement. Having found that the allegations in relation to Person A have been substantiated and the relationship between the parties is not retrievable, it is not appropriate to Order reinstatement.'[53]

**[63]** The Appellant submits that the Commissioner made significant errors of fact in finding that:

- The employment relationship was not stable (at [130] of the Decision).[54]
- The Applicant's taping of the meeting added to the breakdown in trust and confidence (at [121] of the Decision).[55]
- The relationship was not retrievable (at [130] of the Decision).[56]

**[64]** The Appellant also contended that at paragraph [118] of the Decision the Commissioner failed to consider the totality of the Respondent's policies in determining the prospective period of employment. The short point advanced was that the Respondent's grievance handling process 'would have easily resolved the matter had due process been adhered to'.[57]

**[65]** The Appellant's primary complaint is directed at the Commissioner's finding that, but for the dismissal, the Appellant's employment would only have lasted for a further 3 weeks.[58] The Appellant contends that there was insufficient evidence to support the findings made:

> 'Yes, I don't know if there was enough evidence in relation to the further length of employment of three weeks. I don't know if there was enough evidence in relation to the industry and those sorts of things, but I also don't think the Commissioner took into account that the employer had, in a previous employment - which she was submitted with the evidence of the previous written warnings to myself and if we were going to look at whether or not the employment would have continued for only another three weeks, you would possibly then have to go back and look at how they handled those written warnings and those issues. I don't know if she's really considered enough of the evidence, or if there was enough evidence to make that call.'[59]

**[66]** Three things may be said about the points advanced by the Appellant.

**[67]** First, a number of the submissions advanced by the Appellant on appeal are at odds with the submissions put on behalf of the Appellant in the proceedings at first instance. At first instance the Appellant conceded that he had a 'sometimes fractious relationship with other staff members'[60] and submitted that:

> 'The applicant does not seek reinstatement pursuant to section 391 of the Act. Given the relationship, and the matters above <u>the relationship is untenable</u>.'[61] (emphasis added)

**[68]** The concession that the employment relationship between the Appellant and Respondent was 'untenable' is entirely consistent with the Commissioner's findings.

**[69]** Second, the Appellant's submission that there was a lack of evidence in relation to industry circumstances is true – but this is a limitation that applied to both parties and does not necessarily support the Appellant's contention at first instance, that his employment would have continued for at least 10 months.

**[70]** Third, as to whether or not the recording of the meeting of 12 September 2017 by the Appellant, without the consent of the other participants, was lawful, we note that this was not an issue agitated at first instance. The evidence at first instance focussed on whether or not the Appellant had informed the other participants of his intention to record the meeting, not on the legal consequences of doing so.[62] In cross examination the Appellant conceded that he did not tell anyone at the meeting that he was recording it.

**[71]** In any event, it seems to us that the observation which is the subject of the Appellant's complaint was fairly peripheral to the finding that the employment relationship was not retrievable and, further, that finding was entirely consistent with the Appellant's submissions in the proceedings at first instance.

**[72]** Finally, it is important to appreciate the context in which the Commissioner found that the employment would only have lasted a further 3 weeks. The Commissioner had found that there was a valid reason for the Appellant's dismissal but that he had been denied an opportunity to respond to the allegations against him in a procedurally fair manner (see [85] and [101] of the Decision). The Commissioner also observed that:

> 'The process was procedurally flawed, however taking into account all of the evidence (including the Applicant's further evidence at the hearing), this would not have affected the finding of a valid reason for dismissal.
>
> The Applicant, however was not provided with procedural fairness as a prior investigation was not undertaken by the Respondent nor was the Applicant given a reasonable opportunity to respond to the allegations prior to the termination of his employment. This process would have taken further time to complete.
>
> As set out, this case contains some procedural flaws that have been taken into account, in terms of the manner in which the termination was conveyed to the Applicant. The procedural flaws, however do not outweigh the seriousness of the substantive issues of inappropriate conduct.
>
> The dismissal is proportionate to the gravity of the misconduct.
>
> Even if the procedural issues had been rectified, it would not have changed the decision to terminate the Applicant's employment. Given the gravity of the comments, dismissal was appropriate in all the circumstances. Taking into account the procedural flaws, a procedurally fair process allowing for an investigation and proper process of notification and response would have taken a longer period to be discharged. The termination was unfair on this basis.'[63]

**[73]** The Commissioner then engaged in the task of determining how long a procedurally fair process would have taken and concluded that a further 3 weeks was required:

> 'It is considered that if the Respondent had conducted a process whereby the first allegation was put to the Applicant at an early stage (rather than several months later) and a procedurally fair process of investigation with an appropriate period for a response being afforded (not in response to the nature of the letter that was provided), the Applicant would have remained employed for an additional period.
>
> The employment relationship was not stable, the Applicant's texts and emails, as referred to, show that the Applicant was frustrated with many of his colleagues and his lack of progression (on his terms) within the company. The Applicant's representative considered the employment relationship would have lasted a further 10 months. The Respondent assessed a further two weeks. It is considered that given these allegations and the issues in the employment relationship, a further three weeks would have allowed for the discharge of the proper process and brought the employment relationship to an end.'[64]

**[74]** It seems to us that the Appellant's contentions about how long the employment relationship would have continued are somewhat misconceived. The Commissioner was not considering that issue in a vacuum. It was in a context where she had determined that there was a valid reason for dismissal and the remaining issue was simply to estimate how long it would have taken for a procedurally fair process to have been afforded to the Appellant by the Respondent – the answer was 3 weeks. We discern no error in the approach adopted by the Commissioner and her conclusion was reasonably open to her.

**[75]** Seventh, the Appellant submits that the Commissioner made a significant error of fact in paragraph [12] of the Decision,[65] which states:

> 'The Applicant commenced work at the Flinders Lane dealership on 1 July 2016. The dealership was managed by Messrs Sam Bohner and Dean Stuart, both Dealer Principals of the Respondent. The Applicant's direct manager was Mr Rob Stankiewicz, Finance and Insurance Trainee Manager of the Respondent.'[66]

**[76]** The Appellant submits that he commenced at the Flinders Lane dealership on 21 June 2016, not 1 July 2016 (as found by the Commissioner) and that Mr Stankiewicz was not his direct manager at the time he started – Mr Stankiewicz did not start until 1 July 2016. The Appellant's submission is encapsulated in the following extract from the transcript of the appeal hearing:

> 'JUSTICE ROSS: You say 1 July 2016 is that not the correct date? The correct date is 21 June 2016, is that right?
>
> MR PARKER: That's correct, and in that, she also put there the applicant's direct manager was Mr Rob Stankovic. Obviously, that would imply that he was employed at that time as well. He didn't actually start until the 1st so, that's why I've compiled those two together there, if that makes sense.'[67]

**[77]** The finding in paragraph [12] of the Decision that 'the Applicant commenced work at the Flinders Lane dealership on 1 July 2016' is a factual error, but we are not persuaded that it involved a *'significant error of fact'* within the meaning of s.400(2). Whether the Appellant commenced at the Flinders Lane dealership on 21 June 2016 or 1 July 2016 is not a matter of any great moment and did not have any bearing on the central issues in the proceeding.

**[78]** For completeness we also note that the Appellant initially contended[68] that the Commissioner made a significant error of fact in paragraph [116] of the Decision. Paragraph [116] states:

> 'There is nothing improper in Person A's reference to him by this title, considering she had been at the workplace for three or four days. There was no evidence of any intent on her part, to diminish his role. This was simply a label she used being new to the workplace and it was commensurate with the nature of the finance duties he performed. The Applicant's remark to Person A was hostile, threatening and offensive.'[69]

**[79]** The Appellant's initial complaint was directed at the inference to be drawn from [116] that Person A had in fact described the Appellant as 'the finance guy.' During the course of oral argument the Appellant accepted that this issue raised did *not* amount to a 'significant error of fact.'[70]

**[80]** We now turn to the alleged significant errors of fact relating to the Commissioner's findings in respect of the first and second incidents.

**[81]** As we have mentioned, the basis for the Appellant's dismissal was his involvement in two incidents in which he is alleged to have made comments to a young female employee who had recently been employed as a Sales Trainee (referred to as Person A in the Decision).

*The first incident*

**[82]** In the proceedings at first instance the Respondent contended that a few days after Person A commenced employment with the Respondent, the Appellant asked her to come to his office and the Appellant said to Person A *"If you ever call me that business guy, or that finance guy, I will backhand you. I don't care if you are a girl."* The Respondent contended that the Appellant said these words to Person A very directly and bluntly and there was no sign that it was a joke.[71]

**[83]** The first incident is described in Person A's witness statement in the following terms:

> '7. In terms of what happened during the incident, I was talking to the Applicant at the printer about financing cars, and he asked me to come down to his office to talk more about finance. We were sitting in his office and he grabbed an A4 sheet of paper from the printer.
>
> 8. The Applicant then started the conversation with: "If you ever call me that business guy, or that finance guy, I will backhand you. I don't care if you are a girl." The Applicant said that to me very directly and bluntly -there was no sign that it was a joke.
>
> 9. The Applicant then continued to talk about finance for another 10 to 20 minutes. I just sat there and listened. I was taken aback and could not believe that he said that to someone he does not really know.'[72]

**[84]** Person A was very clear in cross examination that the Appellant said the words to her as set out at her statement above, as transcript reveals:

> 'PN1010
> The threat to backhand you, that's a pretty serious threat I suggest?---Mm.
> PN1011

It's the sort of thing that would have made you feel quite uncomfortable to put it mildly?---For my third or fourth day. Maybe even my fifth day at the dealership definitely. I think, you know, being a 21 year old girl who hasn't really worked in a professional industry before it – I was definitely taken back.

PN1012

It's the sort of thing that you'd tell somebody about if – you'd tell a supervisor about if somebody said that to you. It's the sort of thing that you'd remember pretty clearly; is that right?---That's correct.

PN1013

You'd remember the surrounding circumstances pretty clearly; is that right?---That's correct.

PN1014

But you can't actually remember exactly when he made the statement to you; is that correct?---I wouldn't be able to remember the exact date, no.

PN1015

No. You can't even remember the exact date you started this brand new job at Cricks Automotive Group; is that right?---That's correct.

PN1016

The reason that you're fairly vague about this is because your memory about the incident is pretty vague in general; is that right?---It was a year ago.

PN1017

What I suggest to you is that Mr Parker never actually said those words to you. He never threatened to backhand you?---Everything that is said in my statement that he said to me is true and correct.'[73]

**[85]** The Respondent also contended that Person A contemporaneously informed the former Used Car Sales Manager (Mr Andrew Howard) of the incident and Mr Howard then informed one of the Dealers Principal of the Flinders Lane dealership, (Mr Dean Stuart) of what Person A had informed him.[74] The Respondent also contended that Mr Stuart spoke to the Appellant about the incident and informed him of what Mr Howard had told him and said that that he needed to be conscious of how he spoke to other employees and should ensure he engaged with them in the correct manner.[75]

**[86]** Mr Howard's evidence was that Person A reported the incident to him, in July 2016, and that he reported it to Mr Stuart and, in turn, Mr Stuart spoke to the Appellant about that matter in July 2016.[76] There was no challenge to the evidence of Mr Howard and Mr Stuart about the contemporaneous steps they both took after Person A reported incident to Mr Howard in July.[77]

**[87]** Mr Parker expressly denied that the incident occurred.[78] He also expressly denied that Mr Stuart spoke to him about the incident.[79]

*The second incident*

**[88]** In the proceedings at first instance the Respondent contended that on Saturday 10 September 2016 Person A was in the process of selling a motor vehicle to some customers and went to see the Appellant about finance. During that conversation Person A said to the Appellant that she felt uncomfortable dealing with those customers due to their rude and sexist comments and that she was frustrated with them, in response to which the Appellant then said to her: *"Just show them your tits, you will be fine."*[80]

**[89]** On Monday 12 September 2016 Person A made a signed written statement about the first and second incidents when asked to do so by Mr James McKenna, another employee of the Respondent.[81]

**[90]** The second incident is alleged to have occurred on 10 September 2016 and is described in Person A's witness statement in the following terms:

> '15. On 10 September 2016, I had customers come in about midday.
>
> 16. They wanted to purchase a Volkswagen Touareg and were wanting approval for finance.
>
> 17. I arranged for the Applicant to do their finance. After looking at the customer's profile, the Applicant said that he could approve their finance by the end of the day. Whilst the Applicant was looking at the finance side of things, I was continuing the sales process with the customers.
>
> 18. I recall the customers were making me feel uncomfortable. I would not say that they were hitting on me, but rather they were slightly sexist and rude. They objected to a lot of the things that I was telling them about the vehicle. I would answer the questions correctly and they would just try to walk over me. I had to get Mr Howard over a number of times during the process to explain a lot of things to them that I had already explained to them.
>
> 19. At some stage through this process I went to see the Applicant about the customer's finance. During that conversation, I said to the Applicant that I felt uncomfortable dealing with those customers and that I was frustrated with them. The Applicant then said to me: "Just show them your tits, you will be fine." I was taken aback, but at the time I said "No" and I laughed because I knew that was the kind of person the Applicant was. However, I knew immediately that what the Applicant had said was inappropriate and that he could not say things like that to me.'[82]

**[91]** In relation to the second incident Person A was consistent and clear in her oral evidence and rejected the suggestion that she had misheard or misinterpreted what the Appellant had said, as the transcript reveals:

> 'PN1045
> Is it fair to say that it still played on your mind the comments that these gentlemen had made to you?---That's correct. Yes.
> PN1046
> You spoke to Mr Parker about that?---I did.
> PN1047
> You said they were making you feel uncomfortable?---Yes.
> PN1048
> Did you say that one of them was hitting on you?---No.
> PN1049
> Did you feel that one of them was hitting on you?---Potentially but in saying that, like I said, I didn't really take it in that kind of way. They did make me feel uncomfortable, yes, but I did try to dismiss it.
> PN1050
> So you said to Mr Parker something along the lines of, "These gentlemen are making me feel uncomfortable"?---Yes. Yes.
> PN1051
> I'm sure you probably didn't call them gentlemen but anyway?---No.
> PN1052

So then Mr Parker said to you something along the lines of, "Just send them in to me when they get back and you will be fine"?---No.

PN1053

Or he might've said to you, "Just give them the keys when they get back and you'll be fine"?---No.

PN1054

Is it possible that Mr Parker said something along those lines to you?---No.

PN1055

Is it possible that you had in your mind all these comments of a sexual nature that the gentlemen had been making to you over the course of a number of hours at the dealership - - -?---Mm-hm.

PN1056

- - -and so you were particularly sensitive to comments of that kind?---No, I wouldn't say so. I have a very clear and vivid memory of that day.

PN1090

Actually no, before we do, I'll just ask you this. You said you could have left the dealership but the reason that you stayed was you said because you wanted to be professional?---Yes.

PN1091

But also because you weren't too – Mr Parker's comments didn't make you feel too uncomfortable, so uncomfortable that you didn't want to be there with him. Is that right?---I would say that it was something that Mr Parker would say and yes, it did make me feel uncomfortable but again I'm not the sort of person that likes confrontation. It's a part of my job to be there.

PN1092

And you said you laughed after he made the comment, is that right?---Yes I did.

PN1093

Because you didn't take it seriously, you didn't think he was - - -?---I said in my statement that yes, I laughed or I said "No" and then I laughed and as I was walking away I sort of thought "Hang on a minute. That's not right" after I'd correctly registered what he'd said. I realised, you know, and Mr Parker and I have no – in no means been friends throughout. Obviously work colleagues. In saying that, you know, potentially a friend may have said that. I don't think that a work colleague would have. But the fact that Mr Parker and I had in no way been close or been friends or – I feel like he stepped a boundary.'[83]

**[92]** The Appellant denied in cross examination that he said the words alleged, or anything like them, to Person A.[84] Mr Parker's contemporaneous version of events appears in the email he sent the day after the meeting of 12 September 2016 which appears at page 11 of Mr Bohner's statement.

**[93]** In relation to the second incident the Appellant's submission at first instance was that:

'Overall, the evidence supports a finding that Mr Parker did not make the statement as alleged to [Person A].'[85]

**[94]** The Appellant submits that the Commissioner erred in finding that the two incidents took place as stated in Person A's evidence. Three broad lines of argument were advanced in support of this submission:[86]

(i) the Commissioner's finding failed to consider the totality of Person A's evidence (reference was made to an aspect of Person A's evidence which were said to be uncertain, vague and contradictory);

(ii) Person A's reaction to the second alleged incident; and

(iii) the erroneous finding that there were issues of credit with the Appellant's evidence.

**[95]** We have considered the matters raised by the Appellant but are not persuaded that the Commissioner erred in the manner contended. The Commissioner considered the evidence as a whole, including the corrobative effect of that evidence and how that evidence internally relates to itself.

**[96]** We do not propose to canvass each of the points advanced by the Appellant, it is sufficient to respond to his observations about Person A's evidence and his challenge to the Commissioner's characterisation of his own evidence.

**[97]** As to Person A, the Appellant challenges Person A's evidence about her employment start date and contends that her evidence is inconsistent as to when the first incident took place.

**[98]** In her statement Person A says that she commenced employment with the Respondent 'in around the middle of July 2016' and that the first incident 'occurred about 3 or 4 days after I started with the Respondent, and just before we were about to close in the evening.' [87]

**[99]** In her oral evidence Person A could not recall the exact date she started work with the Respondent, other than it was in the middle of July,[88] but was clear about what the Appellant had said to her, as is evident from the passage from her cross examination set out earlier.

**[100]** The Appellant says that paragraph [6] of Person A's statement and her subsequent formal complaint are contradictory. At paragraph [6] of her statement Person A says:

> 'I remember that when providing my initial statement to Mr James Twentyman of the Respondent on 12 September 2016 (Mr Twentyman) which is discussed later in this statement, we estimated the date to be around the 20 July 2016, as I could not remember exactly when it was.'[89]

**[101]** Person A's subsequent complaint is set out at Attachment RK1 to the statement:

> '**Incident Report** 12-Sep-2016
>
> Wednesday 20th July
>
> [Person A] was standing next to Philip at the printer talking about finance at approximately 5.20pm.
>
> Philip then asked [Person A] to come into his office and he would talk to her more about finance.
>
> Philip then said to [Person A] "If you ever call me that finance guy or that guy or that business guy I will back hand you, Even If you are a girl I don't care"
>
> Philip then kept [Person A] back for another 20mlns after all staff had gone home

(Sue and Rhys were still in the office next door)

Saturday 10th September

[Person A] walked into Philip Parker's office and asked Philip If she could have a deal pack. [Person A] proceeded to tell Phil that she felt uncomfortable with her customer's, Philip then replied to [Person A] "Just show them your tits and you'll be fine"

[Person A] replied "No" and then walked out of his office.'[90]

**[102]** There is no conflict between the two documents – the first simply explains how the date of the incident specified in the formal complaint was arrived at. The Appellant's contention that there was a conflict in Person A's evidence as to the date on which the first incident occurred is incorrect, and in any event was never put to Person A in cross examination.

**[103]** The Appellant also submits that a mid July start date was inconsistent with Person A's evidence (at paragraph 1 of her Statement) that she had been working for the Respondent for five and a half months at the time she made her statement. Person A's statement was signed on 17 January 2017 – five and a half months prior to that date would have put her employment starting August 2016.

**[104]** There are two flaws in the Appellant's argument. The first is that Person A says she had been working for the Respondent for five and a half months '*at the time her statement was being prepared.'* The five and a half months is referable to the time the statement was being prepared, not when it was signed. Hence if the statement was being prepared earlier in January 2017 or in late December 2016 that would be consistent with an estimated start date of mid July. The second problem for the Appellant is that the alleged inconsistency was never put to Person A. In these circumstances we reject the point advanced.

**[105]** The Appellant also challenges the Commissioner's adverse finding in respect of his own evidence and submits that 'the specificity and complexity of the end of employment were not considered.'[91] We are not persuaded that there is any substance to this point. The Commissioner had the benefit of seeing and assessing the witness and, further, her credit conclusions were supported by the evidence as whole. Two points may be made in this regard.

**[106]** First, the Commissioner's findings were consistent with the Appellant's concessions at first instance that:

- he had a 'sometimes fractious relationship with other staff members'; and
- he 'thought his job description was important and would take umbrage at being referred to as 'that finance guy.'[92]

**[107]** Second, there is a conflict in the evidence about whether Mr Stuart spoke to the Appellant about the first incident. Mr Stuart said he did have such a conversation with the Appellant; the Appellant expressly denied that Mr Stuart spoke to him about the incident.

**[108]** Importantly, Mr Stuart was questioned about this aspect of his evidence in cross examination, but it was never put to him that he had not spoken to the Appellant about the

first incident.[93] There was no challenge to Mr Stuart's evidence about the contemporaneous steps he took after Person A reported the first incident to Mr Howard in July 2016. This point was made by the Respondent in its final written submission,[94] which was not the subject of any challenge in the Appellant's Amended Submissions in Reply of 5 September 2017. It was entirely open to the Commissioner to prefer the unchallenged evidence of Mr Stuart to that of the Appellant.

**[109]** The evidence that Person A had made contemporaneous complaints in respect of the first and second incidents also supports the Commissioner's findings in respect of the two incidents.

**Conclusion**

**[110]** The decision subject to appeal was made under Part 3-2 - Unfair Dismissal - of the Act. Section 400 (1) provides that permission to appeal must not be granted from such a decision unless the Commission considers that it is in the public interest to do so. Further, in such matters appeals on a question of fact may only be made on the ground that the decision involved a 'significant error of fact' (s.400(2)). In *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 as 'a stringent one'.[95] The Commission *must not* grant permission to appeal *unless* it considers that it is 'in the public interest to do so'.

**[111]** The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[96] 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.'[97]

**[112]** 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.[98] As we have mentioned, s.400(1) provides that permission to appeal *must not* be granted *unless* the Commission considers that it is in the public interest to do so.

**[113]** The Appellant submits that it is in the public interest that permission to appeal be granted, for the reasons set out at paragraphs [16]-[26] of his outline of submissions, as supplemented in the course of oral argument.

**[114]** The Appellant relies upon what are said to be numerous 'significant errors of fact' in the Decision. For the reasons we have given we are not persuaded that the Appellant has established that the Commissioner made any significant errors of fact in the Decision. Nor are we satisfied that the Appellant has established an arguable case of bias on the part of the Commissioner.

**[115]** The Appellant identifies a number of matters said to manifest an injustice in the Decision[99] and to warrant the grant of permission to appeal.[100]

**[116]** At paragraph [13] of the Appellant's outline of submissions, he submits:

> 'It could not have been known by the appellant or their representative that none of the witnesses who provided evidence at trial would not be able to confirm the start date of Person A's employment and allow us to test this date against person A's evidence & suggest motive. The employer had sufficient time to check records but didn't find it prudent to do so before the hearing in order to pervert a just and fair hearing for the appellant.'

**[117]** The essence of the point advanced is that because the Respondent's witnesses were unable to confirm the date on which Person A commenced employment the Appellant says that 'we were unable to test her evidence so we were not able to get clarity on the date of those incidents.'[101] The Appellant also seeks to have further evidence admitted. Since the hearing at first instance the Appellant has found a copy of Person A's first RDO request on his personal computer after it had been restored to a previous version in order to fix a computer software issue. The Appellant submits that the further evidence 'proves Person A was not employed on the 20th July 2016.'[102]

**[118]** We are not persuaded that the point advanced enlivens the public interest. The Appellant was *not* denied the opportunity to cross examine Person A as to the date she commenced employment with the Respondent (including as to the alleged inconsistencies in her statement: see [102]-[103] above). Further, the Appellant could have sought a notice to provide the documents which established the date on which Person A was employed or could have called for the relevant documents from one of the Respondent's witnesses. None of these steps were taken. We also note that Person A's commencement date was only relevant to the timing of the first incident. Person A was clear in her evidence as to the date of the second incident and her evidence in that regard is supported by a contemporaneous written complaint.

**[119]** Nor are we persuaded to admit the further evidence. We accept that it is 'new' evidence, in the sense that is has only become available after the proceedings at first instance, but we are not persuaded that it is in the interests of justice to admit it. The Appellant had numerous options to challenge the alleged date on which the first incident took place by challenging the date on which Person A commenced employment; but chose not to. It is not the function of the appeal process to redress any perceived deficiencies in the manner in which an unsuccessful party ran their case at first instance.

**[120]** A range of other matters were advanced by the Appellant in support of his submission that it was in the public interest to grant permission to appeal. We have considered all of the matters put by the Appellant, we propose deal briefly with three of the points put.

**[121]** The first goes to standard of proof and approach to cases involving allegations of sexual harassment, given what is submitted to be the adverse impact such matters may have on an employee's future employment prospects. The Appellant submits that 'this whole event has a significant impact on my career.'[103] At paragraph [16](a) of his outline of submissions he says:

> 'It is widely accepted in law that a complainant's testimony cannot be solely relied upon as fact in a case of Sexual harassment. And in order for the testimony to be entered into evidence it generally must be reported immediately…The Commission should consider whether Person A's testimony as sole evidence is sufficient to be relied upon as Fact.'[104]

**[122]** Further, in the course of oral argument the Appellant said:

> 'there needs to be certain onerous standard of proof here in these cases, but I really think this goes right to the very very heart of the inequality in these cases of men versus women. I think those inequalities are quite prevalent in this case and that's why I do deserve the permission to appeal the case so that I could test fully and thoroughly the evidence more voraciously…'[105]

**[123]** No authority is cited in support of the proposition advanced at paragraph [16](a) of the Appellant's outline of submission, understandably so. The proposition advanced is wrong, and plainly so. There is no requirement in *criminal* sexual assault cases for corroboration of the complainant's evidence;[106] nor is there a requirement for evidence of complaint.[107] Nor do such requirements apply in civil cases involving allegations of sexual harassment.[108]

**[124]** In terms of establishing that the alleged incidents took place the Respondent bore the onus of proof and the applicable standard is the civil standard of proof, that is the Commission must be satisfied on the balance of probabilities.

**[125]** On appeal the Appellant submitted, in essence, that having regard to the gravity of the matters alleged the *Briginshaw*[109] approach was apposite. This is an approach which recognises that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved. In *Neat Holdings Pty Ltd v Karajan Holdings*[110] the High Court explained the approach as follows:

> 'The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.'[111] [Footnotes omitted.]

**[126]** We are not persuaded that the Commissioner erred in failing to adopt the approach contended for by the Appellant. We make two points in this regard.

**[127]** First, as observed by Branson J in *Qantas Airways Ltd v Gama*[112] moral opprobrium may, but will not necessarily attach, to discriminatory conduct and not all contraventions are equally grave, the gravity of a contravention will vary depending upon the seriousness of the allegations made. Her Honour's observations were made in the context of discriminatory conduct, but have been applied to the *Sex Discrimination Act 1984 (Cth)* and, specifically to allegations of sexual harassment.[113]

**[128]** Having regard to the nature of the allegations in the matter before us we are not persuaded that the Commissioner erred in the approach adopted.

**[129]** Second, the approach contended for by the Appellant, on appeal, was not the approach he proposed at first instance.

**[130]** The approach proposed by the Appellant below to the assessment of whether his conduct provided a valid reason for his dismissal is set out in the Applicant's Outline of Submissions at first instance, dated 9 July 2017:

> 'It is the applicant's conduct, not his capacity in his job, that is in issue here. Where conduct is the stated reason for dismissal it is up to the employer to prove the misconduct occurred. The Commission's role is to determine whether the misconduct occurred on the basis of the evidence before it. The test is not whether the employer believed on reasonable grounds that the incidents occurred. It is an objective test based on the evidence.'[114]

**[131]** In our view the above submission was plainly correct in the context of this case and was applied by the Commissioner.

**[132]** As we have mentioned, the Commissioner considered the evidence as a whole, including the corrobative effect of that evidence and how that evidence internally relates to itself. The Appellant has not established an arguable case of error in the way in which the Commissioner approached her task.

**[133]** As to the proposition that the grant of permission to appeal, upholding the appeal and a consequential rehearing would permit the Appellant to 'test fully and thoroughly the evidence more voraciously'; the Appellant had that opportunity in the proceedings at first instance. As we have mentioned, it is not the function of the appeal process to provide an opportunity for unsuccessful parties to redress perceived deficiencies in their case at first instance.

**[134]** We wish to mention two of the other points advanced by the Appellant. The first is set out at paragraph [21] of the Appellant's outline of submissions:

> 'There is a general applicable widespread use to employees who receive commission remuneration payments considering the calculation of average income where new Remuneration agreements have been provided during the employment period increasing their short-term average.'

**[135]** As we have mentioned, we discern no error in the approach adopted by the Commissioner in respect of s.392(2)(c) and her conclusion was reasonably open to her. The submissions in respect of this issue at first instance were limited and did not advance any general principles for the calculation of lost remuneration in the context of commission payments. We are not persuaded that the circumstances make this case an appropriate vehicle to consider these issues at appellate level. We are not satisfied that the argument advanced enlivens the public interest.

**[136]** The final aspect of the Appellant's submissions to which we wish to refer is at paragraph [22] of the Appellant's outline of submissions:

> 'The Protection of Persons Identity and when they should be protected. In this case for example the Commissioner has protected Person A without any such request by any party to do so and without weighing any actual evidence of the Male to female ratio of the employment situation.'

**[137]** The Commissioner decided to protect the identity of the complainant by describing her as Person A. There was apparently no request by any party to take that step and the parties were not heard on the point. The appropriate course was for the Commissioner to raise the issue with the parties, to provide them with an opportunity to comment, to consider what they put and then decide whether it was appropriate to anonymise the complainant.

**[138]** While the Commissioner erred in not adopting the course described that is not a sufficient basis for the grant of permission to appeal in the circumstances of this case. The error did not bear on any of the Commissioner's principal findings in the proceedings.

**[139]** We are not persuaded that the Appellant has established that it is in the public interest to grant permission to appeal. Nor are we persuaded that the Appellant has established an arguable case of error in relation to the Decision subject to appeal or that there are any other considerations that warrant the grant of permission to appeal. Accordingly, permission to appeal is refused.

PRESIDENT

*Appearances*:

Mr Phillip Parker, self-represented.

Mr Sam Bohner appeared for the Respondent.

*Hearing details:*

Melbourne, VC to Brisbane.

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[1] [2017] FWC 4120.

[2] PR597712.

[3] This is so because on appeal FWC 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.

[4] [2017] FWC 4120 at [75].

[5] Ibid at [104].

[6] Ibid at [107]-[108].

[7] Ibid at [119].

[8] Ibid at [124].

[9] See [2017] FWC 4120 at [125]-[137]; *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR at 17; *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186; *Thinh Nguyen and anor v Vietnamese Community in Australia t/as Vietnamese Community Ethnic School South Australian Chapter* [2014] FWCFB 7198.

[10] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Vakauta v kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41 and *Johnson v Johnson* [2000] HCA 48.

[11] [2016] FCAFC 30 at [35]-[36], cited with approval in *AXQ15* v *Minister for Immigration and Border Protection* [2016] FCAFC 73 at [31].

[12] Transcript of proceedings 9 January 2018 at [33]-[45].

[13] Appeal book at pages 457-458.

[14] Appeal book at page 462.

[15] Transcript of proceedings 9 January 2018 at [71].

[16] Appeal book at pages 353-357.

[17] See Appeal book at pages 119-120.

[18] (2003) 214 CLR 118; 197 ALR 201; 38 MVR 1; [2003] HCA 22 at para 23.

[19] *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522; 286 ALR 501; 88 ACSR 246; [2012] HCA 17 at para 130; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; 270 ALR 204; [2010] HCA 31 at para 76.

[20] *Dearman v Dearman* (1908) 7 CLR 549 at 561; 15 ALR 287 at 291; [1908] HCA 84. See also *Scott v Pauly* (1917) 24 CLR 274 at 278-81; 24 ALR 27 at 31-3; [1917] HCA 60.

[21] *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 AII ER 635 at 637, per Lord Scarman, with reference to *Joyce v Yeomans* [1981] 1 WLR 549 at 556; [1981] 2 AII ER 21 at 26. See also *Chambers v Jobling* (1986) 7 NSWLR 1 at 25.

[22] (1999) 160 ALR 588.

[23] Ibid at [71].

[24] [2013] FCAFC 8.

[25] Ibid at [70]-[72].

[26] At [12](a) of the Appellants outline of submissions.

[27] Transcript of proceedings 9 January 2018 at [127]-[138].

[28] At [12](e) of the Appellant's outline of submissions.

[29] [2017] FWC 4120 at [91].

[30] Transcript of proceedings 9 January 2018 at [144]-[147].

[31] At paragraph [12](f) of the Appellant's outline of submissions.

[32] [2017] FWC 4120 at [59].

[33] Transcript of proceedings 9 January 2018 at [151]-[165].

[34] Applicant's outline of submissions following trial, 25 August 2017 at [99], Appeal Book page 405.

[35] Transcript of proceedings at first instance, 7 August 2017 at [221].

[36] At paragraph 12(g) of the Appellant's outline of submissions.

[37] Transcript of proceedings 9 January 2018 at [167].

[38] [2017] FWC 4120 at [108].

[39] Exhibit 6 at Attachment DH7.

[40] Applicant's outline of submissions following the trial 25 August 2017 at [55]; Appeal Book page 397.

[41] At [12](i) of the Appellant's outline of submissions.

[42] [2017] FWC 4120 at [135]-[137].

[43] Respondent's Final Written Submissions at [127]-[129]; Appeal Book page 447.

[44] Respondent's Final Written Submissions at [129]; Appeal Book page 447.

[45] Amended Applicant's Submissions in Reply at paragraphs [16]-[19].

[46] Appeal Book at page 269.

[47] *Ellawala* v *Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000).

[48] (1998) 88 IR 21 at [32].

[49] At [12](j) and (m) of the Appellant's outline of submissions.

[50] [2017] FWC 4120 at [129]-[130].

[51] Ibid at [118].

[52] Ibid at [121].

[53] Ibid at [124].

[54] At [12](m) of the Appellant's outline of submissions.

[55] At [12](k) of the Appellant's outline of submissions.

[56] At [12](n) of the Appellant's outline of submissions.

[57] At [12](j) of the Appellant's outline of submissions.

[58] Transcript of proceedings 9 January 2018 at [210]-[211] and [214]-[215].

[59] Ibid at [211].

[60] Applicant's outline of submissions following trial, 25 August 2017 at [103], Appeal Book page 406.

[61] Ibid [104].

[62] Transcript of proceedings at first instance, 7 August 2017 at [477]-[482].

[63] [2017] FWC 4120 at [104], [110]-[112] and [119].

[64] Ibid at [129]-[130].

[65] At [12](p) of the Appellant's outline of submissions.

[66] [2017] FWC 4120 at [12].

[67] Transcript of proceedings 9 January 2018 at [223]-[224].

[68] At [12](h) of the Appellant's outline of submissions.

[69] [2017] FWC 4120 at [116].

[70] Transcript of proceedings 9 January 2018 at [169]-[185].

[71] Exhibit 9, paragraphs 4 to 13.

[72] Witness Statement of Person A at paragraphs 7-9.

[73] Transcript of proceedings at first instance, 7 August 1017 at [1010]-[1017].

[74] Exhibit 12 paragraphs 3 to 8.

[75] Exhibit 10, paragraphs 5 to 7.

[76] Exhibit 12, paragraphs 3 to 8 and Exhibit 10, paragraphs 5 to 7.

[77] See the cross examination of Mr Stuart, Transcript of proceedings at first instance, 7 August 2017 at [1157]-[1299] and of Mr Howard at [1359].

[78] Transcript of proceedings at first instance, 7 August 2017 at [334]-[360].

[79] Ibid at [364]-[368].

[80] Exhibit 9, paragraphs 15 to 19.

[81] Exhibit 9, paragraphs 23 to 28 and Attachment "RK1" to Exhibit 9.

[82] Witness Statement of Person A at paragraphs 15-19.

[83] Transcript of proceedings at first instance, 7 August 2017 at [1045]-[1093].

[84] Transcript of proceedings at first instance, 7 August 2017 at [425]-[430].

[85] Applicant's outline of submissions following trial 25 August 2017 at [60]; Appeal Book page 398.

[86] At [12](b)(i), (ii), (iii), (g) and (o) of the Appellant's outline of submissions.

[87] Exhibit 9 at paragraphs [4] and [5]; Appeal Book page 358.

[88] Transcript of proceedings at first instance, 7 August 2017at [995]; Appeal Book page 141.

[89] Appeal Book at page 358.

[90] Appeal Book page 361.

[91] See [12](o) of the Appellant's outline of submissions.

[92] Applicant's outline of submissions following trial, 25 August 2017 at [103], Appeal Book page 406.

[93] Transcript of proceedings at first instance, 7 August 2017 at [1157]-[1299].

[94] At [46](f); Appeal Book page 422.

[95] (2011) 192 FCR 78 at paragraph 43.

[96] *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 paragraph 69 per Gummow, Hayne, Heydon, Crennon, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54 at paragraphs 44 - 46.

[97] (2010) 197 IR 266 at [27].

[98] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27]; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler*; [2011] FCAFC 54; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28].

[99] At [13] of the Appellant's outline of submissions.

[100] At [16]-[25] of the Appellant's outline of submissions.

[101] Transcript of proceedings 9 January 2018 at [228].

[102] At [14] of the Appellant's outline of submissions.

[103] Transcript of proceedings 9 January 2018 at [244].

[104] At [16](a) of the Appellant's outline of submissions.

[105] Transcript of proceedings 9 January 2018 at [246].

[106] See *Evidence Act 1995 (Cth)*, s.164 and *Criminal Code (Qld),* s.632. Also see *Robinson v R* (1999) 197 CLR 162.

[107] See *Criminal Law (Sexual Offences) Act 1978 (Qld)*, s.4A.

[108] See generally *Jemma Ewin v Claudio Vergara (No 3)* [2031] FCA 1311.

[109] See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2.

[110] (1992) 67 ALJR 170.

[111] Ibid at 170-171 per Mason CJ, Brennan, Deane and Gaudron JJ.

[112] (2008) 167 FCR 537 at [123]-[139] (referred to with approval by French and Jacobson JJ at [110]).

[113] *Jemma Ewin v Claudio Vergara (No 3)* [2013] FCA 1311.

[114] Applicant's Outline of Submissions, 28 July 2017 at [11].