DECISION

Fair Work Act 2009
s.604 – Appeal of decisions

Mr Michael Gelagotis
v
Esso Australia Pty Ltd T/A Esso
(C2018/2775)

Mr Michael Hatwell
v
Esso Australia Pty Ltd T/A Esso
(C2018/2777)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER LEE MELBOURNE, 2 OCTOBER 2018

Appeal against decision [2018] FWC 2398 of Deputy President Colman at Melbourne on 14 May 2018 in matters U2017/11682 and U2017/11683 –

1. Background

[1] Mr Michael Gelagotis and Mr Michael Hatwell have applied for permission to appeal and have appealed against a decision by Deputy President Colman[1] (the Decision), in which the Deputy President found that they had not been unfairly dismissed from their employment with Esso Australia Pty Ltd.

[2] The applications were heard by the Deputy President over five consecutive days from 29 January 2018. The Decision was issued on 2 May 2018. In the Decision, the Deputy President determined that the Appellants' dismissal was not harsh, unjust or unreasonable and their applications were dismissed.

[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.[2] There is no right to appeal and an appeal may only be made with the permission of the Commission. The appeals were listed for hearing together, in respect of both permission to appeal and the merits of each appeal.

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[1] [2018] FWC 2398.

[2] 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] The dismissal of the Appellants occurred in a particular industrial context. At first instance the Appellants had objected to certain evidence about the industrial context, in particular evidence about activities on the protest line outside Esso's Longford site. The Deputy President rejected the objection and received the evidence, noting that (at [22]):

> 'I have done so because I considered it to be relevant. Evidence of circumstances surrounding facts at issue can provide a basis for drawing logical inferences. However, I emphasise that the applicants were not said to have been involved in the protest line. I note also that the applicants elsewhere contended that the broader context *was* relevant to the question of harshness, and that the industrial disputation associated with UGL's employment arrangements was dividing the workplace and had created tension.'[3]

[5] On appeal there is no challenge to the above ruling; nor is there any challenge to the Deputy President's observations about the industrial context at [7]-[8] and [27]-[49] of the Decision. We summarise those observations below.

[6] In January 2017, Esso awarded a five year contract to MTCT Services Pty Ltd to undertake maintenance services at Longford. This entity is referred to in the evidence, and in the Decision, as UGL. Those employed by entities that contract to Esso, including UGL, are commonly referred to as 'contractors'. UGL is a wholly owned subsidiary of another entity that, as part of a joint venture, had previously provided maintenance services at the Longford plant. The joint venture is referred to in the evidence and in the Decision as UGLK. The UGLK workforce was dismissed after it lost its Esso contract. In mid-2017 the same workforce was offered employment by UGL on lesser terms and conditions of employment. These employment arrangements have been controversial. The AMWU, CEPU and AWU (collectively, the Unions) attempted to discourage UGLK employees from accepting UGL's offers of employment.[4] Their position was that no member should accept that job offer and that to do so was a 'sell out'.[5]

[7] On 9 June 2017, Mr S.P signed an offer of employment with UGL.[6]

[8] On 20 June 2017, employees of Esso at Longford stopped work[7] in support of a union rally against UGL and Esso that had been organised in Melbourne that day.[8]

[9] On 22 June 2017 a protest line appeared near the entrance to the Longford site. Union flags were placed along the perimeter of Garretts Road, adjacent to the Longford site.[9] A

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[3] Appellants' reply submissions dated 19 January 2018, Exhibit A2 at paragraph 19.

[4] See for example Email from Frank Casella dated 14 June 2017, Exhibit R1 pp. 2 - 4; Statement of Travis Flens, Exhibit R11 at paragraph 6; Statement of John McShane, Exhibit R18 at paragraph 11.

[5] Statement of Greta Marks, Exhibit R21 at GM-6 (p. 2 of attachment); Transcript 29 January 2018 at PN422 - PN439.

[6] Respondent's closing submission, 12 March 2018 at [30].

[7] Transcript 29 January 2018 at PN862 - PN867, PN886; 30 January 2018 at PN1952 - PN1964.

[8] Transcript 29 January 2018 at PN886, PN898.

[9] Transcript 29 January 2018 at PN931 - PN935; 30 January 2018 at PN1979 - PN1981; 2 February 2018 at PN4693, PN5120; Witness statement of Natalie Bannan, Exhibit R20 at paragraph 14, NB-4 (p32), NB-15 (pp.52-53) ; Statement of Travis Flens, Exhibit R11 at paragraphs 8-9, 11(a), 11(f); Statement of Paul Whykes, Exhibit R15 at paragraph 9; Statement of John McShane, Exhibit R18 at paragraphs 15- 16.

group of people gathered, including former UGLK workers who had not accepted employment with UGL.[10] Officials of the Unions were also present.[11]

[10] On the same day that the protest line emerged, Mr Andre Kostelnik, the Longford Production Operations Manager, sent an email to all Esso employees and contractors concerning Esso's Harassment Policy. It contained a hyperlink to the full policy, and relevantly stated:

> 'We have become aware that a community information line has been formed outside Longford Plants …
>
> We would also like to take this opportunity to remind all employees and contractors of the Company's Harassment in the Workplace Policy. If you observe any behaviour or comments that may be considered harassing or intimidating, you are responsible for reporting it to your supervisor or HR.'[12]

[11] UGL's contract to provide maintenance services to Esso commenced on 26 June 2017.[13] By that time, it was evident which individuals had accepted employment with UGL to work at Longford, as they were entering the Longford site.

[12] On 30 June 2017, Mr Hatwell, Mr Gelagotis and other Esso employees received written warnings in respect of their participation in the walk off on 20 June 2017.[14] The warnings issued to both Mr Hatwell and Mr Gelagotis each contained the following direction:

> '…It remains a condition of your ongoing employment that you consistently meet the Company's expectations. Failure to comply with these directions and those expectations could lead to further disciplinary action, leading up to and including termination of employment. In particular, you must comply with the following requirements:
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> - You must comply with all Company policies, procedures and rules;
> - You must perform your duties in a professional and diligent manner; and
> - You must comply with all reasonable and lawful directions given to you.'

[13] On 3 July 2017 a very large inflatable rat appeared outside the entrance to the Longford site.[15] A sign appeared stating 'Don't be Scabby the Rat.' Another sign listed the names of those who had accepted UGL offers of employment.[16] Among those named were Mr

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[10] Statement of Frank Tabone, Exhibit R10 at paragraph 10; Statement of Clint Henness, Exhibit R13 at paragraph 8; Statement of Natalie Bannan, Exhibit R20 at NB-15; Transcript at PN970.

[11] Transcript at PN936 - PN937; Statement of Natalie Bannan, Exhibit R20 at paragraphs 19-20, NB-5.

[12] Statement of Kirsteen Butler, Exhibit R8 at KB-22.

[13] Statement of Frank Tabone, Exhibit R10 at paragraph 5.

[14] Statement of Kirsteen Butler, Exhibit R8; at KB-3 and Transcript at PN928 - PN930 re Michael Hatwell; at KB-9 and Transcript at PN1972 re Michael Gelagotis; and at KB-5 and KB-7 re other Esso employees. See also paragraphs 13, 15, 17, 19.

[15] Statement of Natalie Bannan, Exhibit R20 at paragraph 15, NB-2.

[16] Photograph showing a sign apparently outside the protest line, Exhibit R9; Statement of Travis Flens, Exhibit R11 at paragraphs 15(a) - 15(b), TF-3, TF-4; Statement of Natalie Bannan, Exhibit R20, NB-15 (p. 55); Statement of Greta Marks, Exhibit R21, GM-7 (pp. 1, 3, 5, 8, 9).

S.P.[17] and Mr Flens.[18] Photographs of the above were tendered in the proceedings at first instance.[19]

[14] There was also evidence in the first instance proceedings that some people on the protest line had shouted at UGL employees who drove through on their way to or from work,[20] using language such as 'dick head', 'scab,' 'dog', 'grub', 'scum' or 'coward';[21] that some had hit cars with placards[22] and approached cars with UGL employees inside, pointing at them and calling out 'scab'.[23] Mr Henness gave evidence that he was stopped in a line of traffic held up by the picket line and approached by two people who opened his car door and said 'I know where you live and I know where your family are, we know what you've been doing and we'll be watching you'.[24] As noted by the Deputy President, the Appellants were *not* said to have been involved in the protest line.

[15] On 21 July 2017, the Federal Court issued orders against the Unions and three officials of those unions, requiring them to remove the inflatable rat and the signs naming the persons who had accepted employment with UGL.[25] The orders also prohibited the Unions from threatening, obstructing, harassing or intimidating UGL employees.

[16] It is uncontroversial that in the months of June and July 2017, the working environment between Esso maintenance employees and contractors at Longford was tense, and that this tension was related to the industrial disputation between UGL and the former employees of UGLK and their unions.

[17] On Monday 7 August 2017, UGL's site superintendent, Mr Frank Tabone, reported to Esso Mr Flens' allegation about his encounter with Mr Hatwell on 31 July 2017, during which Mr Flens claimed that Mr Hatwell had called him a 'fucking scab.'[26]

[18] Later that day, UGL made a further report to Esso, stating that another UGL employee, Mr S.P, had attempted to take his own life. On 8 August 2017, Esso was provided with a copy of Mr S.P's note, in which he stated that certain Esso employees, including the Appellants, had 'incite(d) hatred, segregation, isolation between Esso workers and contractors'.[27]

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[17] Photograph showing a sign apparently outside the protest line, Exhibit R9; Statement of John McShane, Exhibit R18 at paragraph 22.

[18] Exhibit R9, ibid. Statement of John McShane, Exhibit R18 at paragraph 20.

[19] Statement of Natalie Bannan, Exhibit R20 at paragraph 15, NB-2, NB-15 (p. 55); Statement of Greta Marks, Exhibit R21, GM-7 (pp. 4, 6, 7, 8), GM-8 (pp. 46, 54, 55).

[20] Statement of Melinda McMillan, Exhibit R5 at paragraph 6(g); Statement of Clint Henness, Exhibit R13 at paragraph 9; Statement of Travis Flens, Exhibit R11 at paragraph 9.

[21] Statement of Travis Flens, Exhibit R11 at paragraph 9; Statement of Frank Tabone, Exhibit R10 at paragraph 11; Statement of Rod Little, Exhibit R12 at paragraph 10; Statement of John McShane, Exhibit R18 at paragraphs 17-19; Statement of Natalie Bannan, Exhibit R20 at paragraph 30.

[22] Statement of Frank Tabone, Exhibit R10 at paragraph 11(G).

[23] Statement of John McShane, Exhibit R18 at paragraph 18.

[24] Statement of Clint Henness, Exhibit R13 at paragraph 9.

[25] Statement of Richard Zvirbulis, Exhibit R6 at paragraph 14, RZ-2; Statement of Natalie Bannan, Exhibit R20 at paragraph 16, NB-3.

[26] Statement of Kirsteen Butler, Exhibit R8 at paragraph 7; Statement of Frank Tabone, Exhibit R10 at paragraph 27.

[27] Statement of Kirsteen Butler, Exhibit R8 at paragraph 8; Statement of Kym Smith, Exhibit R7 at paragraph 38.

[19] Esso was not immediately able to speak to Mr S.P concerning the allegations in his note, due to his medical condition. Ms Butler gave evidence that she decided that the appropriate course of action was to suspend the seven employees referred to in Mr S.P's note on full pay until Esso could better understand what may have occurred.[28]

[20] On 9 August 2017, Mr Hatwell, Mr Gelagotis and four of the other five Esso employees referred to in Mr S.P's note were suspended. The other named employee was suspended on 10 August 2017. Mr Hatwell and Mr Gelagotis received letters from Mr David Anderson, the plant manager, stating that they were suspended while the company investigated allegations concerning 'possible harassment of UGL contractors'.[29] The letters did not refer to Mr S.P, Mr Flens, or any particulars of the alleged harassment.

[21] On 17 October 2017, Mr Hatwell and Mr Gelagotis each received a letter from Ms Butler, setting out formal allegations to which they were asked to respond.[30] The letter to Mr Hatwell stated:

> '1. You were involved in conduct designed to ignore, exclude and isolate employees of contractors on site. In particular, you:
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> a) gave contractors the 'cold shoulder' or refused to make eye contact with them; and
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> b) were involved in the making of a decision to exclude [Mr S.P.] from the lunch room.
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> 2. You made harassing, intimidating or bullying remarks to employees of contractors. In particular you:
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> a) made intimidating and bullying remarks to Travis Flens on 31 July 2017 in relation to working on a rostered day off (RDO); and
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> b) aggressively quizzed Rod Little about his working conditions.
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> 3. You used offensive and intimidating language towards employees of contractors. In particular on 31 July 2017 you called Travis Flens a 'fucking scab', a 'dog' a 'grub' and a 'scabby contractor'.'[31]

[22] The letter to Mr Gelagotis put to him the following allegations:

> '1. You were involved in conduct designed to ignore, exclude and isolate employees of contractors on site. In particular, you:
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> a) ignored employees of contractors and made comments in words to the effect of 'you'll probably find that people around here won't talk to you' and 'no one's going to talk to you like we're not going to talk to [Mr S.P.]'; and
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> b) initiated the making of a decision to exclude [Mr S.P.] from the lunch room.

[28] Statement of Kirsteen Butler, Exhibit R8 at paragraphs 57-59.

[29] Statement of Michael Hatwell, Exhibit A3, MH-1; Statement of Michael Gelagotis, Exhibit A6, MG-1.

[30] Statement of Michael Hatwell, Exhibit A3, MH-5; Statement of Michael Gelagotis, Exhibit A6, MG-3.

[31] Statement of Michael Hatwell, Exhibit A3, MH-5.

> 2. You used offensive and intimidating language towards and about employees of contractors. In particular, you used the words 'scab', 'scum', 'dog' and 'grub'.'[32]

[23] Both letters sought written responses to the allegations. On 20 October 2017, the AMWU sent a response to Esso on behalf of Mr Gelagotis, denying the allegations.[33] Mr Hatwell responded by letter dated 24 October 2017, denying the allegations against him.[34]

[24] On 30 October 2017, Mr Hatwell and Mr Gelagotis were handed letters of termination. Both of the Appellants were dismissed for serious misconduct.

[25] The termination letter handed to Mr Gelagotis stated that he had engaged in 'conduct designed to ignore, exclude and isolate employees of contractors on site including by initiating discussions with Mick Hatwell and Shane Bennett seeking to have [Mr S.P] excluded from the lunchroom, and the use of offensive and intimidating language towards and about employees of contractors'.[35] In the proceedings at first instance only one of the reasons given for Mr Gelagotis' termination was seriously pressed and the Deputy President found (at [237] of the Decision) that Mr Gelagotis engaged in misconduct by initiating and procuring the exclusion of Mr S.P from the maintenance lunchroom and was motivated to do so by the fact that Mr S.P had accepted a UGL contract.

[26] Mr Hatwell was also dismissed for serious misconduct.[36] In doing so, Esso gave as its reason that Mr Hatwell had behaved below acceptable standards twice by engaging in unacceptable behaviour toward two individuals.[37] Both behaviours formed the basis of the alleged serious misconduct. The Deputy President found for Esso in relation to one of them and dismissed the other. The claim the Deputy President upheld, which is the subject of Mr Hatwell's appeal, was Esso's allegation that during a single interaction on 31 July 2017 Mr Hatwell made two abusive statements to Mr Flens.

[27] Esso's reasons for dismissing Mr Hatwell and Mr Gelagotis relate generally to certain types of conduct that they were said to have engaged in towards employees of contractors. But they also relate to the particular events on 15 June and 31 July 2017.

[28] On 15 June 2017 a communications meeting of Esso maintenance employees took place in the lunchroom at Longford. During the meeting, there was a discussion about asking Mr S.P to stop using the Esso employees' lunchroom. It is not in dispute that Mr Gelagotis raised this issue. Why he did so was contested in the proceedings at first instance. Although Mr S.P was an employee of UGL, he usually ate his lunch in the lunchroom, and had done so for some years while he was employed by UGLK. After the communications meeting, Mr Gelagotis spoke with another Esso employee, Mr Lyndon, about the matter. Mr Lyndon, who was Mr S.P's friend, then asked Mr S.P not to use the lunchroom. Esso concluded that Mr Gelagotis instigated Mr S.P's exclusion from the lunchroom because he had recently accepted

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[32] Statement of Michael Gelagotis, Exhibit A6, MG-3.

[33] Statement of Michael Gelagotis, Exhibit A6, MG-4.

[34] Statement of Michael Hatwell, Exhibit A3, MH-8.

[35] Statement of Kirsteen Butler, Exhibit R8, KB-55.

[36] [2018] FWC 2398 at [2]-[3].

[37] The letter of dismissal is AB, p. 817.

employment with UGL. It also considered that Mr Hatwell, who chaired the communications meeting, was directly involved in the decision to exclude Mr S.P from the lunchroom for this reason.

[29] In the proceedings at first instance Mr Gelagotis contended that he had legitimate reasons for excluding Mr S.P from the lunchroom, which were unrelated to Mr S.P's acceptance of a UGL contract. Mr Hatwell contended that he simply chaired the communications meeting, during which a range of matters were discussed, and that he had no special involvement in or responsibility for excluding Mr S.P from the lunchroom.

[30] In the case of Mr Hatwell, Esso gave as its reason for dismissal that Mr Hatwell had behaved below acceptable standards twice by engaging in unacceptable behaviour toward two individuals.[38] Both behaviours formed the basis of the alleged serious misconduct. The Deputy President found for Esso in relation to one of them and dismissed the other. The claim the Deputy President upheld, which is the subject of this appeal, was Esso's allegation that during a single interaction on 31 July 2017 Mr Hatwell made two abusive statements to Travis Flens. These statements were, "You are doing every cunt's job now are you" (the **First Statement**) and then later, "Oh, you're working your RDO today, oh, that's right, you fucking traded that off, you haven't got an RDO, have you? You're a fucking scab" (the **Second Statement**). The Deputy President found that these statements were "inappropriate conduct" that breached Esso's Working Together policy.[39] However, it was the Second Statement, the uttering of the phrase "You're a fucking scab", that the Deputy President found to have constituted a valid reason for dismissal. Mr Hatwell's conduct was also found to amount to serious misconduct.[40]

[31] Mr Hatwell denied the statements attributed to him by Mr Flens. It is not in dispute that there was a conversation between them on 31 July 2017. There was however a direct evidentiary conflict between their accounts of that conversation. The Deputy President expressed a preference for Mr Flens' account for a number of reasons.[41] Those reasons are in contest in this appeal.

[32] Mr Flens and Mr S.P are not Esso employees. They are employed by UGL.[42] Those employed by entities that contract to Esso, including UGL, are commonly referred to as 'contractors'. In the parlance of the Longford site, Mr Flens and Mr S.P were contractors.

[33] Messrs Gelagotis and Hatwell subsequently lodged applications for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (Cth) (the Act). The two applications were heard together in January 2018 with the evidence in one considered to be the evidence in the other to the extent that it was relevant. Thirty-seven witness statements were filed.[43]

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[38] The letter of dismissal is AB, p. 817.

[39] [2018] FWC 2398 at [141].

[40] Ibid at [280].

[41] Ibid at [121].

[42] Ibid at [6].

[43] See Attachment C.

[34] On 2 May 2018 the Deputy President issued his decision (the Decision)[44] in which he decided that the dismissals of Messrs Gelagotis and Hatwell were *not* harsh, unjust or unreasonable and therefore not unfair. On that basis the Deputy President dismissed the applications.

2. The Appeals

[35] As we have mentioned, an appeal may only be made with the permission of the Commission.

[36] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[45] 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.[46]

[37] The Decision at first instance was a refusal to grant an unfair dismissal remedy under s.390; such a decision was discretionary. It follows that the Decision can only be challenged by demonstrating error in the decision-making process.[47]

[38] It is not sufficient for the Appellants to invite the Appeal Bench to simply substitute its own determination for that of the member whose decision is the subject of the appeal. It is necessary to demonstrate error of the type identified by the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*:[48]

> 'Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in *House v The King* in these terms:
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> > If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.' (footnotes omitted)

[39] Further, these two appeals are from decisions made under Part 3-2 (Unfair Dismissal) of the Act and hence s.400 applies. Section 400 provides:

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[44] [2018] FWC 2398.

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

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

[47] *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 at [53] per Buchanan J, Marshall and Cowdroy JJ agreeing; *Mt Arthur Coal v Goodall* (2016) 260 IR 391 at [40]-[41] per Hatcher VP and Wells DP.

[48] *Coal and Allied Operations Pty Ltd v A.I.R.C* (2000) 203 CLR 194 at [21].

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

[40] The legislative scheme manifests an intention that the threshold for a grant of permission to appeal be higher in respect of unfair dismissal appeals than the threshold applicable to appeals generally.[49] 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'.[50] The task of assessing whether the public interest test in s.400(1) is met is a discretionary one involving a broad value judgment.[51]

[41] Factors that might attract the public interest include where a matter raises issues of importance and general application, where there are a diversity of decisions at first instance, where the decision at first instance manifests an injustice or the legal principles applied appear disharmonious when compared with other recent decisions.[52] The public interest is not satisfied simply by the identification of error, or a preference for a different result.[53]

[42] Before turning to deal with the grounds of appeal we propose to say something about the general approach to challenging findings of fact on appeal.

[43] In each of the appeals before us there are challenges to a number of the Deputy President's factual findings. Subsection 400(2) provides that such challenges can only be made on the ground that the decision involved 'a significant error of fact'. It is common ground that to be characterised as 'significant' the factual error must vitiate the ultimate exercise of discretion. In a misconduct case, such as these two matters, a 'significant' fact is one which is foundational to the Member's conclusion about whether the alleged misconduct took place.

[44] We would also observe that in determining the various challenges to the Deputy President's findings we are mindful of the fact that the evidence at first instance was voluminous and in some respects conflicting. Unlike the Deputy President we have not had the advantage of seeing and hearing the witnesses and the 'feeling' of the case. As observed in the joint judgment in *Fox v Percy*,[54] in a passage which has been applied since,[55] Gleeson CJ, Gummow and Kirby JJ said:

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[49] *G & S Fortunato Group Pty Ltd v Stranieri* (2013) 233 IR 304 at [13]; *Barwon Health – Geelong Hospital v Colson* (2013) 233 IR 364 at [6]; *Becke v Edenvale Manor Aged Care* [2014] FWCFB 6809 at [11].

[50] *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [43].

[51] Ibid at [43].

[52] *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266 at [27]; *Construction, Forestry, Mining and Energy Union (Construction and General Division) v Port Kembla Coal Terminal Ltd* (2015) 251 IR 241 at [28].

[53] *Lawrence v Coal & Allied Mining Services Pty Ltd* (2010) 202 IR 388 at [28] affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v McAuliffe* (2014) 241 IR 177 at [28].

[54] *Fox v Percy* (2003) 214 CLR 118; 197 ALR 201; 38 MVR 1; [2003] HCA 22 at [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. 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.'[56] (citations omitted)

[45] In each of the matters before us the Deputy President reached conclusions based on favouring one witness over another, or because of the credibility of a witness. The High Court in *Fox v Percy* noted that such conclusions cannot prevent a court of appeal from performing the functions imposed on it by statute, and in particular cases, 'incontrovertible facts or uncontested testimony will demonstrate the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings'. The Court went on and said '[i]n some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is "glaringly improbable' or 'contrary to compelling inferences in the case''.[57]

[46] More recently, in *Short v Ambulance Victoria*,[58] the Full Court of the Federal Court summarised the principles to be applied by an appellate court or tribunal when considering challenges on appeal to findings of fact made at trial in circumstances whose those findings rested on assessments of credibility:

> 'It was central to Mr Short's case that the real reasons for the refusal to appoint him to higher duties were not as Mr Standfield and Ms Ray testified, and he attacked the credibility of their account. The authorities set a high bar for an appellant seeking to overturn credit findings. In *Devries v Australian National Railways Commission* the majority per Brennan, Gaudron and McHugh JJ observed:
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> > More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage" or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable".
>
> In *Fox v Percy* at [26]-[31] Gleeson CJ, Gummow and Kirby JJ reiterated that a finding of fact by a trial judge, based on the credibility of a witness, will usually only be set aside upon appeal where incontrovertible facts or uncontested testimony demonstrate that the judge's

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

[56] *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.

[57] *Fox v Percy* (2003) 214 CLR 118, [28] – [29] (Gleeson CJ, Gummow and Kirby JJ); *Devries & Anor v Australian National Railways Commission & Anor* (1993) 177 CLR 472, 479 (Brennan, Gaudron and McHugh JJ); *Short v Ambulance Victoria* (2015) 249 IR 217, [98] – [99] (Dowsett J, Bromberg J, Murphy J); *Bluzer v Monash University* [2017] FWCFB 4032, [62] (Ross P, Colman DP, Cirkovic C).

[58] *Short v Ambulance Victoria* [2015] FCAFC 55 at [98]-[99].

> conclusions are erroneous, or where it is concluded that a decision was clearly improbable or contrary to compelling inferences.' (citations omitted).

[47] In the context of appeals, Full Benches of the Commission have consistently held that findings of fact made by a Member at first instance should stand unless it can be shown that the Member 'has failed to use or has palpably misused his advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'.[59]

[48] We would also observe that the Decision which is the subject of the appeal before us must be read fairly and as a whole and not with an eye attuned to detect error. As Kirby J observed in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*:[60]

> 'The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law.'

[49] We turn first to Mr Gelagotis' appeal.

3. Mr Gelagotis' Appeal

[50] The appeal grounds advanced by Mr Gelagotis[61] are set out in **Attachment A**.

[51] Grounds 1 to 4 assert that the Deputy President made errors of fact.

[52] It is submitted that each of these errors are 'significant'[62] within the meaning of s.400(2), on the basis that they are foundational to the Deputy President's reasoning which led him to conclude that Mr Gelagotis targeted Mr SP because he signed a UGL contract.

[53] Before turning to the specific grounds it is important to acknowledge the Deputy President's observation that Mr Gelagotis was 'not an impressive witness.'[63] In support of this observation the Deputy President made the following points about Mr Gelagotis' evidence:

- it was inconsistent (at [161]);
- a number of his answers were 'evasive, lacking in candour or given warily with an eye to forensic advantage or risk' (at [162]); and
- some of his answers 'displayed an improbable naivety' (at [164]).

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[59] *Barwon Health – Geelong Hospital v Dr Mark Colson; Dr Mark Colson v Barwon Health – Geelong Hospital* [2013] FWCFB 4515; *City Motor Transport Group v Devcic* [2014] FWCFB 6074 *Jones v Ciuzelis* [2015] FWCFB 84; *Colin Wright v AGL Loy Yang Pty Ltd* [2016] FWCFB 4818.

[60] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291. See also *Technical and Further Education Commission (t/as TAFE NSW) v Pykett* (2014) 240 IR 130 at [45]; *Esso Australia Pty Ltd v Australian Manufacturing Workers' Union* (2015) 247 IR 5 at [25].

[61] Amended Grounds of Appeal dated 19 June 2018.

[62] Section 400(2) of the Act.

[63] [2018] FWC 2398 at [160].

[54] The Deputy President drew short of making a global adverse credit finding against Mr Gelagotis, noting that:

> 'I do not make global credit findings in relation to Mr Gelagotis' evidence. The fact that I consider many of his answers to be unsatisfactory and unreliable does not mean that I necessarily reject his answers in respect of other matters. The fact that he has given unsatisfactory answers in relation to his knowledge of the industrial situation at Longford is a matter that can be taken into account in considering the credibility of his evidence about his motivations for initiating the exclusion of Mr S.P from the lunchroom. However, I will focus attention on Mr Gelagotis' evidence about his motivations (some of the matters I have referred to above relate directly to these motivations), and on the other evidence that is relevant to his stated or actual motivations.'[64]

[55] Against the background of the Deputy President's observations about Mr Gelagotis' evidence we now turn to the specific grounds of appeal.

[56] Grounds 1 and 2 concern the Deputy President's findings in relation to Mr Gelagotis' motivation or seeking to have Mr S.P excluded from the lunchroom.

[57] Ground 1 contends that the Deputy President erred in finding that Mr Gelagotis' real motivation for seeking to have Mr S.P excluded from the lunchroom was the fact that Mr S.P had signed a contract with UGL. Ground 2 relates to various findings made in relation to the motivations advanced by Mr Gelagotis for his actions.

[58] We note that there is no challenge to the Deputy President's finding (at [159]) that:

> 'The evidence establishes that Mr Gelagotis did not believe Mr S.P should use the lunchroom and took action to achieve this outcome.'

[59] The issues in contention on appeal concern the Deputy President's finding as to Mr Gelagotis' motivation for taking the action he took. This issue is addressed at [159]-[207] of the Decision. In the proceedings at first instance Mr Gelagotis contended that he had legitimate reasons for raising the issue about Mr S.P's presence in the lunchroom and taking the subsequent steps he did. In his reply statement Mr Gelagotis set out three reasons for his actions:

> '(a) Firstly, I had heard [Mr S.P.] make threatening statements and I didn't want something bad happening. I believed that if [Mr S.P.] kept eating in the maintenance lunchroom, it would turn nasty or he could end up in a physical fight with someone.
>
> (b) Secondly, the maintenance lunchroom is where Esso maintenance workers speak about important things. There is often discussion of the current disputes and views are exchanged about the claims made by the Unions in EBA bargaining with Esso, as well as the position of Esso. These things concern our interests as Esso workers. We should be able to have these discussions freely in the space that has given to meet on our break. [Mr S.P.], as I detailed in my first statement, had made it clear that he didn't support the unions or Esso workers. As I have said, the industrial situation was tense. If he made statements like that in the lunch room,

[64] Ibid at [167].

there may have been conflict. I was an occupational health and safety representative. I thought it was my responsibility to avoid such situations if I could.

(c) Thirdly, two former apprentices were also required to leave the lunchroom earlier in the year on the basis of them being contractors. I believed if it was fair for them, then it should apply to all contractors, including [Mr S.P.].'[65]

[60] The Deputy President considered, and rejected, each of the reasons said by Mr Gelagotis to have motivated his actions. At [207] the Deputy President found that Mr Gelagotis' real motivation for initiating the request that Mr S.P not eat his lunch in the maintenance room was that Mr S.P had signed a contract with UGL. The context for this finding is set out at [199] to [207], relevantly:

'[199] I do not accept Mr Gelagotis' explanation of his motivations for proposing, and seeking through his discussion with Mr Lyndon to procure, Mr S.P.'s exclusion from the lunchroom. What then was his actual motivation?...

The Commission may and should draw reasonable inferences as part of its obligation to consider relevant and probative evidence. Proof of any fact on the balance of probabilities can be established by circumstantial evidence; that is, by proof of primary or intermediate facts from which the court infers a further fact…

[203] Of course, all inferences are in one sense 'indirect'. If there is direct evidence on a particular matter in dispute, which evidence is accepted, there may be no need to draw inferences in relation to that matter. In the present case, Mr Gelagotis gave direct evidence as to his motivations in seeking to have Mr S.P. excluded from the lunchroom. I do not accept this evidence. Therefore, in seeking to understand what has occurred for the purposes of establishing whether a valid reason for dismissal exists, it is appropriate to consider whether inferences can be drawn as to Mr Gelagotis' real motivation for seeking to have Mr S.P. excluded from the lunchroom.

[204] In my view, the sequence of events leading up to the communications meeting outlined earlier in these reasons, together with the evidence of Mr Gelagotis himself, points clearly to a motivation related to Mr S.P.'s acceptance of a contract with UGL. It will be recalled that on 29 May 2017, a letter was sent jointly by the three unions to their members, stating that no member should be accepting employment with UGL on the current terms and conditions, and that to do so would be a 'sell out' of hard won conditions. On 9 June 2017, Mr S.P. signed an offer of employment with UGL. On 14 June 2017, Mr McDonald, the AMWU delegate, sent an email to Esso maintenance and operations employees, including Mr Hatwell and Mr Gelagotis, stating that the 'unions are not letting this slip', that 'a visual presence will come soon enough', and that UGLK members should not sign 'this crap deal' that was selling '25 years of hard fought conditions down the drain.' The communications meeting at which Mr Gelagotis proposed excluding Mr S.P. occurred the following day.

[205] Mr Gelagotis acknowledged under cross-examination that he was aware by 13 or 14 June 2017 that some UGLK employees had signed a contract with UGL and by mid-June knew that Mr S.P. had signed. He accepted that by the time he became aware that Mr S.P. had signed the contract he knew that his union, the AMWU, was opposed to offers of employment from UGL which reduced terms and conditions of employment, and took the position that Mr S.P. should not have accepted employment with UGL.

[65] Ibid at [159].

> [206] Mr Gelagotis instigated the process that resulted in the exclusion of Mr S.P. He followed this up by discussing with Mr Lyndon the task of speaking to Mr S.P. about not using the lunchroom. He was, as Ms Butler put it, 'lobbying' for a particular outcome and succeeded in implementing that outcome. In my view, the inference arises clearly that the reason for Mr Gelagotis seeking to exclude Mr S.P. from the lunchroom was because he had accepted employment with UGL. This motivation accords with his unions' industrial interests, as identified in Mr McDonald's email the day before the meeting. It is also consistent with Mr Hatwell's evidence about his understanding of the concern raised by Mr Gelagotis at the communications meeting, namely that it was about '*UGL* contractors in our lunchroom'.
>
> [207] In the present case, a reasonable and definite inference can be drawn that Mr Gelagotis' motivation for excluding Mr S.P. was the fact that he had signed a contract with UGL. I draw this inference upon a comfortable level of persuasion as to its validity. The inference is consistent with the case put against Mr Gelagotis by Esso.'

[61] It is not contended that the Deputy President's statement of the legal principles relating to the drawing of inferences (at [200]-[201]) was erroneous; rather Mr Gelagotis contends that the inferences relied upon as the basis for the Deputy President's finding were contrary to the weight of the direct evidence, including:

> (i) evidence that Mr Gelagotis had not seen the letter from unions referred to in paragraph 204 of the Reasons which stated that a member who accepted employment with UGL was a "sell-out";
>
> (ii) evidence that Mr Gelagotis had not seen the email dated 14 June 2017 from Mr McDonald referred to in paragraph 204 of the Reasons sent the day before the Communications meeting;
>
> (iii) the Deputy President's finding that Mr Gelagotis had heard Mr S.P say "I don't care about the Unions, I don't care about Esso workers. If they've got a problem I'll met them outside the gate and we'll sort it out there";
>
> (iv) the Deputy President's finding in paragraph 176 of the Reasons that Mr S.P's had made statements that were or could be considered to be aggressive; and
>
> (v) evidence that the only "contractor" using the maintenance lunchroom at the time of the Communications meeting was a UGL contractor, namely Mr S.P.

[62] Contrary to the Appellant's submission we are satisfied that the inference drawn by the Deputy President (at [207]) was reasonably open to him and, further, we would have drawn the same inference in the circumstances. As to the particular issues identified by the Appellant at [61] above:

- (i) and (ii): the letter of 29 May 2017 was sent by Mr Gelagotis' union to its members (as noted by the Deputy President at [31]) and Mr Gelagotis was a member of the AMWU and an elected health and safety representative,.[66] The email of 14 June 2017 was sent to Mr Gelagotis.[67] Further, during the course of

[66] Ibid at [4].

[67] Ibid at [34].

cross examination Mr Gelagotis acknowledged that by the time he became aware the Mr S.P had signed a UGL contract he knew that his union took the position that the inflatable rat was directed at UGL employees; that it was designed to send a message to them; and that his union labelled UGL employees 'scabs'.[68]

- (iii) and (iv): the finding must be seen in the context of the Deputy President's other findings in relation to Mr S.P's comments, in particular:

  - there was no clear evidence as to whom Mr S.P made the comment and it was not established that Mr S.P made such statements directly to Esso workers (see [174], [176], [177] and [179]).
  - there was no evidence of previous aggressive behaviour by Mr S.P, nor any evidence that he had previously been disciplined for such behaviour (at [175]).
  - if Mr S.P had made such a comment directly to Esso workers it is likely to have been the subject of some controversy or complaint, but it was not (at [176]). Mr Gelagotis did not report Mr S.P's comments to management (or anyone else) at the time, despite being an elected health and safety representative (see [191]). As the Deputy President observed (at [191]):

    'Mr Gelagotis was a health and safety representative and was aware of Esso's OHS policies. If a safety issue had been identified on site, the logical and appropriate response would have been to report it. It is a condition of entry into the Longford site, and was a condition of Mr Gelagotis' employment, that conduct of this nature is to be reported.'

- (v): contrary to the Appellant's contention, the finding that Mr S.P was the only contractor using the lunchroom at the time of the 15 June 2017 meeting supports the conclusion that Mr Gelagotis' motivation was directed at Mr S.P in particular, rather than UGL employees as a group.

[63] The second ground of appeal alleges that the Deputy President made significant errors of fact in rejecting the reasons advanced by Mr Gelagotis as to his motivation for seeking to exclude Mr S.P from the lunchroom. In particular, it is submitted that the Deputy President erred in finding that Mr Gelagotis' motivation did *not* include:

(i) a genuine safety reason arising from hearing Mr S.P say: 'I don't care about the Unions, I don't care about Esso workers. If they've got a problem I'll meet them outside the gate and we'll sort it out there'.

(ii) the ability of Esso maintenance employees to hold free discussions about industrial matters in the maintenance lunchroom in the absence of 'contractors', including UGL contractors such as Mr S.P.

(iii) consistency of treatment between Mr S.P and other contractors who had been asked to leave the maintenance lunchroom.

[68] PN2023-PN2025.

[64] At [168]-[192] of the Decision the Deputy President addressed what in his final submissions Mr Gelagotis contended was his 'main motivation', namely a concern he held about threats he had heard Mr S.P make and that he did not want 'something bad happening'.[69] At [192] the Deputy President concluded:

> 'For the above reasons, I do not accept that Mr Gelagotis took action to have Mr S.P. excluded from the lunchroom for genuine safety reasons. I do not believe that Mr Gelagotis held a genuine concern that Mr S.P. might be violent or otherwise posed a safety risk.'

[65] At Ground 2(i) the Appellant contends that the Deputy President erred in finding that Mr Gelagotis' motivation did not include a genuine safety reason arising from him hearing the statement attributed to Mr S.P. Mr Gelagotis gave evidence that he was concerned that if Mr S.P remained in the lunchroom, given the tension in the workplace, there could be violence.[70]

[66] As mentioned earlier,the Deputy President concluded that Mr S.P made statements that were or could be considered aggressive but that it was not established that he made such statements directly to Esso workers. At [177] of the Decision the Deputy President concluded:

> 'Despite Mr Gelagotis' unsatisfactory evidence about whom Mr S.P. might have made the remarks to, it does not necessarily follow that he is making the entire thing up. I accept that Mr Gelagotis heard Mr S.P. make comments along the lines alleged, but not that they were spoken directly to a person whom he might 'meet out the front.'

[67] The Deputy President went on to reject the contention that Mr Gelagotis held a genuine concern that Mr S.P might be violent or otherwise posed a safety risk also rejected the proposition that Mr Gelagotis took action to have Mr S.P excluded from the lunchroom for genuine safety reasons (see [192] of the Decision).

[68] The Appellant submits that the Deputy President's rejection of Mr Gelagotis' safety reason 'derived from his own assessment, at [179], of what he made of the words that Mr Gelatogis heard Mr S.P say'. At [179] of the Decision the Deputy President states:

> 'It does not appear to me that the statements of Mr S.P. constituted a credible threat of violence or posed any real risk of a situation arising that might lead to violence. I have found that the comments were not threats directed at those to whom they may have related. As with the comments referred to by Mr Lyndon and Mr Taylor, they reflected a person venting his spleen, not someone engaging in a direct altercation with people. There is no evidence before the Commission, or allegation, that Mr S.P. directly threatened anyone, let alone engaged in any aggressive *behaviour*. The fact that he may have been angry (presumably about his treatment at the hands of others) and complained about it in colourful language to third persons does not to my mind present a risk of violence. Further, I would also not conclude from the formulation 'we'll sort it out outside the front gate' that a physical altercation is implied. It has in mind addressing the matter in some way after work, rather than at work.'

[69] The Appellant contends that the reasoning in [179] is 'illogical in circumstances where the Deputy President accepted the comments relied on by Mr Gelagotis had been made. Mr

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[69] Applicants' final written submissions dated 27 February 2018 at paragraph 115; Statement of Michael Gelagotis, Exhibit A6 at paragraph 16.

[70] Statement of Michael Gelagotis, Exhibit A6 at paragraph 15.

S.P did not give evidence. The only account of what Mr S.P said before the Commission is the evidence of Mr Gelagotis'.[71]

[70] The Appellant also submits that the distinction drawn by the Deputy President at [179] between aggressive comments made by Mr S.P and 'aggressive behaviour engaged in' by Mr S.P 'does not logically render Mr Gelagotis' own assessment of what he heard Mr S.P say incredible or exaggerated'. The Appellant contends that:

> 'The Deputy's President distinction between aggressive comments and aggressive behaviour "engaged in" by Mr SP attributes to Mr SP reasoning that was not relevant to the belief that Mr Gelagotis subjectively held.'[72]

[71] Finally, the Appellant also submits that the 'workplace context was critical to Mr Gelagotis' safety reasons'. In that context the Appellant submits that Mr Gelagotis' concern is supported by other evidence of the kind set out in [169], [170] and [171] of the Decision. In particular, the Appellant points to the unchallenged evidence of Esso's interview with Mr Shane Bennett, who was one of the three persons who, together with Mr Gelagotis and Mr Lydon, decided that Mr Lydon should approach Mr S.P. During his interview with Esso Mr Bennett is asked about what he knew of the reasons for this approach. The Appellant submits that this evidence directly corroborates with that of Mr Gelagotis.

[72] The Deputy President's reasons for rejecting the proposition that Mr Gelagotis sought to have Mr S.P excluded from the lunch room for genuine safety reasons are set out at [178]-[191]. In particular the Deputy President relied on the following matters:

- there was no evidence or allegation that Mr S.P directly threatened anyone, let alone engaged in aggressive behaviour (at [179]);
- Mr Gelagotis did not report the remarks, although he was a health and safety representative; he did not act in a way that suggested that he himself regarded the remarks as posing a safety risk (at [180]);
- Mr Gelagotis' evidence of what he said during the communications meeting was not credible. In his evidence Mr Gelagotis said that he had spoken at the communications meeting of his concerns about Mr S.P namely that 'in the current environment, with [S.P.] and the EBA, I don't think it's a good idea for him to sit in here, it could turn to violence'.[73] The Deputy President rejected this aspect of Mr Gelagotis' evidence noting that no other witnesses recalled him using the word 'violence' at the communications meeting and that Mr Gelagotis had not mentioned the matter in his interview with Esso until September;
- if there had been a genuinely held concern about a risk of violence it is unlikely that Mr S.P would be asked not to use the lunchroom but no other action taken to prevent violence; violence could potentially occur outside the lunchroom; and
- the exclusion of Mr S.P from the lunchroom is not a step that would necessarily minimise the risk of any apprehended conflict: 'If Mr S.P was aggressive, an effort to exclude him might just as likely increase the risk of conflict as minimise it' (at [190]).

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[71] Mr Gelagotis' Appeal Submissions dated 19 June 2018 at [23].

[72] Mr Gelagotis' Appeal Submissions dated 19 June 2018 at [25].

[73] Statement of Michael Gelagotis, Exhibit A6 at paragraph 15.

[73] Contrary to the Appellant's submissions, the above matters provide a compelling foundation for the Deputy President's rejection of Mr Gelagotis' purported motivation. Further, the Deputy President was entitled to form his own assessment of what was to be made of the words used by Mr S.P having regard to the various contextual considerations set out above. The Appellant's submission that the reasoning adopted was 'illogical' is rejected. The fact that the only account of what Mr S.P said was in Mr Gelagotis' evidence did not compel acceptance of Mr Gelagotis' evidence as to his motivation. The Deputy President was entitled to consider that evidence against the factors set out at [72] above, and against his general assessment of Mr Gelagotis' credibility. The Appellant has failed to establish an arguable case of error in respect of this aspect of the appeal.

[74] The Deputy President also considered, and rejected, Mr Gelagotis' second and third reasons for excluding Mr S.P from the lunchroom (at [193]-[198]).

[75] Mr Gelagotis' second motivation for seeking to exclude Mr S.P from the lunchroom was said to be that this is where Esso maintenance workers speak about important things, such as current disputes and claims made by the unions in enterprise bargaining with Esso. He stated that such matters concerned the interests of Esso workers, who should be able to have discussions freely in the space that has been given to them by the company to meet during breaks and stated that Mr S.P had made it clear that he did not support the unions or Esso workers. The Deputy President found (at [195]) this purported motivation for seeking to exclude Mr S.P from the lunchroom was 'not credible'. At Ground 2(ii) the Appellant contends that this finding was erroneous.

[76] The Appellant goes on to submit:

> 'Moreover, the setting was industrial disputation. Mr SP was asked not to eat in the lunchroom "until this shit blows over". This referred to the industrial troubles at Longford. Troubles that were topical at the time. The Deputy President gives no attention to these matters in his assessment of the second motivation.'[74]

[77] The Deputy President's reasons for his finding are set out at [195]:

> 'However, if this was a genuine reason for having Mr S.P. not use the lunchroom, why had it not been raised before? Further, why would this require him to be completely excluded? Mr Hatwell and Mr Gelagotis acknowledged in cross-examination that there had not previously been an issue with Mr S.P. leaving the lunchroom during a meeting, if requested.[75] Mr S.P. could have continued to use the lunchroom, and absented himself for meetings, whether scheduled or impromptu, at which union business or matters concerning Esso employees were to be discussed. There is no reason why Mr S.P. could not have been asked to leave. In my opinion, Mr Gelagotis' second reason for seeking to exclude Mr S.P. from the lunchroom is not credible.'

[78] We reject the proposition that the Deputy President gave no attention to the industrial context in his assessment of the second motivation. The Deputy President dealt extensively with the industrial context at [7]-[8] and [27]-[49] of the Decision. The Deputy President

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[74] Mr Gelagotis' Appeal Submissions dated 19 June 2018 at [28].

[75] Transcript at PN515; PN1889.

received this evidence because he considered it to be relevant, noting that: 'Evidence of circumstances surrounding facts at issue can provide a basis for drawing logical inferences' (at [22]). Further, the Deputy President expressly referred to the industrial context in his consideration of the second motivation, stating (at [194]):

> 'I accept that there might be important matters of union or Esso business to which employees of contractors should not be privy. Although there was no current enterprise bargaining involving Esso maintenance employees, given that the Onshore Agreement had recently been struck, it is reasonable to assume that there are other workplace matters affecting Esso employees which they may wish to discuss privately, without the presence of employees of contractors. Issues for discussion might well include, and indeed have included, issues related to UGL.'[76]

[79] The reasons given by the Deputy President (at [195], set out above) for rejecting the second purported motivation are compelling and we discern no error in the approach adopted.

[80] Mr Gelagotis' third stated motivation was that two former apprentices were also required to leave the lunchroom earlier in the year, because they were employees of contractors. Mr Gelagotis said that he considered that if the apprentices were asked not to use the lunchroom so too should be all other contractors, including Mr S.P.

[81] The Deputy President found (at [198]) that Mr Gelagotis' third stated motivation for seeking to have Mr S.P excluded from the lunchroom was not convincing and rejected it. The Deputy President's reasons for this finding are set out at [197]:

> '[197] I accept that the Esso lunchroom was for Esso employees, and contractors had been asked to leave in the past, however an exception to this rule had been made, in practice, for Mr S.P. For Mr Gelagotis it is then contended that Esso employees could, effectively, terminate the exception and apply the 'general rule' that only Esso employees may use the lunchroom; and that there are legitimate industrial reasons for this position. But why did they choose to do so at that particular meeting on 15 June 2017, one day after Mr McDonald's message to employees about UGL? There was no convincing explanation offered by Mr Gelagotis as to this question of timing. It was suggested in final oral argument that the meeting of 15 June 2017 might have been the first opportunity to address this matter at a communications meeting.[77] But this is not persuasive. There does not appear to be any reason why the matter could not have been addressed between communications meetings.'

[82] The Appellant submits that the rejection of the proffered motivation based on an absence of an explanation for not acting earlier on this ground 'is to introduce speculation into the fact finding process'. The Appellant also points to the fact that in his interview with Esso Mr Anderson cited consistency with the treatment of apprentices as a basis upon which the action had been taken.[78]

[83] We reject the proposition that the approach adopted by the Deputy President introduced speculation into the fact finding process. The other contractors referred to by Mr

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[76] Statement of Michael Hatwell in reply, Exhibit A4 at MH-10.

[77] Transcript at PN5541.

[78] Appeal Book at 982.

Gelagotis had been excluded from the lunchroom in January or February 2017.[79] Mr Gelagotis' actions in seeking to have Mr S.P excluded *one day after* the union's email of 14 June 2017 logically raising the question of a plausible link between the union's email and the decision to exclude Mr S.P from the lunchroom.

[84] Ground 3 is directed at [271] of the Decision, where the Deputy President concluded that Esso did not act inconsistently and found that Mr Lyndon was 'the proverbial messenger in Mr SP's exclusion from the lunchroom' and that his role was much less serious than that of Mr Gelagotis. The Appellant contends that this finding is founded on a mistake of fact.

[85] The Appellant submits that on Mr Lyndon's own evidence, he met with Mr Gelagotis and Mr Bennett in Mr Bennett's office and agreed with the concern that Mr Gelagotis' expressed that if 'anybody said anything to Stuart that he didn't like in the lunchroom he might get aggressive'. It is said that it was on this basis that it was agreed by the three men that Mr Lyndon would speak with Mr SP 'because we knew each other as friends'.[80] It is submitted that on the evidence, Mr Lyndon was more than merely the proverbial messenger, he was an active participant because he shared Mr Gelagotis' concerns about Mr SP. Two of the three, Mr Gelagotis and Mr Bennett, were dismissed by Esso. Mr Lyndon was neither interviewed nor disciplined.

[86] The Appellant contends that the only point of distinction between Mr Gelagotis and Mr Lyndon is that Mr Gelagotis raised the subject of Mr SP's presence in the lunchroom at the communications meeting.

[87] In the course of oral argument counsel for the Appellant also contended that there was a 'joint enterprise' between Mr Gelagotis, Mr Lyndon and Mr Bennett in respect of the exclusion of Mr S.P from the lunchroom.[81]

[88] The Deputy President deals with the contention of inconsistent treatment (Mr Gelagotis vis a vis Mr Lyndon) at paragraph [271] of the Decision in the following terms:

> 'I note that Mr Lyndon was not disciplined by Esso at all, nor did Esso interview him about Mr S.P.'s exclusion from the lunchroom. It was contended that this demonstrated Esso's inconsistency in its disciplinary treatment of the applicants and other employees. However, at the time the investigation into Mr S.P.'s allegations commenced, Mr Lyndon was soon to retire. His employment ended on 18 November 2017. Mr Lyndon was not named in Mr S.P.'s note, which may account for why Esso did not seek to interview him or subsequently take any action against him. In any event, his role as the proverbial messenger in Mr S.P.'s exclusion from the lunchroom was much less serious than that of Mr Gelagotis.'

[89] It is common ground that Mr Gelagotis instigated the conduct in respect of Mr S.P. It was Mr Gelagotis who raised it at the meeting and there was no evidence of any conversation between Mr Gelagotis and Mr Lyndon before the matter was raised by Mr Gelagotis at the meeting. There is no substance in the contention that Mr Lyndon was in a 'joint enterprise' with Mr Gelagotis.

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[79] Transcript Mr Gelagotis cross-examination at [1573].

[80] AB pp880-881 at [13].

[81] Transcript at [471]

[90] The Deputy President's analysis reveals that Mr Gelagotis, unlike others, was dismissed for *instigating* the conduct against Mr S.P. On Mr Gelagotis' own evidence, Mr Lyndon was deployed so his message could be delivered in a respectful way. The following exchange took place during the course of Mr Gelagotis' cross examination in the proceedings at first instance:

> 'Counsel: You knew that excluding him from the lunch room would be hurtful for him, didn't you?
>
> Mr Gelagotis: Well, yes and no. With his attitude at the time, yes, that's why we tried to go about it in a respectful way and get Robbie to talk to him, I guess.'[82] (emphasis added)

[91] The distinction drawn – that Mr Lyndon was the proverbial messenger, rather than instigator – was reasonably open on Mr Gelagotis' own evidence.

[92] It will also be recalled that at the time Mr S.P attempted to take his own life he left a note in which he stated that certain Esso employees, including Messrs Gelagotis and Hatwell, had 'incite(d) hatred, segregation, isolation between Esso workers and contractors'.[83] The seven employees referred to in Mr S.P's note were suspended on full pay while Esso investigated the matter. Mr Lyndon was not mentioned in Mr SP's note.

[93] During the course of oral argument counsel for Mr Gelagotis acknowledged that it was reasonable for Esso to commence its investigation by starting on those mentioned in the note:

> 'The Commission: You can see how the investigation would start on those who are mentioned in the note.
>
> Counsel: Yes, of course. I have no criticism of them starting at that point. It's where they ended up that I'm concerned about. They knew about Mr Lyndon through the investigation.'[84]

[94] Further, Mr Lyndon was on sick leave and could not be interviewed during the investigative process.[85] That process spanned from 9 August 2017 to 17 October 2017[86]. Mr Lyndon retired on 18 November 2017[87]. In light of his sick leave and retirement, it was reasonable for Esso not to have instituted any investigative or disciplinary process against Mr Lyndon. It follows that, there was no occasion for inconsistent treatment.

[95] Grounds 4 and 5 concern the Deputy President's characterisation of what the Appellant refers to as 'the Practice'. The Deputy President makes a finding in respect of 'the Practice' at [213]:

> 'I accept there was a practice whereby the lunchroom was for Esso maintenance employees. They could allow others to use it, but could ask those who were not Esso maintenance employees not to use it. However, there was no evidence of the practice of Esso employees

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[82] Transcript 30 January 2018 at [1867]

[83] Statement of Kirsteen Butler, Exhibit R8 at paragraph 8; Statement of Kym Smith, Exhibit R7 at paragraph 38.

[84] Transcript 9 July 2018 at [490] to [491]

[85] Transcript, McMillan XXN, PN3476 – PN3477 (AB 393).

[86] [2018 FWC 2398 at [274]

[87] Ibid at [271]

> deciding who could use the lunchroom being exercised in an arbitrary or discriminatory way. Contractors had been asked not to use the room because they were contractors per se, that is, not Esso employees. This is what occurred in relation to the two apprentices in 2017, and evidently the crane boom drivers referred to by Mr Taylor above. They were 'strangers.' However, there was no practice of excluding people because they were employees of a *particular* contractor.'

[96] In the proceedings at first instance it was contended by Mr Gelagotis that he had engaged 'the Practice' and that for Esso to impose another standard via its Working Together policy, and then discipline him for a breach of it, was unfair. The Deputy President accepted (at [215]) that it would be unfair to discipline employees for engaging in a practice that had been authorised by Esso, but found that Mr Gelagotis had not engaged the Practice.

[97] In considering Mr Gelagotis' contention, the Deputy President held in [211] of the Decision that it was necessary to first characterise the Practice and then consider whether Mr Gelagotis' actions were consistent with it:

> '[211] It is necessary to characterise the practice and consider whether Mr Gelagotis' actions were consistent with it. There was evidence about the practice.[88] For example, in his interview, Mr S.P.'s supervisor, Mr Taylor, said this of it:
>
> > As a general rule, the Esso lunchroom was used exclusively by Esso maintenance employees. There is a sign on the lunch room door which says "Esso Employees, Esso Maintenance Only" although people who use the lunch room have allowed long term-contractors to have lunch in there. I recall that people have been asked to leave in the past on a number of different occasions. Recently some crane boom drivers were asked to leave because there was a momentary concern at that time about having strangers in the lunch room, which did not persist.'[89]

[98] The Appellant contends that the Deputy President's approach constitutes an error of law. It is submitted that the Deputy President was obliged to act on the evidence to determine the content of the Practice and that his characterisation of the Practice imposed 'a gloss' that was not supported by evidence.

[99] The Appellant submits that the evidence before the Commission was that from time-to-time those who held the status of "contractor" would be asked to cease using the maintenance lunchroom. Whether the Practice was applied to exclude one or many is of no material difference. It is submitted that there is no logical reason to suppose that the Practice could not apply to a particular contractor and that the only criterion was the contractor status of the person or persons to whom it was applied. Moreover, Mr SP was the only contractor using the lunchroom at the time and accordingly the[90] Practice could have only affected him.

[100] The finding that Mr Gelagotis did not act within the Practice, as characterised, was a matter of significance. He was for that reason subject to Esso's policy, on the reasons of the

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[88] See Exhibit A19, extract from the interview of the Plant Manager, David Anderson; Statement in Reply of Brendan Small, Exhibit A14 at paragraphs 17-20; Statement of Robert Lyndon, Exhibit A8 at paragraph 11.

[89] Statement of Matt Taylor, Exhibit R16 at paragraph 16.

[90] AB, p. 859.

Deputy President. It was breach of this policy that was the basis for the Deputy President's conclusion that Mr Gelagotis had committed misconduct, amounting to serious misconduct.

[101] The Deputy President found (at [207]) that Mr. Gelagotis was motivated to exclude Mr SP from the lunchroom by the fact that Mr. SP had signed a contract with UGL. That finding was clearly open to the Deputy President. Having made that finding, he contrasted that particular motivation for excluding contractors from the lunchroom with the evidence before him of the "Practice"

[102] The Deputy President found (at [213]) the "Practice" to be such that the lunchroom was for "Esso maintenance employees" Those employees could allow others to use it but could ask non Esso maintenance employees not to use it. Had Mr. Gelagotis been requesting Mr. SP, through the agency of Mr. Lyndon, to no longer attend the lunchroom because of, for example a general concern about "having a stranger in there", as put by Mr. Taylor in his evidence, or if it was consistent with the exclusion of the two apprentices in 2017, this would have been consistent with the evidence about the practice.

[103] However, this was not Mr. Gelagotis' motivation. The Deputy President found no evidence that the Practice extended to excluding persons because they were employed by a *particular* contractor. This is not putting a "gloss" on the evidence. The Deputy President simply made a finding on the evidence before him about what the practice actually was. Having considered the submissions, we see no error in the Deputy Presidents characterisation of the Practice and the finding that Mr Gelagotis did not act within it.

[104] Ground 6 contends that the Deputy President erred in [67] of the Decision by misconstruing the valid reason criterion in s.387(a) to mean that he was required to determine whether there was a good and a substantiated reason for dismissal, or that the valid reason criterion was confined to that inquiry. At [67] the Deputy President states:

> 'Section 387(a) of the Act requires the Commission, in considering whether a dismissal was harsh, unjust or unreasonable, to take into account whether there was a valid reason for the dismissal related to the person's capacity or conduct. The principles that are relevant to the consideration of this concept are well-established. A valid reason is one that is 'sound, defensible and well-founded.'[91] The Commission does not stand in the shoes of the employer and determine what the Commission would do if it had been in its position.[92] The question the Commission must address is whether there was a valid reason, in the sense both that it was a good reason and a substantiated reason.'

[105] The Appellant submits that in [67], the Deputy President poses the question that he says the Commission must address on the subject of valid reason. The Appellant submits that the Deputy President's characterisation of a 'valid reason' as being both a 'good reason and a substantial reason' reflects a misconception of the parameters of the statutory concept, which resulted in the Deputy President misdirecting himself.

[106] Further, it is submitted that the 'test applied by the Deputy President has the effect of conferring on the Commission a free-standing function to assess the propriety of conduct as 'good', or not, under the rubric of valid reason from its own perspective.'

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[91] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

[92] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

[107] The Appellant contends that the Deputy President was required to consider the matter of valid reason from the perspective of the employer.[93] Esso's reasons for dismissing Mr Gelagotis summarily are to be found in its letter of dismissal[94] and the evidence of Ms Butler. Ms Butler was the principal decision maker for Esso. The employer's reason for termination relied on multiple forms of conduct.[95] It is said that the multiplicity of the conduct was central to the dismissal viewed from the employer's perspective. Ms Butler emphasised this in her evidence in speaking of Esso's policy.[96] The Deputy President accepted that Mr Gelagotis' misconduct was a single act of misconduct[97] and the Appellant submits that the singularity of the conduct was material to his assessment of the validity of dismissal, viewed from the employer's perspective.

[108] The Appellant contends that in considering whether there was a valid reason for Mr Gelagotis' dismissal the Deputy President was required to determine whether the alleged conduct occurred and whether that conduct justified dismissal *from the employer's perspective.* It is submitted that if there was a valid reason for the dismissal then the impact of the dismissal upon the individual concerned is to be considered *from the employee's perspective*.[98]

[109] We note that the proposition advanced by the Appellant finds some support in the decision of the majority (Lawler VP and Cribb C) in *B v Australian Postal Corporation*:[99]

> 'In considering whether there was a valid reason for a dismissal under s 387(a), the reason(s) being considered are the employer's reason(s). In a misconduct case, the Commission is concerned with whether the misconduct in fact occurred, not with whether the employer has reasonable grounds to believe that it occurred (eg. Yew v ACI Glass Packaging Pty Ltd (1996) 71 IR 201, Sherman v Peabody Coal Ltd (No 2) (1998) 88 IR 408; Australian Meat Holdings Pty Ltd v McLauchlan (1998) 84 IR 1).
>
> Subject to that, as indicated by Northrop J in Selvachandran, "valid reason" is assessed from the perspective of the employer and by reference to the acts or omissions that constitute the alleged misconduct on which the employer relied, considered in isolation from the broader context in which they occurred. It is the reason of the employer, assessed from the perspective of the employer, that must be a "valid reason" where "valid" has its ordinary meaning of "sound, defensible or well founded". As Northrop J noted, the requirement for a valid reason "should not impose a severe barrier to the right of an employer to dismiss an employee".'

[110] We accept that in conduct cases the assessment of whether there was a valid reason for the dismissal is to be considered in isolation from the broader context in which the alleged misconduct occurred. That is, the impact of dismissal upon the employee is taken into account under s.387(h) and is *not* brought to account in assessing whether there was a valid reason for

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[93] *B v Australian Postal Corporation* (2013) 238 IR 1 at [35].

[94] AB, p. 869.

[95] AB, p. 1487, paragraph [117].

[96] AB, p. 456: PN4125

[97] Decision at [262].

[98] See transcript at [262] to [305]

[99] (2013) 238 IR 1 at [34] to [35]

dismissal. But in our view, the proposition that 'valid reason' is assessed from 'the perspective of the employer' is unhelpful and obfuscates the task required by s.387(a).

[111] The proposition put is suggestive of a subjective test: 'from *the perspective* of *the employer'*. Such an approach is erroneous. Where the reason for termination is based on alleged misconduct the Commission must determine whether the alleged misconduct took place and what it involved, on the basis of the evidence in the proceedings before it. The test is *not* whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.[100] As Moore J observed in *Walton v Mermaid Dry Cleaners Pty*[101]*,* a case decided under a legislative antecedent to s.387:

> 'I should, however, make plain - and this has been made plain in many cases decided by this court – that it is not the court's function to stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be made by the court but rather it is for the court to assess whether the employer had a valid reason connected with the employee's capacity or conduct, and in these proceedings I have concluded it did.'[102] (emphasis added)

[112] Contrary to the Appellant's submission, we are not persuaded that the Deputy President misdirected himself in his consideration of whether there was a 'valid reason' for Mr Gelagotis' dismissal, within the meaning of s.387(a). As we have mentioned, the Decision must be read as a whole and considered fairly, rather than combing through the reasons with a 'fine appellate tooth-comb'. The Appellant focusses attention on the last sentence of [67] and pays little regard to the balance of the paragraph, in which the Deputy President sets out the well-established principles relevant to the consideration of 'valid reason' within s.387(a). Further, the Deputy President's conclusions in relation to valid reason do not disclose any error of principle. At [235] to [237] of the Decision the Deputy President states:

> **'Conclusions in relation to valid reason**
>
> 'I have concluded that there was a valid reason for the dismissal of Mr Hatwell and for the dismissal of Mr Gelagotis.
>
> On the basis of the factual findings I have made above, I am satisfied on the evidence before me that Mr Hatwell engaged in misconduct in his treatment of Mr Flens on 31 July 2017. This gave Esso a sound, defensible, well-founded and valid reason to dismiss Hatwell.[103]
>
> I am also satisfied that Mr Gelagotis engaged in misconduct by initiating and procuring the exclusion of Mr S.P. from the lunchroom, motivated by the fact that Mr S.P. had accepted a UGL contract, and that this was a valid reason for his dismissal.'

[113] Ground 7 of the original grounds of appeal was deleted in the Amended grounds of appeal.

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[100] See *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201; *Sherman v Peabody Coal Ltd (No 2)* (1998) 88 IR 427; *Australian Meat Holdings Pty Ltd v McLauchlan* (1984) 84 IR 1 and *King v Freshmore (Vic) Pty Ltd* Print S4213.

[101] (1996) 142 ALR 681

[102] Ibid at 685; also see *Miller v University of New South Wales* (2003) 132 FCR 147 at [64] per Ryan and Gyles JJ

[103] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371

[114] Ground 8 contends that the Deputy President erred in concluding that the single act of misconduct he found that Mr Gelagotis had committed constituted serious misconduct.

[115] The Appellant submits that the Deputy President's conclusion that Mr Gelagotis' misconduct was repudiatory[104] focused too narrowly on Mr Gelagotis' compliance with Esso's policy. It is submitted that the correct focus was to consider the impact of the single act of misconduct on the employment relationship as a whole, including by reference to Mr Gelagotis' length of service, demonstrated ability and standards of prior conduct, and to do so from the standpoint that a single act of misconduct does not usually justify dismissal on the ground of serious misconduct. It is also submitted that the abnormal work environment was also a matter of significance, as was Esso's own policy on summary dismissal, which imposed a threshold of exceptional circumstances.

[116] As the Deputy President correctly observed (at [239]), for the purpose of establishing a valid reason in the context of s.387(a) it is *not* necessary to demonstrate misconduct sufficiently serious to justify summary dismissal.[105] The Deputy President deals with the proportionality issue at [277] to [283] of the Decision:

> '[277] The proportionality of the dismissal to the conduct that is the subject of a valid reason is a matter to be considered in connection with s.387(h). Clearly a dismissal may be harsh because it is disproportionate to the gravity of the misconduct on which the employer acted.
>
> [278] As was noted by the Full Bench in *Sharp v BCS Infrastructure Support Pty Limited*, an assessment of the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter to be taken into account under s.387(h), and it may also be appropriate to conclude that the misconduct was of such a nature as to have justified summary dismissal. This does not mean that it is necessary to consider that an employee's conduct meets any particular postulated standard of serious misconduct.
>
> [279] The applicants contended that for conduct to constitute serious misconduct and justify instant dismissal it must be serious, a 'radical breach' of the employment relationship that is inconsistent with its continuation. In this regard they referred to the decision of the Full Federal Court in *Melbourne Stadiums Ltd v Sautner.* However, the Full Court in that case cites a passage from *Rankin* noting that 'there are offences which justify dismissal but which would not, in themselves, show that the employee was intending not to perform contractual obligations in the future'. The Full Court in *Melbourne Stadiums* also noted that the applicant's conduct in that case did not necessarily have to amount to a repudiation of his contract of employment to justify his summary dismissal.
>
> [280] Summary dismissal embraces termination of employment arising from breach of an essential term of the employment contract, a serious breach of a non-essential term, or conduct manifesting an intention not to be bound by the contract in the future. In my view Mr Hatwell's treatment of Mr Flens on 31 July 2017, and Mr Gelagotis' actions in seeking to exclude Mr S.P. from the lunchroom because he had accepted employment with UGL, were serious matters, and of sufficient gravity to constitute serious misconduct…

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[104] Decision at [281].

[105] *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033 at [32]

> [282] Mr Gelagotis took deliberate steps to exclude Mr S.P. from the lunchroom because he had accepted employment with UGL. The conduct was proscribed by a policy with which he was required to comply. He was a health and safety representative. Mr Kostelnik's reminder to employees of the importance of the policy on 22 June 2017 came after Mr Gelagotis' actions on 15 June 2017; nevertheless, Mr Gelagotis acknowledged that he was aware of the policy, and that breach of the policy could result in dismissal. He had undertaken online refresher training on 29 September 2016. Mr Gelagotis accepted employment with Esso understanding that the policy applied to his employment. The policy prohibited conduct which has the purpose or effect of creating an intimidating, hostile or offensive work environment. Excluding Mr S.P. from the lunchroom because he had accepted employment with UGL contravened the policy, and breached his contract of employment. It contravened an essential term of the contract that governed standards of behaviour in the workplace. Even if this term were considered a non-essential term, the contravention of it was a serious breach. The gravity of the conduct is such as to amount to serious misconduct.
>
> [283] For the purposes of my consideration of s.387, I consider that Esso's summary dismissal of the applicants for these reasons was not disproportionate to their conduct in question.' (footnotes omitted)

[117] In considering the Appellant's submissions it is important to appreciate that we are here concerned with a statutory scheme where the central question is whether a person has been 'unfairly dismissed'.[106] In the present case this question is resolved by determining whether the dismissal was 'harsh, unjust or unreasonable' taking into account the matters specified in s.387(a) to (h).[107] A number of general propositions may be made about s.387:

1. When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.[108]
2. There would be a valid reason for termination if the conduct occurred *and* it justified termination. There would not be a valid reason if the conduct did not occur or it did occur but did not justify termination. For example, an employee may concede that the conduct took place but contend that it involved a trivial misdemeanour.[109]
3. For the purposes of s.387(a) it is *not* necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).[110]
4. The existence of a valid reason for a dismissal is not assessed by reference to the existence of a legal right to terminate a contract of employment. As Gray J observed in *Miller v University of New South Wales*:

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[106] s.385 of the Act

[107] It is not contested that the Appellants had been dismissed; the Small Business Fair Dismissal code is not relevant; and it is not a case of genuine redundancy: see s.385.

[108] *Edwards v Giudice* (1999) 94 FCR 561 at [7] per Moore J

[109] ibid

[110] *Annetta v Ansett Australia* (2000) 98 IR 233 at [9] – [10]; *Owen Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 at [32]

> 'What is sought is not the existence of a legal entitlement to terminate the employment, but the existence of a reason for the exercise of that right that is related to the factual situation. The validity is not to be judged by reference to legal entitlements, but to the Commission's assessment of the factual circumstances as to what the employee is capable of doing, or has done, or as to what the employer requires in order to continue its activities.'[111]

5. Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s.387(a).

6. An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter under s.387(h). In that context the issue is whether dismissal (or in the present case, summary dismissal) was a proportionate response to the conduct in question.[112]

[118] The Deputy President correctly noted that no explicit finding of the Appellants' common law position was necessary in order to resolve the questions posed by section 387 ([278]). The Deputy President's reasons are to be understood as determining whether Mr Gelagotis' dismissal was disproportionate to the gravity of the misconduct. In order to do this, he considered whether the conduct, as found, constituted one of the three categories entitling an employer to summarily dismiss ([280], [283]) and concluded that Mr Gelagotis' conduct constituted a breach of an essential term; a contractual requirement that each Appellant comply with Esso's policy ([140], [226], [281] – [282]). Indeed, on the evidence, we would have reached the same conclusion, taking into account:

- the conduct was proscribed by a policy with which he was required to comply;
- the policy prohibited conduct which has the purpose or effect of creating an intimidating, hostile or offensive work environment;
- Mr Gelagotis was a health and safety representative;
- the conduct was intentional. Mr Gelagotis took deliberate steps to exclude Mr S.P from the lunch room because he had accepted employment with Mr S.P;
- Mr Gelagotis was aware of the policy and that breach could result in dismissal, having undertaken some on line refresher training on 29 September 216.

[119] It was reasonably open to the Deputy President to additionally conclude that the conduct was serious misconduct, repudiatory, and that Mr Gelagotis' dismissal was a proportionate response to that conduct. As Gillard J observed in *Rankin v Marine Power International Pty Ltd*: 'There is no rule of law that defines the degree of misconduct which would justify dismissal without notice'[113]. Further, it was not necessary for his Honour to consider intent when considering whether there was repudiation at common law. The test for repudiation is whether the conduct of the employee is such as to convey to a reasonable

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[111] (2003) 132 FCR 147 at [13], cited with approval in *He v Lewin and Others* (2004) 137 FCR 266 at [15]

[112] *Owen Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033 at [34]

[113] (2001) 107 IR 117 at [240]

person, in the position of the employer, renunciation either of the contract as a whole or of a fundamental obligation under it. The issue turns upon objective acts and omissions and not on uncommunicated intention.[114] In any event, the conduct was wilful.

[120] Ground 9 of the original grounds of appeal was deleted in the Amended grounds of appeal.

[121] Grounds 10 to 12 are related. Ground 10 contends that the Deputy President erred "in the fact that he failed to take into account and/or failed to give equal significance to relevant s.387(h) matters in determining whether the dismissal was harsh, unjust or unreasonable, namely:

(a) the singularity of the act of misconduct as found;

(b) the Deputy President's findings in paragraph 134, 256 and 259 of the Reasons pertaining to the prevailing, pre-existing, industrial circumstances;

(c) the Deputy President's finding in paragraph 273 of the Reasons that Mr Gelagotis had an unblemished record of service with the Respondent and his finding concerning the personal effects of the dismissal on Mr Gelagotis, including that he was now doing unskilled work for his father;

(d) the fact that the other reasons relied upon by the Respondent to justify Mr Gelagotis' dismissal were dismissed;

(e) that Mr Gelagotis believed that his actions were supported by and accorded with the Maintenance Lunchroom Rule;

(f) the Deputy President's finding in paragraph 259 of the Reasons that the misconduct as found occurred in abnormal working circumstances; and

(g) the proportionality of dismissal having regard to the aforementioned matters.

[122] At Ground 11 it is contended that the aforementioned considerations are relevant because:

(a) The "valid reason" criterion in s. 387(a) of the *Fair Work Act* 2009 entails an objective assessment of the conduct, as found, viewed from the employer's perspective, including by deciding whether that conduct justified termination of employment.

(b) Section 387(h) of the *Fair Work Act* 2009 required the Deputy President to take into account these matters in deciding whether he was satisfied the dismissal was harsh, unjust or unreasonable.

[123] Ground 12 contends that the Deputy President erred "by giving excessive weight to his reasons for concluding there was a valid reason for Mr Hatwell's dismissal and gave inadequate weight to the matters referred to in paragraph 10 herein".

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[114] *Adami v Maison de Luxe Pty Ltd* (1924) 35 CLR 143, 153 – 154 (Isaacs ACJ); *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623, 658 (Deane and Dawson JJ).

[124] The Appellant contends that the issue of disproportionate weight goes to the question of rationale decision making. In support of this contention the Appellant relies on the joint judgment (per Hayne, Kiefel and Bell JJ) in *Minister for Immigration v Li.*[115] In *Li,* the joint judgment starts with the proposition that in the exercise of a statutory discretionary power (as in the matter before us): 'The legislature is taken to intend that that a discretionary power, statutorily conferred, will be exercised reasonably.'[116] The joint judgment later expands on the context of the standard of reasonableness (at [72]):

> '… in Minister for Aboriginal Affairs v Peko-Wallsend Ltd, Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is "manifestly unreasonable". Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.' (footnotes omitted)

[125] In essence, an obviously disproportionate response to weight attributed to a relevant consideration is one path to a conclusion that the decision fell outside the bounds of legal reasonableness. But, there are limits to such an approach to the review of a discretionary decision, as the joint judgement notes at [66]:

> 'This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.' (footnotes omitted)

[126] In considering grounds 10 to 12 we note at the outset that contrary to the Appellant's submission s.387 does not prescribe the weight to be given to each of the matters in s.387(a) to (h); nor does it require that 'equal significance' be given to each of these matters. Subject to the decision maker operating within the bounds of legal reasonableness the weight afforded to each of the considerations relevant to the exercise of the discretion is a matter for the decision-maker.

[127] At [252] to [295] of the Decision the Deputy President gave consideration to each of the matters said to give rise to harshness; noting at the outset that 'a dismissal may be harsh, unjust or unreasonable despite the existence of a valid reason for the dismissal' (at [253]). In the course of his consideration the Deputy President had regard to:

- the broader industrial context (at [256] to [259]), noting that the submissions as to mitigation by reference to industrial context might have been more compelling 'if the conduct had been admitted and regretted, but explained in some particular way by reason of the context' (at [258]);

[115] (2013) 249 CLR 332

[116] Ibid at [63]

- the fact that the valid reason concerns what might be described as single act, or events, rather than a course of conduct (at [262] to [265]);
- the personal circumstances of the applicants (at [273] to [276]) noting that dismissal has had very significant effects on Mr Gelagotis and Mr Hatwell; and
- the proportionality of the dismissal to the conduct that is the subject of a valid reason (at [277] to [283]).

[128] The Deputy President plainly considered, but was ultimately unmoved by, the various mitigatory factors put to him. The Decision discloses that the Deputy President identified, considered and evaluated all of the matters put to him. In our view the exercise of the Deputy President's discretion, and his weighing of the relevant considerations, plainly falls within the bounds of legal reasonableness as articulated in *Li.*

[129] Grounds 13 and 14 are related and contend that clause 22 of the *Esso Gippsland (Longford and Long Island Point) Enterprise Agreement 2017* precluded Mr Gelagotis' dismissal. These grounds are predicated on the footing that the Deputy President was wrong to hold that Mr Gelagotis committed serious misconduct. It is accepted that if the Deputy President's finding as to serious misconduct is correct then clause 22 would have no operation.[117]

[130] We have earlier concluded that it was reasonably open to the Deputy President to conclude that Mr Gelagotis' conduct was serious misconduct, repudiatory, and that his dismissal was a proportionate response to that conduct (see [117] above). It follows that we need not deal with grounds 13 and 14.

4. Conclusion: Mr Gelagotis' Appeal

[131] As we have mentioned, the decision subject to appeal was made under part 3-2 of the Act and s.400(1) provides that the Commission *must not* grant permission to appeal from such decisions *unless* it 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)).

[132] We are not persuaded that the Appellant has established an arguable case of error in respect of any of the grounds of appeal. In particular, we are not persuaded that the Deputy President made an error of principle or a significant error of fact. Nor are we persuaded that there are any other considerations which enliven the public interest.

[133] We are not satisfied that it is in the public interest to grant permission to appeal. Accordingly, permission to appeal is refused.

5. Mr Hatwell's Appeal

[134] The appeal grounds advanced by Mr Hatwell[118] are set out in **Attachment B**.

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[117] Appellant's Outline of Submissions 19 June 2018 at [55]

[118] Amended Grounds of Appeal dated 19 June 2018.

[135] Grounds 1 to 7 assert that the Deputy President made errors of fact.

[136] It is submitted that these errors are, for each ground, 'significant'[119] within the meaning of s.400(2), on the basis that they are foundational to the reasoning employed by the Deputy President to conclude that Mr Hatwell verbally abused Mr Flens on 31 July 2017.

[137] The finding that Mr Hatwell made the Second Statement (see [30] above), "You're a fucking scab", was the basis for the Deputy President's finding in [141] of the Decision that Mr Hatwell had contravened Esso's policy. It was the making of this statement to Mr Flens that supplied a valid reason for Mr Hatwell's dismissal.[120]

[138] It is uncontroversial that there was a conversation between Mr Hatwell and Mr Flens on 31 July 2017 and that Mr Hatwell initiated that conversation.

[139] The Appellant described the conversation as an act in two parts. The first part of the conversation concerned Mr Flens' actions in connecting ("hooking up") a generator for a job that he was setting up. In chief, Mr Flens said that this conversation concluded with Mr Hatwell making the First Statement, and that after he had made it, he spoke with another electrician who was present, Jonathon Aitken, before making the Second Statement as he walked past Mr Flens from a distance, Mr Flens said, of 6 metres. In his Decision the Deputy President sets out the accounts given by Messrs Flens and Hatwell about the exchange:[121]

> '[103] Mr Flens' account of the altercation with Mr Hatwell on 31 August 2017 was as follows:
>
> > '[26] On 31 July 2017, at approximately after lunch, Mr Hatwell called me a 'fucking scab'. The incident that led up to this occurred as follows:
> >
> > (a) I was setting up a steamer for an upcoming job. The job required me to set up an earth lead between all of the equipment, get the generator out and connect the diesel to the steamer. The generator we were using was from a hire company;
> >
> > (b) Prior to using the equipment, an electrician would ordinarily check everything is connected properly. In our crew we didn't have any electricians, only the two fitters. Jon Aitken, an electrician employed by Esso arrived during the course of the day and started checking the continuities;
> >
> > (c) Jon Aitken asked me to change the way one of the leads was earthed, and said words to the effect "No that needs to run over there instead" or "No this has to change you can't run it to this point, it has to be run over there where it's a proper earth". This sort of issue has never been raised in the past, however I changed the lead and was in the process of running it underneath the road so that it could be run to a grounded earth;
> >
> > (d) While I was in the process of running the lead under the road, Michael Hatwell arrived at the job site and spoke to Jon Aitken. He then approached me and we had a conversation to the following effect:

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[119] Section 400(2) of the Act.

[120] [2018] FWC 2398 at [143].

[121] Flens at [103] of the Decision; Hatwell at [104]-[105] of the Decision.

> Hatwell: "And who's going to check the generator? You can't just hook this shit up. Just because it comes on the back of a fucking truck doesn't mean it's ready to run. It's gotta be checked".
>
> Flens: "Well we set it up, can you check it?"
>
> Hatwell: "When do you want us to do that?"
>
> Flens: "That's a separate permit"
>
> Hatwell: "I suppose you want us to fucking do that?"
>
> Flens: "I'll be talking with Derek regarding that" or "I'll ask Derek to get you to do that"
>
> Hatwell: "Who's hooked this up?"
>
> I ignored the question.
>
> Hatwell: [leaning in very close and bumping into me] "Who's hooked the fucking generator up?
>
> Flens: "I did"
>
> Hatwell: "Why's that?"
>
> Flens: "it's a plug, I plugged it in…"
>
> Hatwell: "oh you're doing every cunt's job now are you?"
>
> I ignored the question
>
> .

[27] I have never been required to check something before I set it up. That's the electrician's job to make sure the equipment is set up correctly. I believe Michael Hatwell was unhappy because I had plugged the generator in, however we weren't at the stage of turning it on and wouldn't have done so without it being checked;

[28] Michael Hatwell continued to talk to Jon Aitken and they checked the continuity leads I had been running. I was running a lead through a long drain and was on the other side of the drain working on my own and Michael Hatwell then walked past me and said words to the effect:

> "Oh, you're working your RDO today, oh, that's right, you fucking traded that off, you haven't got an RDO, have you? You're a fucking scab"'
>
> I ignored him and he kept on working'[122]

[104] Mr Hatwell's account of his exchange with Mr Flens is set out in his second witness statement. Around 4.00pm in the afternoon, he walked past a 'steaming' job, and noticed that an electrical generator was set up. There was a temporary lead from the generator to the steaming unit that looked messy. Mr Hatwell was one of only two electrical safety inspectors on the site, and had a duty of care to follow up on any issues he saw on site and ensure that problems were rectified. Mr Aitken, a power and control technician employed by Esso, was working nearby. He told Mr Hatwell that he was there to do continuity checks (wiring checks that prevent static electricity), and that he had not set up or checked the generator.[123] According to Mr Hatwell, he then had a conversation with Mr Flens to the following effect:

> 'I said: "Who hooked up the generator?"

[122] Statement of Travis Flens, Exhibit R11 at paragraphs 26-28.

[123] Statement of Michael Hatwell in reply, Exhibit A4 at paragraphs 19-22.

> Travis said: "What do you mean?"
>
> I said: "Who hooked up the generator?"
>
> [I was frustrated at this point because I thought my question was pretty clear, and Travis seemed to be dismissive of the question]
>
> Travis said: "It's just a plug-in lead"
>
> I said: "It's not that simple. It needs to be checked by an electrician. The plugs and the circuit breakers have to be the correct size to match the rating of the power cable and the equipment all has to be tested for correct operation"
>
> [Esso requires this under its work management system]
>
> Travis said: "I was going to get it checked"
>
> I said: "By who?"
>
> [I knew at the time that the only electrical people on site were Esso employees because there were no other electrical contractors on site at the time]
>
> Travis said: "I'll go and see Derek"
>
> I said: "Don't bother. I'll go and talk to him about it right now. Don't hook this up or start it until it's been checked or tested by one of our guys."'[124]

> [105] Mr Hatwell's evidence was that, as he started to walk away, he noticed that there were no other contractors or Esso employees on the job, and he asked Mr Flens 'Is it an RDO today?' He asked this, he says, because an RDO would explain why no one else was there, and it was a Monday, which was a common day for RDO's.'

[140] As is apparent from the above extracts, the words, emphasis and subject matter of each account are quite different.

[141] The Appellant contends that a 'critical conclusion' that underscored the Deputy President's analysis of why he found Mr Hatwell made an 'abusive statement' to Mr Flens is his finding in [107]-[111]] of the Decision that there must have been, and there was, a 'factual reference point' for making statements of the kind alleged by Mr Flens.

[142] The Deputy President's reasons for preferring Mr Flens' account to that of Mr Hatwell are set out at [121]-[138], in summary:

- Mr Flens was a credible and convincing witness ([122]-[123]);
- Mr Hatwell had a 'compelling motive' to use abusive language towards Mr Flens and in particular to call him a 'scab' ([124]);
- Mr Flens had no plausible motive to invent a complaint against Mr Hatwell and there is no credible reason why Mr Flens would make a false allegation against Mr Hatwell ([125]).

[143] At [131] of the Decision the Deputy President noted that the three reasons identified above were sufficient for him to prefer Mr Flens' evidence over that of Mr Hatwell:

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[124] Statement of Michael Hatwell in reply, Exhibit A4 at paragraph 23.

> **'[131]** These three reasons - the credibility of Mr Flens' evidence, the presence of a compelling motive for Mr Hatwell to abuse to Mr Flens, and the absence of a plausible motivation for Mr Flens to invent allegations against Mr Hatwell - provide more than a sufficient basis for me to accept Mr Flens' evidence over that of Mr Hatwell in relation to what occurred during their exchange on 31 July 2017. However I shall mention some further reasons.'

[144] The 'further reasons' for the Deputy President's conclusion are:

- Mr Hatwell acknowledged that he asked Mr Flens about an RDO. He also asked another UGL employee, Mr Little, about whether he was on penalty rates. As to these matters the Deputy President noted:

  > 'Mr Hatwell's questions about Mr Flens' and Mr Little's conditions of employment at UGL touch on the motive Mr Hatwell had for abusing Mr Flens, namely acceptance of employment with UGL. In my view these questions are consistent with the existence of such a motive, and show that UGL conditions were on Mr Hatwell's mind during his interaction with Mr Flens'. (at [133]).

- The language complained of by Mr Flens is consistent with that found on signage on the protest line, where the unions maintained a presence (at [133])

- The use of terms such as 'scab', at least on the protest line and among Esso employees themselves, was common place and had become normalised.

[145] Mr Hatwell submits that there were various errors of fact that were foundational to the Deputy President's reasons for accepting Mr Flens' evidence over Mr Hatwell's. We have considered the submission advanced in support of this contention[125] and the related grounds of appeal. We are not persuaded that the Deputy President made a significant error of fact; nor are we persuaded that the Deputy President's reasons for preferring Mr Flens' evidence were inadequate.

[146] The principal reasons for the Deputy President's conclusion are set out at [140] above; they are clear, cogent and open to the Deputy President. The Appellant's attack on the various factual reference points is largely directed at the 'further reasons' for the Deputy President's conclusion. But, as the Deputy President makes clear, the three reasons set out at [139] above – the credibility of Mr Flens' evidence, the presence of a compelling motive for Mr Hatwell to abuse Mr Flens and the absence of a plausible motivation for Mr Flens to invent allegations against Mr Hatwell – provided a 'more than a sufficient basis' for the Deputy President to prefer Mr Flens' account of what occurred during their exchange on 31 July 2017. We agree with the Deputy President – the three matters identified provide a sufficient basis for his finding.

[147] In this context we note that the Appellant challenges the Deputy President's observation that Mr Flens' account 'was unwavering' on the basis of what others say Mr Flens reported to them.[126] The Deputy President deals with this at [116]:

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[125] Appellant's Outline of Submissions at [12] to [44]

[126] Transcript at [185] to [223]

> 'However, Mr Flens' own evidence of the words used by Mr Hatwell was clear and consistent. Mr Flens did not seek to modify his account of events to accommodate the evidence of others. Rather, Mr Flens said simply that the other witnesses can give their evidence, and he will give his.[127] The fact that others reported Mr Flens using different words may reflect their different recollection of what Mr Flens recounted to them. In this regard, it will be recalled that a variety of abusive epithets have been used at Longford. For a person to whom an incident is reported, it may not be of great significance which particular word is used. For example, Mr Little said in his statement that Mr Flens told him on 31 July 2017 that Mr Hatwell had just called him a 'grub or scab for trading in or working his RDO'.[128] For Mr Little the detail was not personal; it was of less significance to him whether the word used was grub or scab, both of which had been used on site. But for a person at whom it is directed, words of abuse would ring in his ears. Mr Flens would be more likely to remember the words accurately, and Mr Flens' account has been unwavering.' (emphasis added)

[148] The reference to Mr Flens' account being 'unwavering' is plainly directed to Mr Flens' own evidence of the word used by Mr Hatwell – so much is clear from the first sentence of the paragraph. Further, the Deputy President's explanation for the differing recollections of others as to what Mr Flens' reported to them is logical and persuasive.

[149] The Appellant also challenged the Deputy President's analysis of some discrepancies in Mr Flens' evidence and his conclusion that they were not significant. These matters are dealt with at [117] to [119] of the Decision. There is no error in the Deputy President's analysis.

[150] The Deputy President's conclusion as to the exchange between Mr Hatwell and Mr Flens and the finding of a valid reason is set out at [139] to [143]:

> '[139] I also find that by speaking to Mr Flens in this way, Mr Hatwell contravened Esso's harassment policy. I address the terms of the policy in further detail in relation to Mr Gelagotis, however it suffices to note that it prohibits any inappropriate conduct that has the purpose or effect of creating an intimidating, hostile or offensive work environment.[129] The policy applies the standard of a reasonable person.[130]
>
> [140] It was a term of Mr Hatwell's contract of employment that he comply with the policy.[131] He was reminded, in the warning letter he received on 30 June 2017 in relation to his unauthorised absence from the site, that it remained a condition of his employment that he comply with company policy.[132] He was also reminded of the harassment policy on 22 June 2017, the day the protest line commenced, when Mr Kostelnik sent an email to all employees and contractors, including Mr Hatwell, reiterating that they were to comply with the Harassment Policy.[133] Mr Hatwell had himself invoked the harassment policy on two occasions.[134]

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[127] PN4820-4822, PN4828-4832

[128] Statement of Rod Little, Exhibit R12 at paragraph 13

[129] Statement of Kirsteen Butler, Exhibit R8, KB-12 (p.4)

[130] Statement of Kirsteen Butler, Exhibit R8, KB-12 (p.6)

[131] Statement of Kirsteen Butler, Exhibit R8, KB-2, KB-8

[132] Statement of Kirsteen Butler, Exhibit R8, KB-3

[133] Statement of Kirsteen Butler, Exhibit R8 at paragraph 43; KB-22

[134] Email from Kirsteen Butler to Michael Hatwell dated 11 July 2017 including 22 June 2017 email chain, Exhibit R2; PN293 - PN294, PN900 - PN914

> [141] The obligations set by the harassment policy were in my view reasonable. Mr Hatwell contravened the policy by engaging in inappropriate conduct that had 'the purpose or effect of … creating an intimidating, hostile or offensive work environment', namely by uttering the abusive words to Mr Flens on 31 July 2017.
>
> [142] In closing oral submissions, counsel for Mr Hatwell noted that, in her evidence, Ms Butler had said that she would not dismiss an employee for the single use of the word 'scab'.[135] The context of this evidence makes clear that she is not referring to the single use of the word 'scab' by Mr Hatwell in the circumstances of the present case. She was answering a question of an un-contextualised nature. As I discuss further below in the context of Mr Gelagotis' alleged conduct, an abusive word can be used in a range of possible contexts (including, significantly, in private). Ms Butler was not in my view suggesting that, had the only allegation against Mr Hatwell concerned his use of the word scab in the context of what he said to Mr Flens, she would not have dismissed him.
>
> [143] In any event, regardless of what may be Ms Butler's view of the matter, I consider that to call a person a 'fucking scab' in the circumstances of my findings above is a very serious matter. It constitutes a valid reason for dismissal. I consider further below whether the conduct amounts to serious misconduct, and the significance of clause 22 of the Onshore Agreement.'

[151] We discern no error in the Deputy President's conclusion that Mr Hatwell's conduct, in calling Mr Flens a 'fucking scab' constitutes a valid reason for dismissal. As mentioned earlier, in conduct cases the assessment of whether there was a valid reason for the dismissal is to be considered in isolation from the broader context in which the alleged misconduct occurred.

[152] Ground 8 contends that the Deputy President erred in [67] of the Decision by misconstruing the valid reason criterion in s.387(a) to mean that he was required to determine whether there was a good and a substantiated reason for dismissal, or that the valid reason criterion was confined to that inquiry. For the reasons set out at [102] to [110] we are not persuaded that the Deputy President misdirected himself in his consideration of whether there was a 'valid reason' for Mr Hatwell's dismissal, within the meaning of s.387(a).

[153] Ground 9 contends that the Deputy President erred by failing to make an express finding about the evidence given by Mr Hatwell concerning the conversation with Mr Flens and to give reasons for that finding resulting in the Deputy President failing to determine whether the alleged conduct occurred in circumstances where the Deputy President was required to be satisfied that the alleged conduct did occur. We are not persuaded that there is any substance to this ground.

[154] It is clear that the Deputy President preferred the evidence of Mr Flens over Mr Hatwell and he provided fulsome reasons for so doing ([121] – [137]). The fact that the Deputy President did not make negative credibility findings in relation to Mr Hatwell does not mean that he was obliged to globally accept his evidence.[136]

[155] For reasons which will become apparent it is not necessary for us to deal with grounds 10 and 11.

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[135] PN4474

[136] *Saravinovksa v Saravinovski (No 6)* [2016] NSWSC 964, [462] - [473]

[156] Grounds 13 to 15 are related. Ground 13 contends that the Deputy President erred in the fact that he failed to take into account and/or failed to give equal significance to relevant s.387(h) matters in determining whether the dismissal was harsh, unjust or unreasonable, namely:

> (i) the singularity of the act of misconduct as found;
>
> (ii) evidence that the Respondent would not have dismissed an employee for the single use of the word "scab" and had warned but not dismissed two other employees, Mr Osborn and Mr Burton, for using that word at the workplace;
>
> (iii) the Deputy President's findings in paragraph 134, 256 and 259 of the Decision pertaining to the prevailing, pre-existing, industrial circumstances;
>
> (iv) the Deputy President's finding in paragraph 273 of the Decision that Mr Hatwell had had 10 years of unblemished service with the Respondent and his finding concerning the personal effects of the dismissal on Mr Hatwell;
>
> (v) the fact that the other reasons relied upon by the Respondent to justify Mr Hatwell dismissal were dismissed;
>
> (vi) the Deputy President's finding in paragraph 120 of the Decision that there was no evidence that Mr Hatwell had done anything like what had been attributed to him to anyone else;
>
> (vii) the Deputy President's finding in paragraph 259 of the Decision that the misconduct as found occurred in abnormal working circumstances; and
>
> (viii) the proportionality of dismissal having regard to the aforementioned matters.

[157] At Ground 14 it is contended that the aforementioned considerations are relevant because:

> (i) The "valid reason" criterion in s. 387(a) of the *Fair Work Act* 2009 entails an objective assessment of the conduct, as found, viewed from the employer's perspective, including by deciding whether that conduct justified termination of employment.
>
> (ii) Section 387(h) of the *Fair Work Act* 2009 required the Deputy President to take into account these matters in deciding whether he was satisfied the dismissal was harsh, unjust or unreasonable.

[158] Ground 15 contends that the Deputy President erred by giving excessive weight to his reasons for concluding there was a valid reason for Mr Hatwell's dismissal and gave inadequate weight to the matters referred to in paragraph 13 herein".

[159] Paragraph [60] of the Appellant's written submission succinctly advances the essence of the argument put in respect of these grounds.

> 'The Deputy President's reasons considered as a whole exposes a focus on his assessment of Mr Hatwell's disrespectful and abusive language toward Mr Flens in breach of Esso's policy (which founded a valid reason), at the expense of a distinct assessment of matters reflective of the employee perspective in determining whether dismissal was harsh, unjust or unreasonable. The inadequate weight given to these matters exposes discretionary error in the discharge of the function conferred by s. 387 of the FW Act. Further, the inadequate weight the Deputy President gave to these matters exposes the exercise of discretion as disproportionate from which it should be inferred that the discretion was exercised unreasonably.'[137]

[160] The Appellant cites the judgment of the majority of the High Court in *Li* in support of the above proposition and the contention that an obviously disproportionate response to weight attributed to a relevant consideration is one path to the conclusion that the decision fell outside the bounds of 'legal reasonableness', as articulated in *Li*. We have earlier set out the relevant passages from *Li* (see [125] to [126]).

[161] At [241] of the Decision the Deputy President notes, correctly, that for a dismissal to be unfair, the Commission must be satisfied that it was harsh, unjust or unreasonable (s.385(b)). Further, in considering whether it is so satisfied, the Commission must take into account the matters specified in s.387. Having considered the question of whether there were valid reasons for dismissal, the Deputy President then turns to address each of the remaining matters in turn and finds that:

- Mr Hatwell was notified of the reason for his dismissal and given an opportunity to respond (s.387(b) and (c)) (see [242] to [246]);
- it was not contended that Esso had refused to allow Mr Hatwell to have a support person present (s.387(d)) (see [248]);
- the dismissal did not relate to unsatisfactory preference and hence there was no need to warn Mr Hatwell prior to his dismissal (s.387(e)) (see [249]); and
- No submissions were made as to the relevance of the considerations in s.387(f) and (g) in the present matter. Esso is an organisation with considerable resources, including dedicated human resources specialists, some of whom gave evidence at the hearing. The size of the employer's enterprise would have no adverse impact on the procedures followed in effecting dismissal. One would expect that allegations of misconduct would be extensively investigated, as was the case here. There was no 'absence of dedicated human resources person' and accordingly the consideration in s.387(g) has no application (see [251]).

[162] The Deputy President then turns to consider any other relevant matters (s.387(h)), in particular:

- The industrial context ([256] to [259]): the Deputy president accepted that the circumstances surrounding UGL's employment arrangements have resulted in significant tension in the workplace and was a 'material change in the applicants' normal working environment. But, because they denied the conduct, the applicants did not explain how their actions were affected by the circumstances

[137] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; per Hayne, Kiefel and Bell JJ at [73]-[74]; per Gageler J at [110].

and why this is a mitigating factor. On this basis the Deputy President concluded that this factor did not weigh in favour of a conclusion that (relevantly) Mr Hatwell's dismissal was harsh unjust or unreasonable.

- Esso's policy is not a source of any obligation on the part of Esso employees to be friends with each other or with employees of contractors. Esso employees are 'fully entitled to hold and express opinions on subjects of industrial concern and to disagree with the industrial actions of others and that this may affect personal relations between those individuals'. But found that 'the conduct of Mr Hatwell … was not confined to expressing opinions' (at [260] to [261]).
- That the valid reason in relation to Mr Hatwell related to a single act or event (at [262] to [264]).
- That Mr Hatwell's conduct had an adverse impact on Mr Flens. The Deputy President observed at [265]:

  > 'In my view, the conduct that I have found occurred, and that constituted a valid reason for dismissal of each of the two applicants in these matters, had an adverse impact on Mr Flens and Mr S.P. The evidence did not establish exactly what this effect was. However, as noted above, in the course of Mr Flens' evidence, he turned to me and said 'I was told I was a fucking scab'[138] It was plain to me from Mr Flens' tone of voice and demeanour that he found this very upsetting.'

- Rejected the applicants' contention of inconsistent treatment (at [269] to [270])
- Mr Hatwell's personal circumstances (at [273] to [276])

[163] The Deputy President then turned to consider the issue of proportionality (at [277] to [281]). In concluding (at [283]) that Esso's summary dismissal of Mr Hatwell was not disproportionate to his conduct the Deputy President said:

> 'The proportionality of the dismissal to the conduct that is the subject of a valid reason is a matter to be considered in connection with s.387(h). Clearly a dismissal may be harsh because it is disproportionate to the gravity of the misconduct on which the employer acted. …
> Summary dismissal embraces termination of employment arising from breach of an essential term of the employment contract, a serious breach of a non-essential term, or conduct manifesting an intention not to be bound by the contract in the future. In my view Mr Hatwell's treatment of Mr Flens on 31 July 2017, and Mr Gelagotis' actions in seeking to exclude Mr S.P. from the lunchroom because he had accepted employment with UGL, were serious matters, and of sufficient gravity to constitute serious misconduct.
>
> Mr Hatwell used very intimidating and abusive language towards Mr Flens. The conduct clearly contravened a policy that applied to Mr Hatwell's employment and with which he was required to comply. He was aware of the policy, had been reminded of it by management, and had himself invoked the policy on two occasions. In my view Mr Hatwell's mistreatment of Mr Flens repudiated his contract of employment with Esso. Even if there had not been such a policy, use of such language is manifestly unacceptable in the workplace and amounts to serious misconduct.'[139] (footnotes omitted)

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[138] PN4840-PN4842

[139] [2018] FWC 2398 at [277] and [280]-[281]

[164] Finally, the Deputy President considered the contention that Esso had failed to comply with the clause 22 of the Onshore Agreement (at [284] to [295]).

[165] The Deputy President's conclusion is set out at [296] to [299]:

> 'The circumstances from which these applications have arisen are lamentable. Mr Flens and Mr S.P. have been subjected to mistreatment. Mr Hatwell and Mr Gelagotis have lost their jobs. Other Esso employees have been dismissed and disciplined. The workplace has been divided.
>
> Many individuals and their unions hold strong views about the employment arrangements at UGL. That is their right. Some former UGLK employees have chosen to accept, or perhaps have had little financial choice but to accept, employment with UGL on lesser conditions than those that they previously enjoyed. This is their right.
>
> The industrial circumstances at Longford have been the subject of much evidence and argument in these matters. However, the focus of my consideration of these two applications has been the conduct of the applicants.
>
> Taking into account all of the evidence and the considerations in s.387 of the Act, and based on my factual findings, I consider that the dismissal of Mr Hatwell was not harsh, unjust or unreasonable, and that his dismissal was therefore not unfair.'

[166] There is a degree of overlap between a decision which falls outside the bounds of legal reasonableness, as articulated in *Li*, and a decision which is 'unreasonable or plainly unjust', such as to fall within the final category of review in *House v The King*[140], that is:

> 'It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'[141]

[167] For the reasons which follow we are satisfied that this is such a case. In our view, the proper exercise of discretion at first instance was, on the evidence before the Deputy President, so clearly in favour of a finding that the dismissal was harsh that the decision to dismiss Mr Hatwell's application for an unfair dismissal remedy was manifestly unjust.

[168] At the outset it needs to be born in mind that the 'valid reason' for Mr Hatwell's dismissal was a single contravention of Esso's harassment policy constituted by Mr Hatwells conduct in calling Mr Flens a 'fucking scab'. This conduct occurred in the context of a protracted industrial dispute which had resulted in 'significant tension' in the workplace and constituted a 'material change' in the normal working environment.[142] Further, the relevant decision maker at Esso – Ms Butler – made it clear that she would not dismiss an employee for a single use of the word 'scab'. The relevant extract from Ms Butler's evidence is as follows:

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[140] (1936) 55 CLR 499

[141] Ibid at 505

[142] [2018] FWC 2398 at [256] and [259].

> 'You would accept, would you not, that it couldn't in the circumstances I have described to you justify in itself termination of his employment?---And that one particular behaviour in and of itself is not the only behaviour that I have had to consider when I've weighed up that decision. Ms Butler, that wasn't my question. Will you answer my question?---Would you like to restate it again.
>
> In the circumstances I just put to you in the question I asked about what you knew from Mr [SP's] evidence you said the word "scab" in and of itself could not justify termination of his employment, could it?---If the only thing that I was faced with considering was an isolated example of an employee using the word "scab" once I would not terminate somebody's employment, no.'[143]

[169] The fact that the employer (for present purposes Ms Butler as Esso's representative) was of the view that conduct of the type engaged in by Mr Hatwell did not warrant dismissal is plainly relevant.[144] Ms Butler was the person at Esso who was responsible for considering the outcomes of an investigation into conduct directed at Mr Flens and Mr SP by various Esso employees; and for deciding whether there should be any disciplinary action.[145] It is pertinent to note in this regard that Ms Butler decided to issue 'first and final' warnings to Mr Osborn and Mr Burton for the use of language like 'scab' and 'grub',[146] rather than dismissing them.

[170] Mr Hatwells' circumstances are also relevant. He had been employed by Esso for over 10 years and expected to continue his career at Esso. Apart from the warning he received from participating in the 'walk off' on 20 June 2017 (along with the other participating Esso employees, see [12] above) Mr Hatwell has had an unblemished disciplinary history. There is no evidence of any previous behaviour of the kind the Deputy President found constituted a valid reason for his dismissal.

[171] The dismissal has had 'very significant effects' on Mr Hatwell and on his family.[147] He was suspended on full pay on 9 August 2017 for nearly three months while Esso conducted an investigation and, as found by the Deputy President:

> 'it must have been difficult for [him] not to be able to go to work as usual and lead [his] normal [life], with the shadow of investigation hanging over [him].'[148]

[172] Further, as noted by the Deputy President (at [275]) several of the allegations against Mr Hatwell were unsubstantiated and this was a factor that may be taken into account:

> 'In the case of Mr Hatwell, I have found his conduct in relation to Mr Flens was a valid reason for dismissal, but have not found substantiated the allegations about his conduct in relation to Mr S.P. Mr Hatwell's suspension was not confined to the issues relating to Mr S.P; the suspension letter refers to allegations about 'harassment of a UGL contractor or contractors', which includes Mr Flens. However, it was the allegations concerning the treatment of Mr S.P.

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[143] Transcript at [4472] to [4474]

[144] See *Lawrence v Coal & Allied Mining Services Pty Ltd T/A Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [20]

[145] Exhibit R8 at [74], Appeal Book 1478

[146] Exhibit R8 at [117.2] and [118], Appeal Book 1478

[147] [2018] FWC 2398 at [273]

[148] Decision at [274]

> that led to the protracted investigation and lengthy suspension. In my view there is an element of unfairness associated with the fact that Mr Hatwell was suspended for a long period (rather than a shorter period, as would have seemed likely had the investigation been confined to his treatment of Mr Flens) in connection with allegations that I have found to be unsubstantiated.'[149]

[173] In accordance with s.400(1), we consider that it is in the public interest to grant permission to appeal and we do so on the basis that the Decision manifests an injustice. Public confidence in the administration of justice is undermined by decisions that are manifestly unjust. This is a matter that enlivens the public interest and warrants the grant of permission to appeal.[150]

[174] We have concluded that the Deputy President's decision was manifestly unjust and plainly falls outside the bounds of legal reasonableness as articulated in *Li*. For that reason we have decided to uphold the appeal and quash the Deputy President's decision to dismiss Mr Hatwell's application for relief.

[175] In rehearing the matter we adopt the Deputy President's finding that there was a valid reason for dismissal and his findings as to the considerations in paragraphs 387(b) to (g), as summarised at [161] above. In relation to s.387(h) we have taken into account the matters set out at [168] to [172] above.

[176] We have taken into account the matters set out at s.387(a) to (h), insofar as they are relevant and have concluded that Mr Hatwell's dismissal was harsh. It follows that Mr Hatwell was unfairly dismissed (see s.385). In our view Mr Hatwell's conduct warranted a disciplinary response which fell short of dismissal.

[177] The jurisdictional prerequisites for an order for a remedy have been met. We are satisfied that Mr Hatwell is a person protected from unfair dismissal at the time of being dismissed (s.390(1)(a)) and he has been unfairly dismissed (s.390(1)(b)).

[178] Given the passage of time and the limited submissions and evidence relevant to remedy in the proceedings at first instance we have decided to remit the question of whether a remedy should be granted and, if so, the nature of that remedy, to Deputy President Colman for determination.

PRESIDENT

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[149] Decision at [276]

[150] *Lawrence v Coal & Allied Mining Services Pty Ltd T/A Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [27]-[29]

Appearances:

Mr Harding for the Appellants.

Mr Parry and Mr Howett for the Respondent.

Hearing details:

Melbourne.
2018.
9 July.

Final written submissions:

Appellants: 11 July 2018

Respondent: 10 July 2018

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ATTACHMENT A: Appeal grounds of Mr Gelagotis

Significant errors of fact

1. The Deputy President erred in finding in paragraph 203 of [2018] FWC 2398 (the **Decision**) that Mr Gelagotis' real motivation for initiating the request that Mr S. P. not eat his lunch in the maintenance lunchroom (the **Request**) was that Mr S.P. had signed a contract with UGL in circumstances where the inferences relied upon as the basis for that finding were contrary to the weight of the direct evidence, including:

   (i) evidence that Mr Gelagotis had not seen the letter from unions referred to in paragraph 204 of the Reasons which stated that a member who accepted employment with UGL was a "sell-out";

   (ii) evidence that Mr Gelagotis had not seen the email dated 14 June 2017 from Mr McDonald referred to in paragraph 204 of the Reasons sent the day before the Communications meeting;

   (iii) the Deputy President's finding that Mr Gelagotis had heard Mr S.P. say "I don't care about the Unions, I don't care about Esso workers. If they've got a problem I'll met them outside the gate and we'll sort it out there";

   (iv) the Deputy President's finding in paragraph 176 of the Reasons that Mr S.P's had made statements that were or could be considered to be aggressive; and

   (v) evidence that the only "contractor" using the maintenance lunchroom at the time of the Communications meeting was a UGL contractor, namely Mr S.P.

2. The Deputy President erred:

   (i) In finding in paragraph 192 of the Reasons that Mr Gelagotis' motivation for the Request did not include a genuine safety reason arising from hearing Mr S.P. say: "I don't care about the Unions, I don't care about Esso workers. If they've got a problem I'll met them outside the gate and we'll sort it out there".

   (ii) In finding in paragraph 195 of the Reasons that Mr Gelagotis' motivation for the Request did not include the ability of Esso maintenance employees to hold free discussions about industrial matters in the maintenance lunchroom in the absence of "contractors", including UGL "contractors".

   (iii) In finding in paragraph 198 of the Reasons that Mr Gelagotis' motivation for the Request did not include consistency in treatment between other contractors who had been asked to leave the maintenance lunchroom and Mr S.P.

3. The Deputy President erred by finding in paragraph 271 of the Reasons that Mr Lyndon was the proverbial messenger in circumstances where the evidence, including from Mr Lyndon, was that Mr Lyndon was one of three (together with Mr Gelagotis and Mr Bennett) employees of the Respondent who decided to ask Mr S. P. not to eat his lunch in the maintenance lunchroom.

4. The Deputy President misdirected himself in paragraph 211 of the Reasons and made a significant factual error by concluding that it was necessary to characterise the general rule that he found existed whereby Esso maintenance employees decided who used the maintenance lunchroom (the **Maintenance Lunchroom Rule**) and, having done so, failed to determine on the evidence whether the conduct occurred and what it involved in circumstances where:

(i) there was uncontroversial evidence before the Deputy President of the content of the Maintenance Lunchroom Rule and how it was applied; and

(ii) the Deputy President mischaracterised the Maintenance Lunchroom Rule and for this purpose relied on conclusions for which there was no evidence; and

(ii) there was evidence that was a basis to find that the Request was consistent with the Maintenance Lunchroom Rule and that Mr Gelagotis believed that his actions accorded with that rule.

Other errors

5. The Deputy President erred by failing to find that Mr Gelagotis' conduct did not constitute misconduct under the Respondent's Working Together policy or otherwise on the ground that the Request was consistent with Maintenance Lunchroom Rule or that Mr Gelagotis believed that the Request was consistent with the Maintenance Lunchroom Rule.

6. The Deputy President erred in paragraph 67 of the Reasons by misconstruing the valid reason criterion in s. 387(a) of the *Fair Work Act* 2009 to mean that he was required to determine whether there was a good and a substantiated reason for dismissal, or that the valid reason criterion was confined to that inquiry.

~~7. The Deputy President erred in paragraph 263 of the Reasons by failing to apply *Jupiter General Insurance v Shroff* [1937] All ER 67 in determining whether Mr Hatwell's conduct as found constituted misconduct and/or whether that conduct was a sufficient basis to justify dismissal in circumstances where the Deputy President was required to decide whether the conduct as found rendered Mr Hatwell's dismissal harsh, unjust or unreasonable in all the relevant circumstances according to law.~~

8. The Deputy President erred in concluding in paragraph 280 of the Reasons that the single act of misconduct the Deputy President found that Mr Gelagotis had committed constituted serious misconduct.

~~9. The Deputy President erred in concluding in paragraph 245 and 246 of the Reasons that Mr Gelagotis had been given a proper opportunity to respond to the Respondent's reasons for dismissing as required by s. 387(b) and (c) of the Fair Work Act 2009 him notwithstanding the generality of those reasons.~~

10. The Deputy President erred in that he failed to take into account and/or failed to give equal significance to relevant s. 387(h) matters in determining whether the dismissal was harsh, unjust or unreasonable, namely:

(i) the singularity of the act of misconduct as found;

(ii) the Deputy President's findings in paragraph 134, 256 and 259 of the Reasons pertaining to the prevailing, pre-existing, industrial circumstances;

(iii) the Deputy President's finding in paragraph 273 of the Reasons that Mr Gelagotis had an unblemished record of service with the Respondent and his finding concerning the personal effects of the dismissal on Mr Gelagotis, including that he was now doing unskilled work for his father;

(iv) the fact that the other reasons relied upon by the Respondent to justify Mr Gelagotis' dismissal were dismissed;

(v) that Mr Gelagotis believed that his actions were supported by and accorded with the Maintenance Lunchroom Rule;

(vi) the Deputy President's finding in paragraph 259 of the Reasons that the misconduct as found occurred in abnormal working circumstances; and

(vii) the proportionality of dismissal having regard to the aforementioned matters.

11. The aforementioned considerations are relevant because:

(i) The "valid reason" criterion in s. 387(a) of the *Fair Work Act* 2009 entails an objective assessment of the conduct, as found, viewed from the employer's perspective, including by deciding whether that conduct justified termination of employment.

(ii) Section 387(h) of the *Fair Work Act* 2009 required the Deputy President to take into account these matters in deciding whether he was satisfied the dismissal was harsh, unjust or unreasonable.

12. The Deputy President erred by giving excessive weight to his reasons for concluding there was a valid reason for Mr Hatwell's dismissal and gave inadequate weight to the matters referred to in paragraph 10 herein.

13. The Deputy President erred in his construction of clause 22 of the *Esso Gippsland (Longford and Long Island Point) Enterprise Agreement* 2017 (the **Agreement**) in holding in paragraph 292-294 of the Reasons:

(i) That the clause permits the Respondent to terminate an employee on notice whilst an employee is being counselled under the clause for behaviour that has fallen below acceptable standards.

(ii) Clause 22 of the Agreement authorises counselling and dismissal.

(iii) That the Respondent's right to dismiss is only diminished by clause 22 of the Agreement to the extent that an affected employee is permitted by the clause to raise a grievance with the way the procedure has been applied in accordance with the disputes procedure contained in the Agreement.

14. The Deputy President erred by failing to find:

(i) that, properly construed, clause 22 of the Agreement precluded Mr Gelagotis' dismissal for the misconduct he was found by the Deputy President to have committed; and

(ii) by reason thereof, it was harsh, unjust or unreasonable to dismiss Mr Gelagotis for that misconduct.

ATTACHMENT B: Appeal grounds advanced by Mr Hatwell

Significant errors of fact

1. The Deputy President erred by finding in paragraph 109 of [2018] FWC 2398 (the **Decision**) that there was a reference point for saying to Mr Flens "oh, you're doing every cunts job now are you?" in circumstances where:

   (i) there was evidence that the job Mr Flens was doing on 31 July 2017 was not a job that was done by an Esso worker or by an electrician, including an Esso electrician;

   (ii) the Deputy President found in paragraph 119 of the Decision that there were factual discrepancies in the evidence of Mr Flens.

2. The Deputy President erred in concluding in paragraph 119 of the Decision that the factual discrepancies he found existed in the evidence of Mr Flens were not significant in circumstances where those discrepancies were a basis to find or infer that the Appellant (**Mr Hatwell**) had not said "oh, you're doing every cunts job now are you?"

3. The Deputy President erred by failing to find that Mr Hatwell had not said, or that it was improbable that he had said, to Mr Flens "oh, you're doing every cunts job now are you?" in circumstances where he had found there were factual discrepancies in Mr Flens accounts of the conversation with Mr Hatwell, the evidence of Jon Aitkens and the absence of any adverse credit finding against Mr Hatwell.

4. The Deputy President erred by failing to make a finding about and/or give adequate weight to the evidence referred to in paragraph 115 of the Decision and other evidence that was a basis to find or infer that Mr Flens had given multiple, inconsistent, accounts of the words used by Mr Hatwell during their conversation on 31 July 2017.

5. The Deputy President erred by finding in paragraph 124 of the Decision that Mr Hatwell had a motive to abuse Mr Flens by reference to circumstantial evidence and Mr Hatwell's own evidence in circumstances where:

   (i) The Deputy President did not expressly reject Mr Hatwell's evidence and there was direct evidence:

      (a) that Mr Hatwell believed it was a matter for MTCT workers whether they accepted employment on lower wages and conditions, that it was up to them to decide;

      (b) that Mr Hatwell did not consider those who accepted employment with UGL to be sell-outs or unwelcome, that they made their own decisions based on their own positions;

      (c) that Mr Hatwell had a cogent basis for asking Mr Flens whether it was an RDO day that day (31 July 2017) that was consistent with Mr Hatwell's evidence;

      (d) that Mr Hatwell did not know Mr Flens well;

(e) that Mr Hatwell exercised caution in his dealings with UGL employees due to the prevailing industrial circumstances.

(ii) The Deputy President found:

(a) in paragraph 120 of the Decision that there was no evidence of Mr Hatwell doing anything like what had been attributed to him by Mr Flens to anyone else; and

(b) in paragraph 137 of the Decision that the conversation between Mr Hatwell and Mr Flens occurred for cogent reasons, and evidence that it occurred spontaneously.

~~(c) applied reasoning in paragraph 128 of the Reasons that was also a basis to find or infer the absence of a plausible motivation for the conduct attributed to.~~

(iii) The Deputy President's reasoning in paragraph 128 of the Decision supported a finding in favour of Mr Hatwell that he lacked a plausive motive to abuse Mr Flens.

6. The Deputy President erred by failing to find or infer that Mr Flens did have a plausible motivation for making a false claim against Mr Hatwell in circumstances where there was a basis to do so, including by reason of:

(i) the matters referred to in paragraphs 1 to 4;

(ii) the Deputy President's finding in paragraph 137 of the Decision that Mr Hatwell had cogent reasons for speaking with Mr Flens about the generator and evidence that Mr Hatwell had been critical of Mr Flens for hooking up the generator and had spoken sternly and seriously to him for doing so; and

(iii) evidence that Mr Flens blamed the union or union members for the treatment he and his family had suffered, knew that Mr Hatwell was a union delegate and believed that he supported the unions position.

Other Errors

7. The Deputy President erred in concluding in paragraph 111 of the Decision that it would have been reasonable for Mr Hatwell to think that Mr Flens might be working on 31 July 2017 because he did not have an RDO entitlement as a basis to conclude that there was a reference point for Mr Hatwell to make an abusive statement to Mr Flens "concerning the working of RDOs" in circumstances where the evidence was that Mr Hatwell's question did not concern the working of RDOs by Mr Flens and there was no evidence that Mr Hatwell believed that Mr Flens was working on 31 July 2017 because he did not have an RDO entitlement or had traded it off.

8. The Deputy President erred in paragraph 67 of the Decision by misconstruing the valid reason criterion in s. 387(a) of the *Fair Work Act* 2009 to mean that he was required to determine whether there was a good and a substantiated reason for dismissal, or that the valid reason criterion was confined to that inquiry.

9. The Deputy President erred in that by failing to make an express finding about the evidence given by Mr Hatwell concerning the conversation with Mr Flens and to give reasons for that finding, the Deputy President failed to determine whether the alleged conduct occurred in circumstances where Deputy President was required to be affirmatively satisfied that the alleged conduct did occur.

10. The Deputy President erred in paragraph 263 of the Decision by failing to apply *Jupiter General Insurance v Shroff* [1937] All ER 67 in determining whether Mr Hatwell's conduct as found constituted misconduct and/or whether that conduct was a sufficient basis to justify dismissal in circumstances where the Deputy President was required to decide whether the conduct as found rendered Mr Hatwell's dismissal harsh, unjust or unreasonable in all the relevant circumstances according to law.

11. The Deputy President erred in concluding in paragraph 280 of the Decision that the single act of misconduct the Deputy President found that Mr Hatwell had committed on 31 July 2017 constituted serious misconduct.

~~12. The Deputy President erred in concluding in paragraph 245 and 246 of the Reasons that Mr Hatwell had been given a proper opportunity to respond to the Respondent's reasons for dismissing as required by s. 387(b) and (c) of the Fair Work Act 2009 him, notwithstanding the generality of those reasons.~~

13. The Deputy President erred in that he failed to take into account and/or failed to give equal significance to relevant s. 387(h) matters in determining whether the dismissal was harsh, unjust or unreasonable, namely:

(i) the singularity of the act of misconduct as found;

(ii) evidence that the Respondent would not have dismissed an employee for the single use of the word "scab" and had warned but not dismissed two other employees, Mr Osborn and Mr Burton, for using that word at the workplace;

(iii) the Deputy President's findings in paragraph 134, 256 and 259 of the Decision pertaining to the prevailing, pre-existing, industrial circumstances;

(iv) the Deputy President's finding in paragraph 273 of the Decision that Mr Hatwell had had 10 years of unblemished service with the Respondent and his finding concerning the personal effects of the dismissal on Mr Hatwell;

(v) the fact that the other reasons relied upon by the Respondent to justify Mr Hatwell dismissal were dismissed;

(vi) the Deputy President's finding in paragraph 120 of the Decision that there was no evidence that Mr Hatwell had done anything like what had been attributed to him to anyone else;

(vii) the Deputy President's finding in paragraph 259 of the Decision that the misconduct as found occurred in abnormal working circumstances; and

(viii) the proportionality of dismissal having regard to the aforementioned matters.

14. The aforementioned considerations are relevant because:

(i) The "valid reason" criterion in s. 387(a) of the *Fair Work Act* 2009 entails an objective assessment of the conduct, as found, viewed from the employer's perspective, including by deciding whether that conduct justified termination of employment.

(ii) Section 387(h) of the *Fair Work Act* 2009 required the Deputy President to take into account these matters in deciding whether he was satisfied the dismissal was harsh, unjust or unreasonable.

15. The Deputy President erred by giving excessive weight to his reasons for concluding there was a valid reason for Mr Hatwell's dismissal and gave inadequate weight to the matters referred to in paragraph 13 herein.

16. The Deputy President erred in his construction of clause 22 of the *Esso Gippsland (Longford and Long Island Point) Enterprise Agreement* 2017 (the **Agreement**) in holding in paragraph 292-294 of the Decision:

(i) That the clause permits the Respondent to terminate an employee on notice whilst an employee is being counselled under the clause for behaviour that has fallen below acceptable standards.

(ii) Clause 22 of the Agreement authorises counselling and dismissal.

(iii) That the Respondent's right to dismiss is only diminished by clause 22 of the Agreement to the extent that an affected employee is permitted by the clause to raise a grievance with the way the procedure has been applied in accordance with the disputes procedure contained in the Agreement.

17. The Deputy President erred by failing to find:

(i) that, properly construed, clause 22 of the Agreement precluded Mr Hatwell's dismissal for the misconduct he was found by the Deputy President to have committed; and

(ii) by reason thereof, it was harsh, unjust or unreasonable to dismiss Mr Hatwell for that misconduct.

~~18. The Deputy President erred in the exercise of discretion in that to dismiss Mr Hatwell's application for relief for the single act he found Mr Hatwell had committed on 31 July 2017 was in all the relevant circumstances unreasonable or unjust.~~

ATTACHMENT C: Witness Statements

Witness Statement of Michael Hatwell dated 30 November 2017 (Exhibit A3);

Second Witness Statement of Michael Hatwell dated 19 January 2018 (Exhibit A4); Statement of Michael Gelagotis dated 30 November 2017 (Exhibit A6);

Second Statement of Michael Gelagotis dated 19 January 2018 (Exhibit A7);

Witness Statement of Robert Lyndon dated 19 January 2018 (Exhibit A9);

Statement of Jonathon Aitken, undated (Exhibit A10);

Statement in Reply of Jonathon Aitken dated 18 January 2018 (Exhibit A11);

Statement of Jason Burton plus annexures, undated (Exhibit A12); Statement of Jason Burton in Reply dated 19 January 2018 (Exhibit A13);

Witness Statement of Brendan Shane Small dated 19 January 2018 (Exhibit A14);

Witness Statement of Michael Osborn, undated (Exhibit A15);

Second Witness Statement of Michael Osborn dated 19 January 2018 (Exhibit A16);

Witness Statement of Justin Moody, undated (Exhibit A17);

Second Witness Statement of Justin Moody dated 19 January 2018 (Exhibit A18);

Witness Statement of Melinda Julia McMillan, undated (Exhibit R5);

Witness Statement of Ricahrd Zvirbulis, undated (Exhibit R6);

Supplementary Attachment to Witness Statement of Richard Zvirbulis (Exhibit R6A); Statement of Kym Smith, undated (Exhibit R7);

Witness Statement of Kirsteen Butler, undated (Exhibit R8);

Statement of Frank Tabone (Exhibit R10);

Witness Statement of Travis Hendrick Flens, undated (Exhibit R11);

Witness Statement of Rodney Stuart Little (Exhibit R12);

Affidavit of Ms Winckworth, undated (Exhibit R14);

Statement of Paul Whykes, undated (Exhibit R15);

Statement of Matthew Taylor dated 20 December 2017 (Exhibit R16);

Statement of Mick Triantafyllou dated 20 December 2017 (Exhibit R17);

Statement of John McShane dated 20 December 2017 (Exhibit R18);

Statement of Melanie Ireland dated 20 December 2017 (Exhibit R19);

Witness Statement of Natalie Bannan dated 20 December 2017 (Exhibit R20);

Affidavit of Greta Helen Marks dated 21 December 2017 (Exhibit R21);

Second Affidavit of Greta Helen Marks, undated (Exhibit R22);

Statement of Andre Kostelink dated 20 December 2017 (Exhibit R24).