DECISION

Fair Work Act 2009
s.604—Appeal of decision

Michael Guorgi
v
Transdev Queensland Pty Ltd
(C2018/7350)

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT ANDERSON
COMMISSIONER SPENCER

MELBOURNE, 13 FEBRUARY 2019

Appeal against decision [2018] FWC 7314 of Commissioner Booth at Brisbane on 3 December 2018 in matter number U2018/219.

Background

[1] Mr Michael Guorgi has lodged an appeal, for which permission to appeal is required, against a decision issued by Commissioner Booth on 3 December 2018[1] (Decision). The Decision concerned an application by Mr Guorgi for an unfair dismissal remedy in respect of dismissal from his employment by Transdev Queensland Pty Ltd (Transdev) effective from 20 December 2017. In the Decision, the Commissioner found that Mr Guorgi's dismissal from his employment was for a valid reason but was nonetheless unfair. The Commissioner decided that an order for reinstatement was inappropriate but that an order for compensation was appropriate. The Commissioner ordered payment of four month's wages plus superannuation less income earned and payment in lieu of notice. The compensation order totalled $17,795.08.

[2] Mr Guorgi contends in his notice of appeal that the Decision was in error in a number of respects and that it would be in the public interest to grant permission to appeal and that on its merits the appeal should be granted.

[3] The factual background to the matter may be summarised as follows. Transdev operates a public transport business providing bus and ferry services in Queensland. Mr Guorgi commenced employment with Transdev in November 2014. He was employed as a Compliance Coordinator and remained in that role until his dismissal. As Compliance Coordinator his responsibilities included but were not exclusively limited to ensuring health and safety compliance across the business. This included ensuring, together with the Safety, Quality and Risk Manager, compliance with Transdev's Drug and Alcohol Policy and a related Drug and Alcohol Testing Procedure.

[4] Without prior notice, on 14 November 2017 Mr Guorgi was asked by the Safety, Quality and Risk Manager (Ms Taylor) to self-administer a (saliva) drug test. Before

administering the test, Mr Guorgi informed Ms Taylor that he was taking an over the counter medication Nurofen Plus. The test revealed a non-negative result consistent with the taking of Nurofen Plus. Ms Taylor was concerned at Mr Guorgi's behaviour in handling the drug testing equipment whilst self-administering the test on 14 November 2017. Mr Guorgi also mistakenly provided a Panadeine Forte box rather than a Nurofen Plus box to Ms Taylor, but the next day provided the correct box. Also on the next day, 15 November 2017, Mr Guorgi volunteered to Ms Taylor to self-administer a further (saliva) drug test. She had not asked that he do so. Ms Taylor again became concerned at Mr Guorgi's behaviour during the test. She noticed that the testing device registered a faint line next to the opiates indicator. She asked Mr Guorgi to complete an external (urine) drug test, and stood him down pending the results. The external test returned a non-negative result for opiates. Mr Guorgi remained stood down.

[5] Transdev commenced an investigation conducted by Ms Taylor and its People and Culture Business Partner, Ms Belmonte. Mr Guorgi was provided an allegations letter on 20 November 2017 asserting the he had failed to comply with Transdev's Drug and Alcohol Policy (allegations 1 and 2) and the Drug and Alcohol Procedure (allegation 3) on 14 and 15 November 2017. On 22 November 2017, Mr Guorgi met with Ms Belmonte and Ms Taylor to respond to the allegations. He was accompanied by a support person, his brother Mr George Guorgi. Following this meeting, Ms Belmonte prepared a report on the matter for Transdev's Managing Director Ms Loughborough (the investigation report). The investigation report dealt with the allegations and also Mr Guorgi's disciplinary history. It found each of the allegations substantiated. It asserted that Mr Guorgi showed no remorse or appreciation for the seriousness of the alleged breaches. It concluded that his continued employment was a risk to the business.

[6] On 1 December 2017, Mr Guorgi was served a show cause letter setting out the investigation report's findings and inviting his further response in advance of a decision being made about his employment. Via his representative and after securing an extension of time, on 12 December 2017 Mr Guorgi responded in writing. On 20 December 2017, Ms Loughborough and Ms Belmonte met with Mr Guorgi (who was accompanied by Mr Boura from Workers First). After further hearing from Mr Guorgi (in which he denied breach or relevance of the Drug and Alcohol Policy to the events of 14 and 15 November 2017), Ms Loughborough adjourned the meeting. On resumption she informed him that she had decided to terminate his employment on the ground of serious misconduct, effective immediately. She handed Mr Guorgi a termination letter.

[7] Mr Guorgi subsequently commenced proceedings in the Commission seeking an order that his dismissal was unfair and that he be reinstated.

The Decision

[8] In the Decision the Commissioner, after setting out the facts of the matter and summarising submissions received, dealt with each of the matters she was required to consider under section 387 of the *Fair Work Act 2009* (FW Act).

[9] In relation to section 387(a), the Commissioner found that a valid reason for dismissal existed. She found that Mr Guorgi had breached Transdev's Drug and Alcohol Policy in that he had failed to report that he had been taking Nurofen Plus (allegation 1) and that he had failed to complete a Medication Declaration Form "until well after the testing" (allegation 2).[2] The Commissioner did not find allegation 3 proven (alleged tampering with the saliva test in

breach of the Drug and Alcohol Procedure). On that issue, the Commissioner concluded "the conduct may have been ill-advised and done with some manipulative intent, but in all the circumstances it is a significant overreach to characterise it is failure to comply with the D & A Policy".[3] The Commissioner also concluded that a valid reason existed on account of Mr Guorgi's "stated views on the D & A policy", his "cavalier treatment of the second test" and the Managing Director's "stated loss of trust and confidence in him in that role".[4] On that latter matter the Commissioner observed:

> "A compliance coordinator who does not share the corporate view on an important policy seems unlikely to be able to carry out the very purpose of the position, even if he is competent at component parts."[5]

[10] On valid reason overall, the Commissioner concluded:

> "Having found that the first two allegations are substantiated, combined with Mr Guorgi's lack of insight and contrition, I consider that there was a valid reason for the dismissal."[6]

[11] It is noteworthy that the Commissioner concluded that Transdev's Drug and Alcohol Policy was a lawful and reasonable policy with clear intent but poorly worded.[7]

[12] In relation to sections 387(b), (c) and (d), the Commissioner found that Mr Guorgi had been notified of the reason for dismissal,[8] had been provided an opportunity to respond[9] and was not unreasonably refused a support person.[10] However, the Commissioner also concluded that Mr Guorgi had been the subject of previous unfair targeting and disciplinary overreach[11] and that the inclusion of past allegations in the investigations report tended to "a finding of unreasonableness in the process leading to the dismissal".[12]

[13] The Commissioner then considered whether Mr Guorgi's dismissal was, in an overall sense, unfair. She concluded that it was for the following reasons:

> "In my view, Mr Guorgi's conduct was not wilful or deliberate behaviour inconsistent with the continuation of the employment contract. His conduct was founded on an incorrect interpretation of a reasonable policy, and despite the opportunity to demonstrate understanding, he continued to question the policy.
>
> In my view, the two substantiated allegations, while constituting a valid reason for dismissal, do not amount to serious misconduct.
>
> The finding of serious misconduct when the evidence does not support that finding, supports my conclusion that the termination was harsh and unreasonable, despite the validity of the reason for termination."[13]
>
> "I have also considered that the dismissal was harsh on Mr Guorgi."[14]

[14] On the issue of remedy, the Commissioner concluded that reinstatement was inappropriate because Mr Guorgi was employed in "a critical safety role",[15] that Ms Loughborough's evidence established "a rational basis for the allegation of loss of trust and confidence"[16] and that there had been "a significant loss of trust and confidence in Mr Guorgi's capacity to do his work".[17]

[15] The Commissioner then assessed compensation having regard to the factors in section 392 of the FW Act. On the issue of remuneration Mr Guorgi would have or would likely have received had he not been dismissed (section 392(2)(c)) she concluded that:

> "Mr Guorgi persisted even into the hearing with his particular interpretation and attitudes towards the D & A Policy's importance. Given his lack of insight it is unlikely that he would have remained in employment for a long period. I consider that a reasonable period of further employment is between three and four months. In the circumstances, I have therefore concluded his employment would have continued for no longer than four months."[18]

[16] From an amount of four month's compensation ($25.083.61), the Commissioner deducted an amount for monies earned ($1,500) and an amount of four weeks in lieu of notice ($5,788.53) resulting in an order of $17,795.08 plus superannuation, to be taxed according to law.[19]

The Appeal

[17] In his notice of appeal and submissions on appeal, Mr Guorgi identified multiple (some 18) grounds on which permission to appeal should be granted and on which the appeal should be upheld. These grounds relate to both the Commissioner's merits decision and her decision on remedy.

[18] Mr Guorgi does not seek to set aside the Commissioner's decision that his dismissal was unfair, but he contends that the Commissioner's finding that a valid reason for dismissal existed was in error and should be set aside. He also contends that the Commissioner's decision that reinstatement was inappropriate was in error. He seeks that the compensation ordered be set aside in favour of an order for his reinstatement together with orders for lost remuneration and continuity of service. In the alternative, he contends that the amount of compensation ordered should be increased, in part to correct an error. He also seeks an order directing Transdev to re-issue an employment separation certificate in an amended form.

[19] Multiple grounds of appeal are raised and were advanced in writing and at the hearing of this appeal. They can be summarised under four headings:

1. In finding a valid reason, the Commissioner made errors of fact;
2. In finding a valid reason, the Commissioner wrongly concluded that the Drug and Alcohol Policy applied to Mr Guorgi's conduct in taking Nurofen Plus;
3. In concluding that reinstatement was inappropriate, the Commissioner wrongly concluded that a rational basis existed for Transdev to have lost trust and confidence in Mr Guorgi;
4. The Commissioner's compensation order was inadequate and in any event she wrongly made deductions from the quantum ordered.

[20] In summarising the appeal grounds in this manner we indicate that we have considered each ground as presented by Mr Guorgi in his notice of appeal, in his written submissions and at the hearing. As there was a degree of repetition, we deal with them in this summary form for ease of reference only.

Consideration

[21] An appeal under section 604 of the FW Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[20] There is no right to appeal and an appeal may only be made with the permission of the Commission.

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

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

[23] In the decision of the Full Court of the Federal Court in *Coal & Allied Mining Services Pty Ltd v Lawler and others,*[21] Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under section 400 as "a stringent one". The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[22] A Full Bench of the Commission, in *GlaxoSmithKline Australia Pty Ltd v Makin,* identified some of the considerations that may attract the public interest:

> "… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."[23]

[24] 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.[24] 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.[25]

[25] An application for permission to appeal is not a de facto or preliminary hearing of the appeal. In determining whether permission to appeal should be granted, it is unnecessary and inappropriate for the Full Bench to conduct a detailed examination of the grounds of appeal.[26]

[26] Except in one respect (the quantum of the compensation order) we are not satisfied that a grant of permission to appeal would be in the public interest or that grounds are made out of appealable error, for the following reasons.

Alleged errors of fact

[27] The Commissioner's decision was heavily based upon her findings of fact. We are satisfied that the findings she made were open on the substantial body of evidence before her. On appeal, Mr Guorgi contended that the Commissioner took an "overly favourable and

overly generous" acceptance of the evidence of Ms Loughborough.[27] This is not a sustainable ground of appeal. It is well established that a Commissioner, as a first instance decision maker, is in the best position to assess the credit of witnesses and afford appropriate weight to their evidence.[28]

[28] Mr Guorgi also contends that the Commissioner failed to take into account certain facts, including evidence of breaches of the Drug and Alcohol Policy by other persons. We do not agree. The Commissioner did consider the Drug and Alcohol Policy in the context of its operation in the workplace and concluded that it was both lawful and reasonable. Although the Commissioner did not make findings about the operation of the policy vis-a-vis other employees, she was not compelled to do so and was not in error in not doing so. The case before her necessarily concerned the application of Transdev's Drug and Alcohol Policy in relation to the conduct of Mr Guorgi. She made specific findings in that regard. She noted at [127] and [128] that Mr Guorgi made "a very large number of submissions" and that she had "considered all his submissions", but had only dealt with those relevant to the consideration of whether his dismissal was unfair. We see no error in that approach.

[29] Nor do we consider that the Commissioner failed to consider Mr Guorgi's evidence that he understood and applied the policy as he had been trained. That evidence was founded on Mr Guorgi's interpretation of the Drug and Alcohol Policy. On that matter, the Commissioner not only considered the evidence but made specific findings. She found that:

> "Mr Guorgi's reading of the D & A Policy is selective, and allows for a subjective judgement by the employee about actual impairment. No part of the D & A Policy allows for self-assessment."[29]

[30] Mr Guorgi also contended that the Commissioner failed to make findings of fact as to whether the investigation report before her was complete and the same as that which had been prepared by Ms Belmonte and put before the decision-maker Ms Loughborough. Mr Guorgi puts this submission as high as contending that Transdev misled the Commission in its evidence.[30] There is no evidence that this was so. The investigation report was produced into evidence through Ms Belmonte and matters relating to it were the subject of cross examination and submission. The Commissioner made findings concerning that report as presented to her in evidence. That evidence was received in the orthodox manner. We see no error in the Commissioner's approach. The report as before her had some relevance and she made findings based in part on it.

[31] Mr Guorgi also contends that the Commissioner made errors of fact in that she failed to make certain findings which he had urged upon her. No doubt the Commissioner did not make some findings which had been urged upon her by Mr Guorgi. In the same way, she did not make certain findings that had been urged upon her by Transdev. It is not appealable error for a first instance decision maker to not make findings urged on them by one party or the other. It is in the nature of independent arbitration that findings are made based on a proper and objective consideration of the evidence as a whole. Whether findings made accord with the urgings of one party or the other is neither here nor there, so long as the findings are based on properly received and considered evidence and are relevant to the matters at issue and the conclusions which need to be drawn.

[32] Other than with respect to the compensation order, we are not satisfied that the Commissioner made an error of fact let alone "a significant error of fact" as would be required by section 400(2).

Error in finding the Drug and Alcohol Policy applied

[33] A central ground of appeal and one advanced at length on the hearing of the appeal is the contention that the Commissioner erred in finding that Transdev's Drug and Alcohol Policy applied to the taking of Nurofen Plus by Mr Guorgi. In large measure, this is a question not of contested evidence about whether Mr Guorgi had been taking Nurofen Plus at the relevant time but whether the Policy required his prior notification to Transdev of that fact and whether the Policy required completion by Mr Guorgi of a Medication Declaration Form prior to testing.

[34] This appeal ground raises the question of the interpretation by the Commissioner of clause 5.3 of the Drug and Alcohol Policy. It is contended that if the Policy did not impose those obligations on Mr Guorgi, then he could not have been in breach of the Policy on 14 or 15 November 2017 and could therefore not have engaged in conduct forming a basis for a valid reason for dismissal, and should therefore have been reinstated.

[35] Whilst these propositions do not necessarily follow (the Commissioner concluded that Mr Guorgi's "attitude" towards applying the policy as required by Transdev inhibited a reinstatement order, not just his understanding of it) the issue is one of substance.

[36] Clause 5.3 of the Policy provides as follows:

> "The use of prescription or over-the counter (OTC) medications may impair a person's ability to safely perform their role. Workers taking prescribed drugs or OTC medications are to obtain advice from their Doctor (or pharmacist for OTC medications) as to the effects of the drug that may be relevant to the persons work performance. This information must be conveyed to the Safety, Quality and Risk Manager prior to commencing work or as soon as reasonably practicable once the taking of such medication commences.
>
> Employees who are required to take prescribed or over-the-counter medication on a long term basis that may impact their ability to safely perform their role must also obtain written advice from their doctor as to the general nature of the problem, drugs prescribed and period of medication. It will then be the responsibility of the employee to notify their manager and obtain a medical clearance before being cleared to work.
>
> Notification of prescribed or over-the-counter medication must be reported using the Medication Declaration Form. The Safety, Quality and Risk Manager is responsible for managing the process of notification from employees and any subsequent actions."

[37] We do not consider that the Commissioner was wrong in her interpretation of the Policy or conclusion that Mr Guorgi had acted in breach. She found that although the Policy was poorly worded and could be clearer,[31] it was breached by Mr Guorgi. Clause 5.3, read as a whole, is reasonably interpreted so as to impose an obligation of prior notification with respect to non-prescription medication and to require the completion of a Medication Declaration Form irrespective of whether that medication may or may not impact the ability

to safely perform work. The interpretation urged by Mr Guorgi not only sits at odds with the position advanced by his employer but would have the effect of enabling an employee, on the basis of an opinion formed by them and/or their medical practitioner that there was no likely workplace impact, to withhold from the employer knowledge that the employee was taking a particular drug. Given that the purpose of the Drug and Alcohol Policy was to enable Transdev to manage and discharge its duty of care to employees and others, such an interpretation is unreasonably restrictive. In the absence of express language restricting clause 5.3 of the Policy in this way and given the language used in clause 5.3, it was open to the Commissioner to find that the Policy required prior notification and the submitting of a Medication Declaration Form. Mr Guorgi did neither. It was therefore open for the Commissioner to conclude that he had breached the Policy, and that the breaches were a valid reason for dismissal.

Error in concluding reinstatement inappropriate

[38] Mr Guorgi's contention is that the Commissioner was wrong to objectively conclude that Transdev had a rational basis for asserting that it had lost trust and confidence in Mr Guorgi.

[39] We note that the Commissioner at [151] correctly states the principle that "an allegation of a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of the loss of confidence in the employee."[32] There is no error of law in the Commissioner's consideration of section 391 of the FW Act.

[40] Nor are we satisfied that the Commissioner made an error of fact or that her conclusion was not reasonably open to her or manifested an injustice. In her decision, the Commissioner deals at some length with the reinstatement issue before concluding it to be inappropriate. We are satisfied that the Commissioner applied an objective test to the evidence, including careful scrutiny of the evidence of Mr Guorgi and Ms Loughborough. Relevantly, the Commissioner's decision was not based on the difficult relationship between Mr Guorgi and Ms Belmonte but she considered the overall relationship between the business (as reflected in the evidence of Ms Loughborough) and Mr Guorgi.[33]

[41] Further, contrary to the submission put to us by Mr Guorgi, the Commissioner's conclusion was not simply based on a finding that Mr Guorgi had breached the Policy in taking Nurofen Plus. Rather, a fair reading of the Decision as a whole reveals that the Commissioner took into account all relevant circumstances including the critical safety role Mr Guorgi held as Compliance Coordinator. This required him to administer on behalf of Transdev the very Policy he had breached and was continuing to call into question.[34] The Commissioner's finding at [153] is of particular relevance:

> "Transdev management's loss of trust and confidence is not simply on the basis of an instance of non-compliance with the D & A Policy <u>but with Mr Guorgi's attitude to and understanding and acceptance of the policy that give rise to concerns of trust and confidence</u> that he would properly implement it." (our emphasis)

[42] The evidence as a whole before the Commissioner was sufficient to render this finding open to her. For example:

> "Ms LOUGHBOROUGH: I have got to say in answer to that question, in my decision-making none of it was based on the testing that happened. It was based on Michael's inability to understand what had happened and how he hadn't followed procedure. His lack of understanding in his role of compliance officer when he is responsible to be able to – to have to educate others in the business…and he couldn't show me that understanding or remorse for what had happened wrongly in the overall process and the failure to follow policy and procedure."[35]

[43] We are satisfied that this was a case where the evidence as a whole and its objective consideration weighed heavily against an order of reinstatement. Not only did Mr Guorgi contest Transdev's view as to how the business interpreted its Drug and Alcohol Policy once he returned two non-negative results, but he was one of the company officers required to implement the very policy he contested. His view on how the policy should be applied to the disclosure of over the counter medication continued to differ from that of Transdev in the weeks and months after his dismissal, including at first instance before the Commission and on appeal. It would be inappropriate to order an employee to be reinstated to a role where that employee has responsibility to ensure compliance with a set of rules within a business operation but where that employee holds a fundamentally different view from the business on how that set of rules should apply, and demonstrates no willingness to adapt their future conduct to accord with the employer's reasonable expectations.

[44] The Commissioner was not in error in concluding that an order for reinstatement was inappropriate.

Inadequate compensation order

[45] Mr Guorgi contends that the impact of dismissal on him and on his reputation is so severe that the compensation order should be at the maximum level permitted and should provide for reputational loss.

[46] There is no basis at law for a compensation order to include non-economic factors of that kind. Section 392(4) expressly provides that an order must not include a component for shock, distress or humiliation or other analogous hurt caused to the person by the manner of dismissal. We consider the compensation for perceived reputational damage contended for to be of "an analogous nature" and not permitted to be included in a compensation order under section 392 of the FW Act.

[47] There is however one respect in which the Commissioner's decision was in error. The Commissioner at [169] indicates that Mr Guorgi was paid four weeks' wages in lieu of notice. Had this been so, the Commissioner would have been correct in making a deduction from the compensation order of that four weeks, as she did. However, through no fault of the Commissioner, it was agreed on appeal by Mr Guorgi and Transdev that this amount had not been paid. Unfortunately the Commissioner had been wrongly advised in Mr Guorgi's written submissions at first instance that he had been paid four weeks in lieu of notice. It was only on appeal that this matter has been brought before the Commission for correction.

[48] On the basis of the agreement between the parties that an error requiring correction has occurred, and on the basis that we consider it to be a significant error of fact (albeit not one for which the Commissioner could have foreseen) and one which in the public interest should be corrected, we will allow permission to appeal for the purposes of correcting the error in the

compensation order only, uphold the appeal in that respect only and order that the compensation order be increased by the value of the four weeks' notice which had been deducted plus superannuation payable on that four weeks.

[49] Should it be necessary, we will remit the matter back to Commissioner Booth to settle the revised quantum if the parties are not able to agree the corrected figure between themselves.

[50] We note for the sake of completeness Mr Guorgi's request that the Commission order Transdev to re-issue an employment separation certificate in an amended form. The power to make such an order does not fall within the Commission's jurisdiction under Part 3-2 of the FW Act.

Conclusion

[51] For these reasons, permission to appeal is refused and the appeal is accordingly dismissed, save that with respect to the compensation order permission is granted and the appeal is upheld for the purposes of increasing the compensation order by a quantum equivalent to the value of four weeks wages' plus superannuation.

[52] We order as follows:

(1) Permission to appeal limited to the determination of the quantum of compensation to be paid to Mr Guorgi in lieu of reinstatement and the order for compensation is granted but in all other respects, permission is refused.

(2) The appeal limited to the determination of the quantum of compensation to be paid to Mr Guorgi in lieu of reinstatement and the order for compensation is upheld but in all other respects, the appeal is dismissed.

(3) The Decision ([2018] FWC 7314), insofar as it determined the quantum of compensation to be paid to Mr Guorgi in lieu of reinstatement, and the Order (PR702830) are quashed.

(4) In addition to compensation of $17,795.08, plus superannuation, to be taxed according to law, Transdev Queensland Pty Ltd is to pay Mr Guorgi compensation of an additional amount equivalent to four weeks' notice, plus superannuation, to be taxed according to law within 21 days of the date of this decision.

(5) Should the parties be unable to agree on the quantum of the additional amount ordered in paragraph (4) above within 7 days of the date of this decision, the matter is remitted to Commissioner Booth to determine the quantum on the basis of such further evidence and submissions which the Commissioner may determine to admit.

DEPUTY PRESIDENT

Appearances:
M Guorgi on his own behalf.
M Bower for Transdev Queensland Pty Ltd.

Hearing details:
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Melbourne; with video-link to Brisbane.
5 February.

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[1] [2018] FWC 7314.
[2] Ibid at [88].
[3] Ibid at [95].
[4] Ibid at [97].
[5] Ibid at [100].
[6] Ibid at [110].
[7] Ibid at [82].
[8] Ibid at [119].
[9] Ibid at [122].
[10] Ibid at [124].
[11] Ibid at [102] – [107] and [133] – [136].
[12] Ibid at [136].
[13] Ibid at [130] – [132].
[14] Ibid at [137].
[15] Ibid at [149].
[16] Ibid at [152].
[17] Ibid at [155].
[18] Ibid at [162].
[19] Ibid at [174].
[20] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.
[21] (2011) 192 FCR 78 at [43].
[22] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46].
[23] [2010] FWAFB 5343, 197 IR 266 at [27].
[24] *Wan v AIRC* (2001) 116 FCR 481 at [30].
[25] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 288, 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, 241 IR 177 at [28].
[26] *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [82].
[27] Outline of submissions dated 31 January 2019, paragraph 22 (c).
[28] *City Motor Transport Pty Ltd v Devcic* [2014] FWCFB 6074 at [29] – [30]; *Hyde v Serco Australia Pty Limited T/A Serco Australia Pty Limited* [2018] FWCFB 3989 at [45] – [47].
[29] [2018] FWC 7314 at [84].
[30] Outline of submissions dated 31 January 2019, paragraph 23 (i) and (j).
[31] [2018] FWC 7314 at [82] and [87].
[32] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic Schools Australia Chapter* [2014] FWCFB 7198.
[33] [2018] FWC 7314 at [154].

[34] See for example findings at [149] and [162].
[35] Transcript, 27 April 2018, PN2694-2695.