



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr John Ashley Stevens

v

ISS Property Services Pty Ltd T/A ISS Property Services
(U2019/3726)

DEPUTY PRESIDENT ASBURY

BRISBANE, 12 MARCH 2020

Application for an unfair dismissal remedy.

[1] Mr John Ashley Stevens (the Applicant) applies under s. 394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy in respect of his dismissal by ISS Property Services Pty Ltd (ISS). ISS is a provider of cleaning services and holds a contract with the New South Wales Government (Property New South Wales) to provide cleaning services to all NSW Government properties in North-Eastern New South Wales. A substantial proportion of those properties are public schools and Colleges of Technical and Further Education.

[2] Mr Stevens was employed by Tempo Cleaning Services from 1995 and at some point in the 2000's his employment was transferred to ISS when it acquired Tempo and its contract with the New South Wales Government. At the time his employment was terminated the Applicant was employed as a cleaner at the Casino West Public School. The Applicant was employed on a part-time basis and he worked 32.5 hours per week. The Applicant worked on a number of sites during his employment with the Respondent and Tempo, but always worked at New South Wales Government sites.

[3] Mr Stevens was dismissed after the Principal of the school at which he was working requested his removal from that site alleging that staff and volunteers at the school were feeling threatened by the Mr Steven's behaviour. ISS maintains that no alternative employment could be found for the Mr Stevens and his employment was terminated. The letter provided to the Applicant confirming the termination of his employment states that it is the result of the request for removal from site by the client and the Applicant's "pattern of behaviour".

[4] Mr Stevens asserts that the request for his removal from the school site by the Principal was not a valid reason for dismissal related to his capacity and that the alleged "pattern of behaviour" is not a valid reason related to conduct. Mr Stevens denies that he engaged in threatening, harassing or intimidating behaviour towards staff and volunteers as alleged. It is also asserted by Mr Stevens that it is improbable that ISS was contractually required to remove him from its site. Mr Stevens further asserts that even if the Principal had the power to issue such a direction (which is disputed) the Principal did not do so and simply made a request by email that Mr Stevens be removed. It is further asserted that redeployment

opportunities were not sufficiently explored given that ISS had the ability to move Mr Stevens between sites under its enterprise agreement and had previously done so. In relation to the procedural aspects of the dismissal, it is asserted that Mr Stevens was not notified of the reason in sufficiently clear terms nor given an opportunity to respond. Further, it was asserted that if Mr Stevens was dismissed as a result of poor performance, he was not warned about this. Mr Stevens sought reinstatement to his position.

[5] ISS maintained that its contract with Property New South Wales allows School Principals to direct ISS to remove any of its personnel if they are considered unsuitable. Mr Stevens had previously been removed from the Casino TAFE in December 2015. The valid reason for Mr Stevens' dismissal is that he was removed from the Casino West Public School at the direction of the client, in accordance with the client's rights under the commercial arrangements between ISS and Property New South Wales and ISS could not redeploy Mr Stevens. Despite the Principal's broad commercial rights to remove a cleaner, ISS contends it did not simply accept the allegations regarding Mr Stevens' conduct without question but reviewed the allegations regarding Mr Stevens' conduct and established on the balance of probabilities that the conduct allegedly engaged in by Mr Stevens actually occurred. According to ISS, Mr Stevens was notified of the reasons for dismissal and given an opportunity to respond to those reasons at meetings he attended with a representative.

[6] Mr Stevens' application was made within the time required in s.394(2) of the Act. It is not in dispute that Mr Stevens is a person protected from unfair dismissal as defined in s.382 of the Act. ISS is not a small business and the dismissal was not a case of redundancy. The matter was dealt with by way of a hearing. Mr Stevens was represented by Mr Armen Aghazarian of the United Workers Union (then known as United Voice) and the Respondent by its General Counsel, Mr Jed Moore. Mr Stevens gave evidence on his own behalf. Evidence in support of Mr Stevens' application was also given by Ms Patricia Jennifer Woods, Member Rights Organiser with the United Workers Union.

[7] Evidence for ISS was given by:

- Mr Duane Hawkins, General Manager Operations - Education;¹
- Mr Allan Renwick, Key Account Manager North Coast;²
- Mr Mark Harding, Customer Service Manager.³

LEGISLATION

[8] In deciding whether a dismissal was unfair on the grounds that it was harsh, unjust or unreasonable, the Commission is required to consider the criteria in s.387 of the Act, as follows:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.”

[9] The employer bears the onus of establishing that there was a valid reason for a dismissal.⁴ A valid reason for dismissal is one that is “*sound, defensible or well founded*” and not “*capricious, fanciful, spiteful or prejudiced*.”⁵ The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts,⁶ and the validity is judged by reference to the Tribunal’s assessment of the factual circumstances as to what the employee is capable of doing or has done.⁷ The Commission is not limited to the reason given by the employer in considering whether there was a valid reason for the dismissal.⁸ Misconduct justifying dismissal is conduct so serious that it goes to the heart of the employment relationship⁹ or evinces an intention that the employee no longer intends to be bound by the employment contract.¹⁰

[10] Where the reason for the dismissal is misconduct, the Commission must be objectively satisfied that the misconduct occurred. However, as Vice President Hatcher observed in *Bista v Glad Group Pty Ltd*¹¹, the case law does not establish that a minor failing on the part of an employee could constitute a valid reason for dismissal simply because it was proven to have occurred. Dismissal on such a basis could not be sound, defensible or well founded.¹² His Honour also cited the majority judgement of Moore J in *Edwards v Giudice*¹³ where it was held that:

“The reason would be valid because the conduct occurred and justified termination. The reason might not be valid because the conduct did not occur or it did occur but did not justify termination. An employee may concede in arbitration that the conduct took place because, for example, it involved a trivial misdemeanour. In those circumstances the employee may elect to contest the termination in the arbitration on the basis that the conduct took place but it did not provide a valid reason and perhaps by relying on the other grounds in [the section].”¹⁴

[11] That judgement was relied on by Vice President Hatcher as authority for the proposition that, under the present Act, the consideration of whether there is a valid reason for dismissal requires, where the relevant conduct upon which the dismissal is proceeded is found to have occurred, an assessment of whether the conduct was of sufficient gravity or seriousness such as to justify dismissal as a sound, defensible or well-founded response to the conduct.

[12] A number of cases have considered the manner in which the matters in s. 387 of the Act are considered in circumstances where an employer provides labour to a client and the client directs the employer to remove the employee from a site.¹⁵ As a Full Bench of the Commission observed in *Donald Pettifer v MODEC Management Services Pty Ltd (Pettifer)* labour hire arrangements in which a host employer has the right to exclude a

labour hire employee from its workplace, are becoming a common part of the employment landscape in Australia.¹⁶ The reality for companies in the business of supplying labour is that they frequently have little if any control over the workplaces at which their employees are placed and the rights of such Companies in circumstances where a client seeks the removal of an employee are limited. However, this is not a basis upon which companies in the business of supplying labour to clients can abrogate responsibility for treating employees fairly when dismissal is the result of removal from a particular site and the fairness of the dismissal is considered with reference to the matters in s. 387 of the Act.

[13] The consideration in s. 387(a) of the Act in relation to the validity of a reason for dismissal is limited to circumstances where the dismissal is based on the conduct or capacity of the person who is dismissed. In circumstances where the decision of the client to remove a particular employee is based on objective operational reasons rather than the conduct or the capacity of the employee being removed, validity of the decision to remove the employee from the site does not fall for consideration under s. 387(a) of the Act if the employee makes an unfair dismissal application against the employer.

[14] However, where the reason for the removal is the conduct or capacity of the person being removed and the result of the removal is the termination of an employee's employment, an employer may be required to establish on the balance of probabilities that the conduct of the employee which led to the removal occurred. It may also be sufficient that the employer took reasonable steps to investigate the alleged conduct and to engage with its client where there is doubt that the conduct occurred or that it warranted removal from the client's site. I accept that the reality is that such an investigation may place a company in the business of supplying labour in a difficult position with its client and that a supplier of labour cannot insist that a client alter a decision to remove a particular employee or allow a particular employee to access its premises in circumstances where the client refuses to do so.

[15] Despite these difficulties, I am also of the view that where an employee who has been placed in the premises of a third party has been dismissed for reasons related to conduct, the employer of that person must have at least taken reasonable steps to investigate whether the conduct occurred and a failure to do so cannot be excused by the fact that a client formed the view that the conduct had occurred and that view was accepted by the employer without question. Where there is such a failure the result may be that the Commission is unable to be satisfied to the required standard that there was a valid reason for dismissal.

[16] The matters in s.387 go to both substantive and procedural fairness and it is necessary to weigh each of those matters in any given case, and decide whether on balance, a dismissal is harsh, unjust or unreasonable. A dismissal may be:

Harsh - because of its consequences for the personal and economic situation of the employee, or because it is disproportionate to the gravity of the misconduct;

Unjust - because the employee was not guilty of the misconduct on which the employer acted; and/or

Unreasonable - because it was decided on inferences that could not reasonably have been drawn from the material before the employer.¹⁷

[17] I turn now to consider the evidence and submissions in relation to the dismissal of Mr Stevens.

EVIDENCE AND SUBMISSIONS

[18] As previously noted, Mr Stevens was employed to conduct work done by ISS pursuant to a contract with the Government of New South Wales under a Contract known as the Whole of Government Facilities Management Services (Cleaning services only) Contract (the Contract). In response to a Notice to produce issued by the Commission at the request of the United Workers Union, ISS tendered the Contract. Relevantly, the definitions contained in clause 1.1 of Part B of the Contract provides that Facility/Facilities Manager of the Facility means the school principal and/or other person responsible for managing the facilities.

[19] The Contract provides that the “Principal” without being required to give any reason, may direct the Contractor not to engage a particular employee/subcontractor at a facility and the contractor must comply with such a direction. The term “Principal” is defined in the contract as Property New South Wales within the Department of Innovation and Finance. The Contract also provides that the Principal may direct that the contractor no longer engage a person who in the Principal’s opinion is guilty of misconduct or is otherwise unsuitable. The Contract also contains a dispute resolution procedure by which the contractor may dispute a determination or instruction given by the Principal.

[20] Mr Steven’s evidence is that he has been a cleaner performing work under the Contract (or its predecessors) for 24 years. Mr Stevens commenced working for Tempo at Wollongbar TAFE. At some point in 2000, ISS acquired Tempo and took over the contract. Mr Stevens remained at the Wollongbar TAFE for 5 or 6 years before requesting and being granted a transfer. Mr Stevens was transferred to the Albert Public School in or around 2000 or 2001. Mr Stevens states that he had little issue at the Albert Public School until 2010 when he made a complaint to the New South Wales Discrimination Board about his daughter who is in a wheelchair and was a student at the school. Mr Stevens also filed a complaint of victimisation to the Board. Both claims were settled. During this time Mr Stevens asked for a transfer to another school and was transferred to the Casino TAFE with effect from late 2011 or early 2012.

[21] For the first three years that Mr Stevens worked at Casino TAFE there were no issues or complaints about his behaviour. In 2015 Mr Stevens made a formal complaint to ISS and Department of Education against a General Assistant/Caretaker employed by the TAFE (referred to by Mr Stevens as a “yardsman”) about an incident in which Mr Stevens alleged that the General Assistant swore at Mr Stevens and threatened him. Mr Stevens said that no immediate action was taken against the General Assistant. Mr Stevens said that after seeking advice from the United Workers Union (United Voice at that time) Mr Stevens had a meeting with Mr Smith, a Manager of ISS, and the matter was resolved by Mr Stevens moving to the Casino West Public School. Mr Stevens gave evidence about those circumstances in his witness statement in reply which is dealt with later.

[22] Mr Stevens worked at the Casino West Public School from early 2016. He states that for most of the time he had no issues with the staff or volunteers at the School. The exception was that Mr Stevens had issues with another cleaner who became rude and used bad language towards Mr Stevens after the ISS Area Manager, Mr Harding, left a comment in the ISS communication books about the cleaning at the school stating “*major improvement well*

done". After that message the other cleaner referred to Mr Stevens as "*the brown nose*". Mr Stevens lodged a complaint against the cleaner on 19 July 2016 in which he alleged that the cleaner engaged in a number of behaviours which made his job difficult and requested a transfer in the Casino area.

[23] Mr Stevens states that other than the issue with the other cleaner where he was not at fault, he had a good working relationship with staff and volunteers at the Casino West School. Mr Stevens states that he also had a good relationship with the School Principal. The only issue that Mr Stevens can recall the School Principal raising with him was related to leaving notes about matters such as the removal of a cord and the position of a photocopying machine. The Principal informed Mr Stevens that the teachers would prefer that he spoke directly to them if he had any issues and Mr Stevens stopped leaving notes.

[24] Mr Stevens also states that the only other issue involving a member of staff or a volunteer that he can think of occurred in 2018. Mr Stevens was not at fault in relation to this matter but made a Police report against a member of the School Parents and Citizens Association (P&C) over a few serious actions by that person including sending pornographic images to Mr Stevens' phone and threatening Mr Stevens during work. According to Mr Stevens other persons have made complaints about that person and he later made a complaint to the Department of Education as well. Mr Stevens further states that the incidents involving that person seemed to occur not long before the Principal of the Casino West School requested his removal. The incidents related to children accessing the School playground before School commenced and the time at which the School gates should be opened. Mr Stevens maintained that he was following directions given to him by the Principal and the Canteen Manager took issue with this.

[25] At the time of his dismissal Mr Stevens was working 32.5 hours per week with 1 hour and 15 minutes per day being worked at the New South Wales Registry Office in Casino and the remainder of his daily hours at the Casino West Public School.

[26] In relation to the events leading to his dismissal, Mr Stevens said that on 19 February 2019 he arrived at work prior to his usual starting time at 2.00 pm and was met by ISS Area Manager Mr Mark Harding who told him that he was to be suspended pending an investigation. Mr Harding handed a notice to Mr Stevens stating that he had been suspended for the reason that an investigation of the client's request to remove him from the site was to be conducted and that he would be paid for the period of the suspension. The notice also stated that he had not been accused of any offence or impropriety at that time and that the suspension was to allow the matters to be fully and objectively investigated without prejudice to Mr Stevens or other parties. At Mr Harding's request Mr Stevens gave Mr Harding his keys to the Casino West School and to the Service NSW Centre and Mr Harding directed Mr Stevens not to come anywhere near the school or the Centre.

[27] Mr Stevens contacted his Union and on 7 March 2019 received a text message from Mr Renwick asking him to attend a meeting on 11 March 2019. In attendance at that meeting were Mr Stevens and Ms Woods of the Union (who attended by telephone) and Mr Renwick and Mr Harding. Mr Stevens was told at the meeting that the Principal wanted him off the site and that there were no other schools that ISS could send him to. Mr Stevens was told that ISS was looking at other options and that he should go away and think about what they could do. A follow up meeting was arranged for 12 March 2019. Mr Stevens said that Ms Wood

asked for a copy of the email from the Principal. Mr Stevens also said that nothing was said about the possibility of his dismissal.

[28] Mr Stevens attended the follow-up meeting on 12 March 2019 and said that he came prepared to say that he was ready to move to other schools in surrounding towns if there was no other option. Mr Stevens was told that there were no schools in the immediate area to which he could be moved and responded by stating that he would be prepared to move to other schools in neighbouring towns. Company representatives responded by stating that they had decided to dismiss Mr Stevens. Mr Stevens received a termination letter dated 15 March 2019. Mr Stevens tendered an advertisement for casual school cleaners placed in a local newspaper after he was dismissed. Mr Stevens states that this shows that ISS had other jobs available in the area and the advertisement was not for a particular school.

[29] Mr Stevens made a witness statement in reply in relation to matters raised in Mr Renwick's statement which annexed a number of documents.¹⁸ In relation to Mr Renwick's assertion that Area Manager Ms Barker felt intimidated by the Applicant and asked Mr Renwick to attend a meeting at Albert Park Public School in 2010 to support her, Mr Stevens said that the meeting was to discuss a transfer that he had requested. Mr Stevens also said that he got on well with Ms Barker and that she telephoned him when she retired. In support of his assertion Mr Stevens tendered a request for a transfer from the Albert Park Public School dated 26 January 2011.

[30] Mr Stevens also denied that he was removed from Casino TAFE for aggressive behaviour and said that he was removed after lodging a harassment complaint about the College's General Assistant and tendered a copy of that complaint dated 4 November 2015 which sets out allegations that he was verbally abused and threatened by the General Assistant.¹⁹ Mr Stevens said in relation to an incident on 29 July 2016 referred to in Mr Renwick's statement that he had been assaulted by the Casino TAFE General Assistant and had reported the assault to the Police and to Mr Renwick.

[31] Mr Stevens also tendered a Report annexed to his witness statement of a meeting he attended in December 2015 about the incident at Casino TAFE. Mr Stevens states that Report was prepared by his witness at the meeting, a Major and Commanding Officer in the Salvation Army. The name of the witness is set out in the Report. The Report states that the attendees at the meeting were Ms Jill Saggus, Regional Operations Manager for ISS, a person referred to as "*Alan ? Regional Operations Manager ISS (designate)*", Mr Stevens and his witness. The Report states that Mr Stevens was told at the meeting in December 2015 that the complaint of harassment he had made against the General Assistant at the Casino TAFE had been concluded and found to be confirmed and the General Assistant would be disciplined. The Report notes also state that Mr Stevens was advised that notwithstanding this the Manager of the TAFE had insisted on Mr Stevens being removed as a cleaner. The Report further records that Mr Stevens asked why the TAFE Manager had the right to ask for his removal and was informed that there was a clause in ISS's contract that allowed clients to request removal of ISS employees and that Mr Stevens would be advised of his new position before completing his annual leave.²⁰

[32] Mr Stevens also tendered a letter he wrote to Ms Saggus on 15 December 2015. The letter refers to the meeting on 9 December 2015 which I infer is the meeting covered in the Report referred to above. The letter confirms that in relation to the three topics discussed at the meeting on 9 December 2015 the outcome was that: there were no ongoing interpersonal

issues between Mr Stevens and another person at the TAFE Casino Site; Mr Stevens had referred a complaint of bullying to his Union and was not aware that there were Company policies he had not followed and would have followed such policies if he was aware of them; and that he had not disobeyed a directive from a Senior Manager on the basis that he had not been given such a directive.²¹

[33] ISS took no issue with the contents of the Report of the meeting on 9 December 2015 or the letter stating Mr Stevens' views about the outcome of that meeting, tendered by Mr Stevens. Further, it emerged in final submissions that Mr Renwick was at the meeting and is recorded as "Alan ?" in the Report. Mr Renwick gave evidence to the Commission by witness statement and orally but was not asked to verify or dispute the Report of the meeting. Mr Stevens also said that he had never been informed that he was banned from the Casino TAFE site. ISS did not tender any documents to establish that Mr Stevens was found to have engaged in aggressive conduct at the Casino TAFE or that he had been warned or counselled about this matter as a result of the meeting on 9 December 2015.

[34] Mr Stevens said that he was never contacted by Police about a complaint made by the other cleaner at the Casino West School who alleged that he abused her on the street. Further, Mr Stevens said that he did not behave aggressively towards canteen staff and was never spoken to about this. In relation to Mr Renwick's evidence that there were no viable employment options identified at the meeting of 12 March 2019, Mr Stevens said that he informed Mr Renwick that he was prepared to travel to work at other locations and Mr Renwick did not consider this. Mr Stevens also said that Mr Renwick informed him that ISS's legal team had said that the Applicant's employment was terminated at 9.00 am that day.

[35] In response to the Report of the Principal of the Casino West School appended to Mr Harding's statement Mr Stevens said that none of the issues set out in the Report had been raised with him by the Principal in relation to no-smoking signs or incidents involving staff and volunteers at the School. Mr Stevens also said that he had never been spoken to by the Police about the canteen staff. Further Mr Stevens said that the practice of placing stools on the table once a week for cleaning referred to in the Principal's Report had been in place and was standard. With respect to Mr Harding's evidence about bullying allegations between Mr Stevens and the General Assistant at Casino TAFE, Mr Stevens said that he was the victim of bullying and had complained about it as evidenced by the documents he tendered. Mr Stevens denied the allegations referred to in Mr Harding's statement that he had approached the partner of the Canteen Manager at the Casino West School and that he had behaved aggressively towards canteen staff.

[36] Mr Stevens said that the loss of his job has had a significant impact. He has been unable to find further employment. Mr Stevens' 19 year old daughter suffers from spina bifida and is confined to a wheelchair. Finances are a big worry and the lives of Mr Stevens and his wife are stressful caused by worrying about their daughter's needs and house repayments. Mr Stevens also said that he was removed from working at both the School and the Registry Office and should be able to work at the Registry Office.

[37] Under cross-examination Mr Stevens denied that he was aggressive when Mr Harding informed him on 19 February 2019 that he was suspended from the Casino West School Site and said that he was shocked. Mr Stevens agreed that he was aware that the allegations which led to his suspension related to intimidation and harassment of volunteers but maintained that

he had no idea of the specifics of the allegations. In relation to the advertisement for school cleaners tendered in his evidence, Mr Stevens said that he had not responded to the advertisement. Mr Stevens also maintained that notwithstanding that he was told he could not return to Casino West School and there were no other Principals in the area who wanted him, he was not told that termination of his employment was the likely outcome.

[38] In response to questions from me, Mr Stevens agreed that as at June 2019 he was not able to be employed by ISS on any work under the Whole of Government Facilities Management Services (Cleaning) Contract but maintained that he should be reinstated to another equivalent position. Mr Stevens also acknowledged the difficulty with reinstatement given the correspondence on 7 June 2019 between ISS and the Authorised Person under the Contract and said that ISS had “*sort of tied [the Commission’s] hands as well as mine*”.²²

[39] Ms Woods said that she received a call from Mr Stevens on 19 February 2019 advising that he had been stood down. Ms Woods emailed Ms Victoria Carrol the Human Resources Representative for ISS asking about the reason for the stand down. The response from Ms Carrol was that ISS had been requested to remove Mr Stevens from the site because of allegations about his attitude to others on the site. The response also stated that Mr Stevens would be provided with as much information as possible prior to a meeting to discuss this matter.²³ Ms Woods emailed Ms Carroll again on 6 March 2019 asking for an update and did not receive a response. On 7 March 2019 Ms Woods received a telephone call from Mr Stevens advising that he had been called into a meeting on 11 March 2019 and Ms Woods communicated with Mr Renwick to arrange her attendance by telephone.

[40] During the meeting on 11 March 2019, Ms Woods and Mr Stevens were advised that the Principal had requested that Mr Stevens be removed from the Casino West Public School and that the issue was intimidation and harassment of staff and volunteers. Reference was also made to Mr Stevens being removed from a TAFE site in 2015. Ms Woods also said that they were told that a solution was required in two days and that other Principals have said that they will not have Mr Stevens at their schools and that ISS did not know where to place Mr Stevens. Ms Woods requested and was provided with a copy of the Principal’s request to remove Mr Stevens from the Casino West School.

[41] Ms Woods also attended the meeting on 12 May 2019. During that meeting Mr Stevens attempted to speak and say that he would travel but was not listened to. Mr Stevens was told that there were no vacancies and that the legal team had decided to terminate Mr Stevens’ employment with immediate effect. Ms Woods said that it appeared that ISS representatives were in a hurry to wrap up the meeting and would not listen to anything Mr Stevens had to say. The meeting only lasted a matter of minutes.

[42] Under cross-examination Ms Woods agreed that her notes do not state that Mr Stevens was cut off but she was shocked at the time and the meeting only went for a few minutes. In response to the proposition that ISS representatives had stated that they did not know where to place Mr Stevens, Ms Woods said that they were asking Mr Stevens for guidance on what to do.

[43] Mr Hawkins evidence was that on 7 June 2019 he emailed the Authorised Person under the Contract regarding the termination of Mr Stevens’ employment. That email (with the subject line being “*John Stevens*”) was in the following terms:

“Hi Yvette

Wanted to advise of a HR issue we are currently dealing with Re the above cleaner in the North Coast package, ISS have terminated the cleaner in question due to long running issues of aggressive behaviour which I have just been made aware of. Some issues have led to Principal/s requesting the removal of Mr Stevens with one, Casino West PS which resulted in a report to police see attached statements and reports.

- Webclean ID #2762
- JA Stevens
- WWC – 0996314E – Expiry Date 29/3/2022
- CRC – TR300600K

The termination is being disputed by the employee in FW proceedings as mediation was unable to resolve the matter.

I have attached recent statements and the request for removal of the cleaner by the Principal for your information and consideration in respect of suitability of employment within NSW Whole of Government Contract.

Regards,

Duane Hawkins”

[44] Regrettably, the documents referred to in the email were not appended to the version filed in the Commission. I allowed them to be tendered at the hearing for the purpose of ensuring that I had all relevant evidence and on the basis that permission would be granted to recall Mr Stevens if he wished to give evidence about the contents of the documents and that an opportunity would be given to Mr Stevens and his Representative to examine the documents before giving such evidence. The first document was a statement made by the Casino West School Canteen Manager dated 12 February 2019 making complaints about a number of interactions with Mr Stevens and the quality of cleaning.²⁴ There was also a statement – again made by the Canteen Manager – alleging that the Applicant had telephoned the employer of the Canteen Manager’s husband and made false allegations about him selling drugs. The Canteen Manager stated that she had reported this to the Police and had been informed that they had spoken to Mr Stevens and warned him to stop harassing the Canteen Manager and her husband.²⁵ There was also an email from the Principal requesting that Mr Stevens be removed from the School and a statement from the Principal dated 8 February 2019. Mr Hawkins said that these statements were provided to Mr Renwick by Principal of the Casino West Public School who had been given the statements by the Canteen Manager.

[45] Mr Stevens was recalled and gave further evidence about the matters set out in the statements and reports that were appended to the email sent by Mr Hawkins on 7 June 2019 to the Authorised Person under the Contract. Mr Stevens denied the allegations made by the Canteen Manager about interactions with him and that he had contacted her husband’s employer and made allegations about him. Mr Stevens said that he did not even know the Canteen Manager had a husband or where he worked. Mr Stevens also denied that there were any issues with the standard of cleaning and said that no such issues were raised with him by the Principal or by any Manager of ISS while he was working at the Casino West Public School. Further, Mr Stevens said that he had not previously seen the documents appended to the email sent by Mr Hawkins to the Authorised Person.

[46] The response from the Authorised Person to Mr Hawkins' email also sent on 7 June 2019 was as follows:

"Hi Duane

I have assessed the complaints and concerns raised in your email below (with attachments).

As Authorised Person for the Contract I agree with the decision of ISS to terminate Mr John Ashley Stevens position at Casino West PS as his behaviour as described in the attached documentation is unacceptable for a cleaner on a Government site.

In line with Part E Special Conditions 5.5.1 Part (e) and (f) this cleaner is not to be employed under the Whole of Government Contract to work in any school, TAFE or agency site in region 8061001 or any other Contract region.

Regards, Yvette"

[47] In his oral evidence to the Commission Mr Hawkins said that he asked Mr Renwick whether the Canteen Manager's statements could be corroborated by the person who made them and Mr Renwick said that this was the case. Mr Hawkins also said that ISS has no other commercial work in the Casino and Lismore area outside of the Whole of Government Facilities Management Services (Cleaning) Contract. Mr Hawkins is not aware of any circumstances where a direction to remove a person from a site has been successfully disputed by ISS.

[48] Under cross-examination Mr Hawkins said that he had not undertaken an independent investigation of the allegations against Mr Stevens, but he believed that Mr Renwick had spoken with Mr Harding and the Canteen Manager about these matters. Mr Hawkins agreed that he became aware of the fact that Mr Stevens' employment had been terminated four to eight weeks prior to sending the email to the Authorised Person. Mr Hawkins also agreed that at the time he sent the email to the Authorised Person, Mr Stevens had made an application to the Commission for an unfair dismissal remedy. Further, Mr Hawkins agreed that the Principal of a school is not an authorised person for the purposes of the Contract. In response to the proposition that if a Principal directs that a cleaner be removed ISS is not contractually bound to comply, Mr Hawkins said that ISS is bound to investigate.²⁶

[49] Mr Hawkins agreed that ISS could have disputed the issue under clause 12.4.1 of the Contract with the NSW Government. In response to questions from me, Mr Hawkins said that he did not confirm that Mr Renwick had spoken to the Canteen Manager before he emailed the Authorised Person but had simply asked whether the complaints could be corroborated and then forwarded relevant documentation to the Authorised Person. Mr Hawkins also said that the purpose of his email was to inform the Authorised Person that the dismissal of Mr Stevens had been disputed and that he sent the email because the Contract requires that any serious industrial issues that arise are reported to the Authorised Person. Mr Hawkins agreed that as a general rule he would have notified the Authorised Person when the Principal asked for a cleaner to be removed from a school but had neglected to do so in this case. Mr Hawkins said that the delay was because he was not aware of the situation.

[50] In re-examination Mr Hawkins said that generally the Facility Manager directs the activity of cleaning operations on site and that he is not aware of any occasion when the Authorised Person under the contract has taken a different view to a Facility Manager about the suitability of a person for employment at a school.

[51] Mr Renwick said that he met Mr Stevens in 2010 when he attended a meeting with Mr Stevens' Area Manager at the time, who requested his presence stating that she felt intimidated by Mr Stevens and was not sure how he would react during the meeting. Mr Renwick said that he had no further dealings with Mr Stevens until he took over as Regional Manager of the North Coast Upper Region as Regional General Manager in 2016. During his handover with the incumbent, Mr Renwick was informed that Mr Stevens had been removed from working at the Casino TAFE in December 2015 at the request of the client due to aggressive behaviour. Mr Renwick also said that on or around 29 July 2016 Mr Stevens was involved in an altercation with a TAFE General Assistant and another ISS employee at the Casino TAFE when he went there to deliver some equipment. According to Mr Renwick, due to the aggression shown by Mr Stevens, the TAFE Manager banned him from the site. The ISS employee involved in the incident later reported to Mr Renwick that Mr Stevens had threatened her and used abusive language outside the workplace and Mr Renwick told the employee to report the matter to the Police as it was not work-related conduct.

[52] Mr Renwick said that in February 2019 he received reports that there were issues between Mr Stevens and some Canteen Staff at Casino West Public School. Mr Renwick asked the Customer Service Manager Mr Harding to get clarification from the Principal of the School. A number of statements were received from the Principal along with a request that Mr Stevens be removed from the School due to aggressive and threatening behaviour. Mr Stevens was removed from the School on 19 February 2019 in accordance with the Client direction and was stood down because ISS did not have an alternative location at which to offer work to Mr Stevens.

[53] On 11 March 2019 Mr Renwick met with Mr Stevens at the ISS Office in Lismore with Mr Harding. Ms Woods attended by telephone. Mr Renwick said that he explained that the Principal had requested Mr Stevens' removal from the Casino West Public School because of concerns that Mr Stevens' conduct could be considered to be intimidation and harassment. Mr Renwick states that he informed Mr Stevens that there were no alternative sites to offer him due to his previous removal from other sites, including the TAFE. Mr Renwick further states that he advised Mr Stevens that other Principals from local schools had advised that they would not have Mr Stevens on their sites. Mr Renwick adjourned the meeting to allow both parties an opportunity to consider whether any alternative solutions could be identified.

[54] On 12 March 2019 the meeting was reconvened. Mr Renwick states that he informed Mr Stevens that there were no viable alternative employment options identified and as a result, his employment would be terminated. On 15 March 2019 Mr Renwick sent Mr Stevens a termination letter in the following terms:

“Dear John

NOTICE OF TERMINATION OF EMPLOYMENT

This letter is to confirm that your employment with ISS Facility Limited has been terminated effective 12th March 2019.

As explained at our meeting on the 11th March 2019, the Company is bound by contractual obligations with its clients. This includes the ability for clients to require the removal of employees from their site. Where the request for removal does not result in termination relocation to another alternative location

may be offered. In the event that no suitable relocation is available, request for removal from site by a client will result in termination of employment. Your termination is as a result of:

- Request for removal from site by a client
- Pattern of Behaviour

You will be paid your notice period, any accrued unused annual leave and any other entitlements owing in accordance with employment law.²⁷

[55] In oral evidence Mr Renwick said that on receiving the request from the Principal to remove Mr Stevens from the School, he had immediately suspended Mr Stevens on full pay. Mr Renwick then spoke to the people involved at the School and the Principal to get an outline of facts and passed that information on to ISS's Human Resource Management Department. This process was spread over approximately three weeks. Mr Renwick said that he provided the documents to Mr Harding which were attached to his email to the Authorised Person for the Contract. Mr Renwick confirmed that he spoke to the School Principal and the Canteen Manager and asked them to send statements.

[56] Under cross-examination Mr Renwick said that he started to hear that something was going on at the Casino West School in early February but did not get involved until the Principal requested that Mr Stevens be removed from the School. Mr Renwick said that the request for Mr Stevens' removal went to Mr Harding on 8 February and he became aware of it on 15 February 2019. Mr Renwick maintained that he spoke to the Canteen Manager after 15 February and asked her for a statement. In response to a question about why the Canteen Manager's statement was dated 12 February, Mr Renwick said that it may have been a statement the Canteen Manager had prepared for the Principal and had then forwarded it to Mr Renwick.

[57] Mr Renwick also confirmed that he had only interviewed the Canteen Manager and had not interviewed any other staff in the canteen. Mr Renwick spoke to the Principal after he spoke to the Canteen Manager. Mr Renwick agreed that he had stood Mr Stevens down on 19 February and had a meeting with him on 11 March 2019. It was at that meeting that Mr Stevens was told that he had been removed from the site at the request of the Principal because of an incident that had happened at the Site. Mr Renwick did not tell Mr Stevens that the Canteen Manager had made a complaint about him. Mr Renwick said that he did not elaborate too much because his focus was to remove Mr Stevens from the site at the direction of the Principal and to see what could be done from there.

[58] Mr Renwick was asked whether he spoke to Principals in the area and said that he spoke to Principals at Schools where ISS had vacancies. The Principals of those Schools had indicated that they did not want Mr Stevens at their Schools. Mr Renwick also said that as it is a small country town everyone knew what was going on and there was nothing available.²⁸ Mr Renwick said that there are some 20 Schools in the Lismore area and he had contacted only those with vacancies. Mr Renwick was asked whether the Manager of the Lismore Service Centre had asked for Mr Stevens to be removed and said that no request had been made in this regard.

[59] Mr Renwick agreed that the allegations made in the statement of the Principal of the Casino West School dated 8 February 2019, such as slamming a door nearly hitting a Canteen Worker's heels, were serious. Mr Renwick also agreed that none of the allegations had been put to Mr Stevens at any time.²⁹ Mr Renwick also said that he did not investigate the

allegations with Mr Stevens but rather, got statements from the staff on site to go with the evidence that he sent to Mr Harding. Mr Renwick agreed that if one of his staff members lodged a complaint against another staff member he would speak to both employees as it is common to have two conflicting stories. Mr Renwick also agreed that he had not taken this approach in dealing with Mr Stevens but said that he did not have authority over the other person in the canteen.

[60] Further, Mr Renwick agreed that he did have authority over Mr Stevens and could have spoken to him and that he could have spoken to the Principal of the School to put Mr Stevens' version of events. In relation to the allegations about cleaning, Mr Renwick said that he did not inspect the cleanliness of the toilet which had been the subject of a complaint by the Canteen Manager. In relation to the incident at the Casino TAFE in 2017, Mr Renwick agreed that he had only been given the version of the General Assistant at the TAFE as reported by the TAFE Manager and was not 100% sure that the altercation had occurred. Mr Renwick was not aware that Mr Stevens had made a complaint about the General Assistant at the TAFE or that it had been resolved by Mr Stevens being moved to the Casino West Public School.

[61] Mr Renwick also agreed that he had told a cleaner employed by ISS who reported that she had been threatened by Mr Stevens to go to the Police as he had no control over events occurring outside work. Further, Mr Renwick agreed that Mr Stevens had previously lodged a complaint against that cleaner. In re-examination Mr Renwick was asked about the usual practice when a Principal requests that a cleaner be removed from site. Mr Renwick said that the practice is that the cleaner is suspended with pay and he looks at the situation and speaks to those involved. Mr Renwick then passes the relevant information to his Human Resource Management Department to obtain advice on what should be done. The outcome in Mr Stevens' case was to have a meeting with him and see if a vacant position could be found and because there was nothing vacant, Mr Stevens' employment was terminated.

[62] Mr Harding gave evidence about the 2015 matters involving Mr Stevens and the General Assistant at the Casino TAFE. Mr Harding said that he attended a meeting on or about 2 December 2015 with the client representative from the Casino TAFE College. The meeting was to address bullying allegations between Mr Stevens and a General Assistant at the College. Mr Harding said that Mr Stevens became aggressive during the meeting and he had to suspend it. On 7 December 2015 Mr Stevens was directed to attend a meeting on 9 December 2015 to discuss a number of matters relating to: ongoing interpersonal issues with another person on the site; disregarding Company policies and procedures and disregarding a direction from a senior Manager. As a result of this matter, on 8 December 2015 ISS was directed to remove Mr Stevens from the Casino TAFE site and on 15 January 2016 Mr Stevens was transferred to the Casino West Public School.

[63] Mr Harding also said that on or about 29 July 2016, Mr Stevens was banned from the Casino TAFE as a result of further threatening behaviour towards staff on site. In relation to this matter, Mr Harding tendered an email from the Manager of the TAFE setting out allegations that Mr Stevens spoke to a General Assistant/Caretaker at the Campus in an aggressive and confrontational tone when Mr Stevens was asked to move a vehicle he had parked in a disabled parking spot. It was also alleged that Mr Stevens spoke in an aggressive way to another ISS staff member telling her to "stop smiling I haven't finished with you yet." The email concluded by asking that the matter be addressed with ISS staff and: "*If it is found*

*that John has behaved in the manner described above, can you please ensure that he does not enter Casino Campus in his capacity as an ISS employee again.*³⁰

[64] Mr Harding said that while Mr Stevens was working at the Casino West Public School the Principal telephoned him on a couple of occasions regarding Mr Stevens' behaviour towards staff, including the Canteen Manager, which they found intimidating and aggressive. On 8 February 2019 Mr Harding received a letter from the Principal setting out a number of concerns about Mr Stevens' conduct. The letter which was tendered by Mr Harding outlined conduct alleged to have been engaged in by Mr Stevens including: slamming doors; slamming stools on to the top of a bench where they are not to be placed due to food preparation; the Canteen Manager being scared of Mr Stevens and going to the Police; and failure on the part of Mr Stevens to clean a toilet. The letter records that these incidents had occurred over the past six weeks and that previously there had been a good relationship between Mr Stevens and Canteen Staff. The letter states that the Canteen Staff would like to take over the cleaning and have the other ISS cleaner at the School polish the floor and clean the toilet and did not want Mr Stevens in the canteen any more. The letter concludes by stating that the Canteen and P&C do not want mediation as they are not willing to talk to Mr Stevens because of the abuse but are willing to meet with Mr Harding.³¹

[65] On 15 February 2019 the Principal of the Casino West School emailed Harding requesting that Mr Stevens be removed from the school and stating: *"We have staff and volunteers who are feeling very threatened by John's behaviour and this situation is untenable."*³²

[66] On 11 March 2019 Mr Harding attended a meeting at the Lismore Office with Mr Renwick and Mr Stevens regarding his aggressive behaviour and removal from multiple sites in the local area. Mr Renwick was advised of the difficulty that now existed in being able to relocate him and the meeting was suspended until the next day to consider options. On 12 March 2019 a further meeting confirmed that no alternative employment options could be identified and Mr Stevens' employment was terminated as a result.

[67] Under cross-examination, Mr Harding agreed that his role entails inspections at sites, replacing people when they are sick, payroll, stores orders, delivering stores orders and dealing with matters that arise from time to time. Mr Harding also agreed that he has direct line management of cleaners. Mr Harding said that he has regular meetings with School Principals and that he had monthly meetings with the Principal of Casino West Public School.

[68] In relation to the meeting at the Casino TAFE on 2 December 2015, Mr Harding said that he did not remember what the allegations were or whether Mr Stevens had made a complaint against the General Assistant. Mr Harding said that the Principal of the Casino Public School had spoken to him about the matters in the letter of 8 February 2019 but could not remember whether the discussion was on the day the letter was sent or prior to that date. Mr Harding said that he did not speak to the Canteen Manager. Mr Harding was also asked about the meeting with Mr Stevens on 11 March 2019 and said that Mr Renwick ran the meeting and he could not recall whether Mr Renwick put the allegations set out in the Principal's letter of 8 February to Mr Stevens.

[69] Mr Harding was also referred to the statement made by the Canteen Manager and could not recollect whether it was given to him by the Principal or the Canteen Manager. Mr

Harding agreed that he was given the document before the Principal requested that Mr Stevens be removed from the Casino West Public School.³³

[70] Mr Harding said that there had been other complaints about cleaning at the school prior to the issues with Mr Stevens. In response to questions from me, Mr Harding said that he did not know whether the complaint at the TAFE College in December 2015 was made by Mr Stevens or the General Assistant at the College. Mr Harding was also unaware that the Applicant had requested to be moved from the TAFE College and that his complaint about the General Assistant was made out. Notwithstanding the minutes of the meeting on 15 December tendered by Mr Stevens, Mr Harding maintained that the Manager at the TAFE had stated that Mr Stevens was aggressive and that he wanted him moved. In relation to the incident in July 2016, Mr Harding said that he had not investigated whether the alleged conduct on the part of Mr Stevens occurred, despite being invited to do so by the TAFE Manager in the email of 29 July 2016 appended to Mr Harding's witness statement.³⁴ Mr Harding also said that he believed that Mr Stevens was banned from the TAFE site after the first incident in December 2015 and in response to a question about why Mr Stevens would have been sent there in July 2016, Mr Harding said that the person who asked him to deliver items to the TAFE may not have been aware of the ban.³⁵

[71] In response to a question from me, Mr Harding agreed that the letter from the TAFE Manager of 29 July 2016 was not a ban on Mr Stevens attending that site, but rather asked that Mr Harding investigate the allegations and not allow Mr Stevens to go to the site if they were substantiated. Mr Harding also agreed that his response was not to investigate but rather to prevent Mr Stevens from going to the TAFE again.

APPLICATION FOR REOPENING

[72] After my decision was reserved, ISS sought to reopen the proceedings by corresponding with the Commission advising that it had been provided with a copy of an Apprehended Personal Violence Order involving Mr Stevens and the Canteen Manager and her family. The matter was relisted for hearing in relation to whether it should be reopened.

[73] The Respondent submitted that the AVO is relevant to remedy but accepted that it is not evidence of the truth of the allegations made by the Canteen Manager against Mr Stevens. It was submitted for Mr Stevens that the matter should not be reopened. In this regard the power to reopen should be exercised sparingly.

[74] At the outset of the hearing into whether the matter should be reopened, I indicated that my provisional views in relation to the application were as follows:

- The Applicant's dismissal was unfair;
- Reinstatement was not practicable on the basis that the Applicant had been excluded from every New South Wales Government site covered by the Contract;
- The Applicant should have a remedy of compensation for his unfair dismissal; and
- At very least the Applicant should be compensated for the period between his dismissal on 12 March 2019 and 7 June 2019 when the Authorised Person under Contract and determined pursuant to the Contract that Mr Stevens would not be permitted to work in any School, TAFE or agency site in the Region or any other contract region.

[75] I also expressed a provisional view that the fact an AVO had been obtained by the Canteen Manager of the School at which Mr Stevens had been working was at the very least relevant to the question of remedy and that the evidence (which was limited to the terms of the AVO) would be admitted.

[76] After hearing submissions from the parties, I revised my provisional view in relation to the relevance and admissibility of the AVO and accepted the submissions of Mr Aghazarian on behalf of Mr Stevens to the effect that:

- The fact that the Canteen Manager had obtained an AVO was not evidence of the truth of the allegations upon which it was based;
- The AVO did not refer to a particular School and simply required that Mr Stevens stay away from the Canteen Manager and her family including at the School or any other place where they might go for study.

[77] Mr Aghazarian also pointed to the fact that the Applicant was dismissed on 12 March 2019 and the AVO was issued on 5 September 2019 as a further indication of the matters I am required to determine in relation to Mr Stevens' application for an unfair dismissal remedy. Mr Aghazarian also submitted that the factual circumstances which formed the basis of the AVO being obtained were known about by ISS when the unfair dismissal application was heard and did not constitute new evidence. Mr Aghazarian further submitted that if the AVO was admitted into evidence that Mr Stevens should be permitted to provide evidence in relation to context.

[78] After considering the matter I observed that there was no evidence from the Canteen Manager about the circumstances in which the AVO was sought. I also observed that the AVO did not appear to relate to a particular school and that I had no evidence about whether the Canteen Manager was still volunteering at the School where Mr Stevens was previously employed and/or whether her children still attended the School.

[79] I gave ISS seven days to provide a statement of evidence from the Canteen Manager in relation to these matters and indicated that if this was not received, I would refuse to reopen the matter and to allow the AVO to be tendered into evidence. I further indicated that I would determine the issue of merit separately from remedy.

[80] No further material was filed by the Respondent and in the circumstances, I refuse the application to reopen the case and decline to admit the AVO into evidence. Accordingly, I have had no regard to it in determining Mr Stevens' application.

[81] I turn now to consider whether Mr Stevens' dismissal was unfair in light of the matters for consideration in s. 387 of the Act.

CONSIDERATION

Was there a valid reason for Mr Stevens' dismissal – s. 387(a)

[82] The first matter I am required to take into account in deciding whether Mr Stevens' dismissal was unfair is whether there was a valid reason for Mr Steven's dismissal related to his capacity or conduct (including its effect on the safety and welfare of other employees). ISS asserts that the reasons for dismissal were the request for removal from site by a client; a

pattern of behaviour on the part of Mr Stevens; and that there were no sites to which Mr Stevens could have been redeployed. I turn to consider each of these reasons.

[83] It is true that the Principal of the Casino West School who is the Manager of a Facility at which Mr Stevens was working, asked that he be removed from the Site. Regardless of the terms of the contract in evidence before me, I accept that the Principal of a School has such a right and that ISS was required to comply. However that is not the end of the matter. The basis of the Principal's request was Mr Stevens' conduct and allegations about that conduct by staff and volunteers at the School. This was not a case where the Principal decided on subjective operational grounds to remove an employee provided by a contractor from the School site. Any changes in the manner that cleaning was to be carried out after Mr Stevens' removal were related to views formed about Mr Stevens' conduct and the reasons for his removal rather than an operational change removed from the identity of the employee who was being removed.

[84] ISS was given notice in writing on 8 February 2019 that the Principal of the School where Mr Stevens was working had serious concerns about allegations made by canteen staff about their interactions with Mr Stevens. There is no evidence that Mr Harding took steps to have the discussions with the Canteen staff or the P&C despite the Principal indicating that persons in both of these groups were willing to meet with Mr Harding. No discussions were held with Canteen Staff until after 15 February 2019 when the Principal again communicated with Mr Harding and Mr Renwick requesting that Mr Stevens be removed from the School.

[85] Thereafter, any investigation was cursory to say the least. Mr Renwick appears to have considered that all that was required to "*corroborate*" the allegations was to speak to the Canteen Manager and ask her to put the allegations in writing. Mr Renwick spoke only to the Canteen Manager and not to other Canteen Staff. Mr Renwick states that this conversation occurred after 15 February 2019 when the request that Mr Stevens be removed from the site was made. The written statement from the Canteen Manager is dated 12 February 2019 and it is clear that Mr Renwick's investigation involved a discussion with the Canteen Manager and receipt of a statement that she had already prepared given that the statement pre-dates the email requesting that Mr Stevens be removed from the site. Mr Renwick simply accepted the Canteen Manager's version of events and did not have any discussion with Mr Stevens to ascertain his side of the story.

[86] The further statement by the Canteen Manager alleging that Mr Stevens had inappropriately contacted the employer of her husband was also apparently accepted by Mr Renwick without question. The assertion by the Canteen Manager that she had complained to the Police about Mr Stevens's conduct was also accepted. Mr Renwick could easily have attempted to verify what he was being told by contacting the Company where the Canteen Manager's husband worked or seeking further information about the Police Report that the Canteen Manager indicated that she had made. Mr Renwick did not take these steps and appears to have simply accepted these allegations as "*corroborated*" only on the basis that the person who made the allegations put them into writing. The allegations were serious and should not have simply been accepted on that basis.

[87] It is also the case that Mr Renwick accepted while giving oral evidence to the Commission that he could have had a discussion with Mr Stevens about the allegations and then met with the Principal to discuss Mr Stevens' position or response. In all of the circumstances I do not accept that the request of the Principal of the Casino State School that

Mr Stevens be removed from the School was a valid reason for his dismissal in circumstances where ISS did not take sufficient steps to independently verify that there were reasonable grounds for the request and did not discuss the matter with Mr Stevens, much less attempt to put Mr Stevens' side of the story to the Principal. This failure to properly investigate the allegations is surprising in circumstances where Mr Stevens was stood down on 19 February 2019 and was not spoken to about the matters until 11 March 2019.

[88] I do not accept that Mr Stevens engaged in a pattern of behaviour which provided a valid reason for his dismissal. Mr Stevens provided explanations for each of the incidents relied on by ISS to establish the alleged pattern of behaviour. After assessing the evidence, I have concluded that ISS has not established to the requisite standard, that there was such a pattern, and that it constituted a valid reason for dismissal. ISS asserts that Mr Stevens was "banned" from the Casino TAFE College due to aggressive behaviour.

[89] Mr Stevens produced notes of a meeting about the issues which arose at the Casino TAFE in or around December 2015. The material produced by Mr Stevens includes a record of a meeting taken by his support person indicating that any outstanding issue was resolved without an adverse finding against him. Also tendered by Mr Stevens is a letter to ISS recording his understanding of the outcome of that meeting to the effect that all matters were resolved without an adverse finding being made against Mr Stevens.

[90] There is no evidence that Mr Stevens was banned from Casino TAFE in December 2015. Rather, he was removed following a complaint that he made about an employee at the TAFE College. The General Manager of the TAFE College asked ISS to investigate allegations against Mr Stevens made by a person against whom Mr Stevens had also made a complaint. ISS did not investigate the matter but rather decided to remove Mr Stevens from that site in circumstances where removal was not required by the client.

[91] Neither is there evidence that Mr Stevens engaged in aggressive conduct at the Casino TAFE in July 2016. At best, the evidence establishes that the General Manager of the TAFE asked that an investigation be conducted with respect to allegations about an interaction between Mr Stevens and the General Assistant at the TAFE College. The email from the General Manager makes it clear that it is only if ISS was satisfied that Mr Stevens engaged in the conduct that ISS ensure that he not enter the TAFE College again. This communication does not constitute a ban. It is improbable that if Mr Stevens was already banned from the Casino TAFE because of the December 2015 matters that the General Manager of the Casino TAFE would not have pointed this out in the July 2016 correspondence. Further, there is no evidence that ISS investigated the matters and it cannot therefore rely on them as part of a pattern of behaviour constituting a valid reason for dismissal.

[92] I am not satisfied that Mr Stevens engaged in the conduct alleged against him with respect to volunteers at the Casino West Public School Canteen. All that is established by the evidence is that the Canteen Manager made complaints against Mr Stevens. Mr Stevens placed evidence before me that makes it equally probable that Mr Stevens had responses to the matters raised by the Canteen Manager that could have been accepted as establishing that the complaints were without substance. The allegations made by the Canteen Manager were not properly investigated. There were no complaints from volunteers other than the Canteen Manager identified and nor were complaints by staff against Mr Stevens identified, notwithstanding the reference to such complaints in the correspondence between the Principal

and management of ISS. If the complaint made by the cleaner who was Mr Stevens' colleague had any credibility then it is surprising that Mr Renwick did not deal with it on the basis that when two persons work together, a threat made by one against the other can impact the workplace.

[93] In my view, the only pattern established in the evidence is ISS responding to complaints or allegations about Mr Stevens by simply moving him to other locations without considering whether the complaints or allegations are substantiated. The fact that complaints or allegations are made about an employee is not of itself sufficient to constitute a valid reason for dismissal notwithstanding that this occurs on a number of occasions. In all of the circumstances I do not accept that these matters – either individually or collectively – constituted a valid reason for dismissal. At best the matters provided a valid reason for a discussion with Mr Stevens for the purpose of allowing him to respond to the allegations.

[94] I also do not accept that ISS had a valid reason for dismissing Mr Stevens on the basis that there was no available position to deploy Mr Stevens into after the request for his removal from the Casino West Public School was made by its Principal. Firstly, ISS accepted without question that Mr Stevens had engaged in conduct which warranted his removal when there was insufficient evidence for the Company to be satisfied that this was the case. Secondly, ISS made little or no effort to find an alternative position for Mr Stevens. Efforts were limited to the Schools in the area with vacancies. Further, Mr Stevens was removed from work at the Registry Office in circumstances where his removal had not been sought by the Manager of that facility.

Whether Mr Stevens was notified of that reason – s. 387(b)

[95] Notification of “the reason” for dismissal relates to the reason for dismissal based on the capacity or conduct of the dismissed person.³⁶ Notification of the reason must be given before the decision to terminate is made,³⁷ given in explicit terms and in plain and clear terms³⁸. The purpose of the notification of the reason for dismissal is to give the employee an opportunity to respond to that reason and to defend against allegations relating to conduct or capacity. Notification of the reason for dismissal informs the subsequent matters required to be considered by the Commission in ss. 387(c) and (d) of the Act. As a Full Bench of the Commission observed in *Crozier v Palazzo Corporation Pty Ltd* in relation to provisions of former legislation which were substantially the same as those in s. 387(c) and (d) of the present Act.³⁹

“As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify the employee and give them an opportunity to respond after the decision to terminate their employment.”

[96] Mr Stevens was not notified of the reason for his dismissal until after the decision to dismiss him had been made. ISS had relatively fulsome details of the allegations made against Mr Stevens but provided him with only minimal information in circumstances where he needed details in order to respond.

Whether Mr Stevens was given an opportunity to respond to any reason related to his capacity or conduct – s. 387(c)

[97] The meetings with Mr Stevens for the purported purpose of giving him an opportunity to respond to allegations were inadequate for this purpose. Firstly, Mr Stevens did not have sufficient details of the allegations to enable any meaningful response to be made. Secondly, the removal of Mr Stevens from the Casino West Public School was a *fait accompli* and the meetings were limited to discussing alternative locations for Mr Stevens to be deployed to. Mr Stevens was dismissed for reasons including his conduct without any opportunity being given to him to respond to those reasons.

[98] I accept the submission advanced by the United Workers Union on behalf of Mr Stevens that the first detail that Mr Stevens had of the allegations about his conduct was when the Respondent filed its material in response to his unfair dismissal application. Even at that point, relevant documents referred to that material which should have been filed with it, were not filed and were tendered during the hearing.

Any unreasonable refusal by ISS to allow Mr Stevens to have a support person – s. 387(d)

[99] There was no refusal by ISS to allow Ms Star to have a support person.

Whether Mr Stevens was warned about any unsatisfactory performance – s. 387(e)

[100] Mr Stevens was not warned about any unsatisfactory performance. ISS simply moved Mr Stevens between locations when issues arose in circumstances where Mr Stevens reasonably believed that he had made complaints which had been substantiated and that he was not at fault in the incidents which led to him being moved.

Impact the size of the employer's enterprise would likely have on procedures followed in effecting the dismissal – s. 387(f)

[101] ISS is a large employer and there is no evidence that the size of the Company impacted or would likely have impacted on the procedures followed in effecting Mr Stevens' dismissal. To the contrary, it would be expected that an employer the size of ISS would have dealt more appropriately with Mr Stevens.

The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal – s. 387(g)

[102] ISS has dedicated human resource management specialists and expertise and there is no evidence that the size of the Company impacted or would likely have impacted on the procedures followed in effecting Mr Stevens' dismissal. To the contrary, it would be expected that an employer with dedicated human resource management specialists would have dealt more appropriately with Mr Stevens.

Other relevant matters – s. 387(h)

[103] Mr Stevens had worked for the Respondent for a considerable period of time. He was employed on a part-time basis with regular hours. Mr Stevens has daughter with a disability. It is also relevant that he works in a small community and would have great difficulty in obtaining other employment due to his age and the circumstances of his dismissal.

Conclusion in relation to whether Mr Stevens' dismissal was unfair

[104] On balance and after considering the matters in s. 387 of the Act, I am satisfied that Mr Stevens' dismissal was unfair. Mr Stevens' dismissal was the result of a request to remove him from a site where he had been working for some three years. The removal of Mr Stevens from that site was unjust because of allegations about his conduct which were not substantiated or properly investigated before the decision to dismiss him was made. Notwithstanding that ISS had an obligation to comply with a request from the Principal of the School where Mr Stevens was working the request was not given in accordance with the Contract under which ISS provided its services.

[105] Upon receipt of the request ISS did not take reasonable steps to investigate the allegations before deciding to dismiss Mr Stevens. Further, ISS did not take reasonable steps to find an alternative location for Mr Stevens to work. The dismissal was also unreasonable because it was based, in part, on a conclusion that Mr Stevens had engaged in a pattern of behaviour which was not reasonably open on the basis of the material ISS had before it. The dismissal was harsh because of its consequences for Mr Stevens' personal and economic situation.

REMEDY

[106] Given that I have found that Mr Stevens' dismissal was unfair, it will be necessary to consider the question of remedy. As required by s.390 of the Act, I am satisfied that Mr Stevens was protected from unfair dismissal and that he has been unfairly dismissed. I am also of the view that Mr Stevens should have a remedy for his unfair dismissal. Mr Stevens seeks reinstatement.

[107] Reinstatement is the primary remedy for unfair dismissal. Compensation can only be awarded where the Commission is satisfied that reinstatement is inappropriate. In the present case my provisional view is that reinstatement is inappropriate. My reasons for this provisional view are as follows. ISS has a contract to perform cleaning work in Government facilities including Schools and TAFE Colleges in the Casino – Lismore area. The only work which ISS has available in that area is work under the Contract. Mr Stevens is not able to work outside the Casino – Lismore area and the only work that Mr Stevens is qualified to perform is work under the Contract. On 7 June 2019, the Authorised Person under the Contract, determined in accordance with the provisions of the Contract that Mr Stevens is not to be employed under the contract to work in any School, TAFE or Agency site in the region or any other Contract region.

[108] I accept that the determination made by the Authorised Person was instigated by ISS sending details of allegations against Mr Stevens to the Authorised Person and that this was done some 12 weeks after Mr Stevens was dismissed. The conduct of managers of ISS leaves much to be desired in this regard. Essentially material that was highly prejudicial to Mr Stevens was sent to the Authorised Person in circumstances where Mr Stevens was given no opportunity to comment on that material or to provide his version of events. Further, the conduct of Mr Hawkins in sending the material to the Authorised Person after Mr Stevens had filed his unfair dismissal application smacks of an attempt to retrospectively justify the dismissal of Mr Stevens.

[109] I do not accept the evidence to the effect that ISS was solely motivated to refer the matter to the Authorised Person because it was obliged under the contract to advise of serious industrial relations matters. If the matter became a serious incident it was because of the failure of ISS to manage the issues relating to Mr Stevens and to take reasonable steps to investigate the matters raised by the Principal in February 2019. As Mr Stevens succinctly put the matter in his evidence, by its conduct in referring the matter to the Authorised Person in the circumstances in which this occurred, ISS has tied the hands of the Commission in relation to reinstatement.

[110] Notwithstanding these matters, it remains the case that Mr Stevens cannot currently undertake any work under the Contract and could not do so if he was reinstated. In order to reverse the decision of the Authorised Person a Review process would be required to be undertaken. It appears from the terms of the Contract which are in evidence – and which I am informed by the parties are the only terms relevant to the dispute – that such a review can only be instigated by one of the parties to the contract and cannot be instigated by or on behalf of an employee who is aggrieved at a decision of the Authorised Person.

[111] I am also of the view that it is doubtful that the Commission has jurisdiction in relation to an order for reinstatement, to also order ISS to seek a review of a decision made by the Authorised Person under the Contract. I am certain that the Commission does not have jurisdiction to order the Authorised Person to review or reconsider the determination with respect to Mr Stevens much less to withdraw the determination and allow Mr Stevens to undertake work covered by the Contract. Accordingly the practical result of an order for reinstatement would be that Mr Stevens could not perform any work for ISS.

[112] If I am not persuaded to depart from my provisional view that reinstatement is not appropriate, my I am also of the view (on a provisional basis) that an order for payment of compensation is appropriate in all of the circumstances. Mr Stevens is a long-standing employee who has lost his employment in circumstances where he was unfairly dismissed. I have previously indicated to the parties that other than making a determination with respect to whether Mr Stevens should be reinstated, I would determine the issue of remedy separately from merit. In light of the conclusions I have reached in relation to merit I express the following provisional views with respect to compensation.

[113] In relation to the assessment of compensation, s. 392 of the Act provides as follows:

“392 Remedy—compensation

Compensation

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

Criteria for deciding amounts

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

- (a) the effect of the order on the viability of the employer’s enterprise; and
- (b) the length of the person’s service with the employer; and

- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the FWC considers relevant.

Misconduct reduces amount

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

Shock, distress etc. disregarded

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

Compensation cap

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

- (a) the amount worked out under subsection (6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

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

- (a) the total amount of remuneration:
 - (i) received by the person; or
 - (ii) to which the person was entitled;

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

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

[114] The approach to the calculation of compensation is set out in a decision of a Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.⁴⁰ That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*,⁴¹ *Jetstar Airways Pty Ltd v Neeteson-Lemkes*⁴² and *McCulloch v Calvary Health Care (McCulloch)*.⁴³

[115] In *McCulloch*, the Full Bench considered, in some detail, the question of how a contingency discount should be applied to the calculation of the remuneration the dismissed person would have received, or would have been likely to receive, if the person had not been dismissed. The Full Bench pointed out in *McCulloch* that a deduction for contingencies is applied to prospective losses, or losses occasioned after the date of the hearing. The Full Bench also noted that at the time of the hearing any such impact on the earning capacity of the dismissed person between the date of dismissal and hearing will be known, and a finding can be made on the basis of whether the dismissed person's earning capacity has in fact been affected during the relevant period.

[116] I turn now to the particular criteria I am required to consider in deciding the amount of compensation to be awarded to Mr Stevens for his unfair dismissal.

The effect of the order on the viability of ISS – s. 392(2)(a)

[117] There is no evidence that an Order for compensation will have any impact on the viability of ISS. ISS submitted that if an Order for compensation was to be made then it should be limited to the period prior to 7 June 2019 when the Authorised Person determined that Mr Stevens could not perform any work under the Contract. My provisional view is that there is no evidence that an award of compensation that exceeds that amount and approximates the maximum amount available, will affect the viability of ISS.

Length of Mr Stevens' service – s. 392(2)(b)

[118] Mr Stevens was employed by the Respondent for a lengthy period. While the evidence is not conclusive Mr Stevens had worked for the entity which held the Whole of Government Contract prior to ISS since 1995. ISS acquired that Company at some stage in the 2000s. Mr Stevens therefore had almost 25 years service, a considerable portion of which was with ISS. My provisional view is that the length of Mr Stevens' service supports the making of an order for compensation at the higher end of the scale.

Remuneration that Mr Stevens would have or would likely have received – s. 392(2)(c)

[119] This consideration requires an assessment of how long Mr Stevens would have remained in employment but for his dismissal. My provisional views in relation to this matter are as follows. Mr Stevens had a lengthy period of service. He had successfully defended previous allegations of aggressive behaviour. No warnings had been issued to him in respect of those previous allegations. To the contrary, Mr Stevens established that on balance, the outcome of earlier incidents where he had been accused of aggression were resolved without an adverse finding being made against him so that there was no pattern of behaviour that could properly have been relied on as a valid reason for dismissal.

[120] There was a possibility that the allegations made against Mr Stevens in relation to his interactions with the Canteen Manager may have been resolved without dismissing Mr Stevens if ISS had undertaken a proper investigation. Mr Stevens may have been moved to another location as had previously occurred if ISS had dealt with Mr Stevens reasonably and fairly and in accordance with its previous practice. There was no evidence as to why it was reasonable for ISS to have confined its consideration of redeployment to Schools where there was a vacancy and the consideration of redeployment was at best, cursory. The Principal of the Casino West Public School may not have taken the matter further if Mr Stevens had been

moved to another school. The Authorised Person under the Contract may not have determined that Mr Stevens should not be permitted to work under the Contract if Mr Hawkins had not sent highly prejudicial documents containing untested allegations against Mr Stevens to the Authorised Person.

[121] In all of the circumstances it is my provisional view that but for his dismissal, Mr Stevens would have remained in employment for at least a further period of twelve months. Mr Stevens' evidence was that he was taking home an amount of \$1,286.00 per fortnight. In the Form F3 Response to Mr Stevens's unfair dismissal application filed by ISS it is stated that Mr Stevens' weekly gross income was \$730.85. Accordingly, Mr Stevens would have earned an amount of \$38,004.20 in the twelve month period following his dismissal. Mr Stevens would also have been entitled to superannuation contributions in the amount of some \$3,610 in that period.

Mr Stevens' efforts to mitigate loss – s. 392(2)(d)

[122] I accept that Mr Stevens would have had great difficulty obtaining other employment. At the time his application was heard, Mr Stevens was 60 years of age and is a few years from retirement. It is submitted on Mr Stevens' behalf that he has a relatively narrow skill set and that the fact he lives in a regional area with limited job opportunities has further hindered his search for employment. It is also relevant that the Contract held by ISS is with respect to the whole of government makes it less likely that Mr Stevens will find work. Mr Stevens gave evidence that he had registered with job agencies and found some casual cleaning work. Mr Stevens has also commenced another career as a carer for persons with disabilities. My provisional view is that no deduction should be made from the compensation to be awarded to Mr Stevens for failure to mitigate the loss of his employment as he has taken reasonable steps to mitigate that loss.

The amount of any remuneration earned since dismissal – s. 392(2)(e)

[123] Mr Stevens has earned an amount of \$3,500 from work as a carer in the five or six weeks before his unfair dismissal application was heard. Mr Stevens also earned a small amount of some \$300 undertaking cleaning work.

[124] My provisional view is that no deduction should be made from compensation awarded to Mr Stevens on the basis that he had no income for a significant period after his dismissal and was paid only his minimum statutory entitlement of five weeks in lieu of notice on termination plus accrued entitlements.

The amount of any income reasonably likely to be earned during the period between the making of the order for compensation and the actual compensation – s. 392(2)(f)

[125] Given the period which has elapsed since Mr Stevens was dismissed my provisional view is that no adjustment to the amount of compensation is warranted on this basis.

Any other matter that the FWC considers relevant – s. 392(2)(g)

[126] I have had regard to the fact that Mr Stevens was paid five weeks wages in lieu of notice and his accrued entitlements on termination of his employment. In all of the circumstances including the hardship that Mr Stevens' dismissal has visited on him and his

family and where the dismissal has been found to be unfair, my provisional view is that no adjustment to the compensation to be awarded to Mr Stevens should be made on this basis.

Deduction for misconduct

[127] I do not accept that it has been established that Mr Stevens engaged in misconduct and this consideration is not relevant in the present case.

CONCLUSION

[128] In summary my provisional views are:

1. An order for the payment of compensation would not affect the viability of ISS's business (s.392(2)(a)).
2. The length of the Mr Stevens' service favours the making of an order for compensation and no diminution of any amount that might otherwise be determined is warranted because of this circumstance (s.392(2)(b)).
3. The remuneration that the Mr Stevens would have been likely to receive, but for his dismissal, is \$38,004.20 in wages and \$3,610 in superannuation contributions (s.392(2)(c)).
4. I make no deduction for contingencies
5. I make no deduction on account of a failure to mitigate loss (s.392(2)(d)).
6. I make no deduction for remuneration earned since dismissal (s.392(2)(e)).
7. I make no deduction for income likely to be earned during the period between the making of the order and the actual compensation (s.392(2)(f)).
8. I make no deduction for payment in lieu of notice or redundancy payments made to Mr Stevens.
9. I make no deduction for misconduct (s.392(3)).
10. If my provisional views are maintained then it will be necessary to cap the amount of compensation to Mr Stevens at \$19,002.10.

[129] If any party wishes to be heard in relation to my provisional views on remedy, that party should advise my Associate by email directed to chambers.asbury.dp@fwc.gov.au by no later than 4.00pm on Thursday 19 March 2020 and the matter will be listed for further hearing. In the absence of advice that either party wishes to be heard, an Order giving effect to my provisional views will issue.



DEPUTY PRESIDENT

Appearances:

Mr A Aghazarian of the United Workers Union for the Applicant.

Mr J Moore for the Respondent.

Hearing details:

2019.

29 & 30 August.

6 December.

Brisbane.

Printed by authority of the Commonwealth Government Printer

<PR717440>

¹ Exhibit R1 Statement of Duane Hawkins.

² Exhibit R4 Statement of Allan Renwick.

³ Exhibit R3 Statement of Mark Harding.

⁴ *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410 at 5; *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201 at 204.

⁵ *Selverchandron v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

⁶ *Rode v Burwood Mitsubishi* Print R4471 at [90] per Ross VP, Polites SDP, Foggo C.

⁷ *Miller v University of NSW* [2003] FCAFC 180 at pn 13, 14 August 2003, per Gray J.

⁸ *Heran Building Group Pty Ltd v Anneveldt* [2013] FWCFCB 4744 at [15] per Acton, SDP, Sams DP and Hampton C citing *MM Cables (a Division of Metal Manufacturers Ltd v Zammit* AIRC (FB) S8106 17 July 2000.

⁹ *Culpeper v Intercontinental Ship Management* (2004) 134 IR 243; [2004] AIRC 261; Print RP 944547.

¹⁰ *North v Television Corporation Ltd* (1976) 11 ALR 599.

¹¹ [2016] FWC 3009.

¹² *Ibid* at [37].

¹³ (1999) 94 FCR 561.

¹⁴ Ibid at 572.

¹⁵ *Donald Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243; *Kool v Adecco Industrial Pty Ltd T/A Adecco* [2016] FWC 925; *Star v WorkPac Pty Ltd t/a WorkPac Group* [2018] FWC 4991.

¹⁶ [2016] FWCFB 5243 at [19].

¹⁷ *Stewart v University of Melbourne* (U No 30073 of 1999 Print S2535) Per Ross VP citing *Byrne v Australian Airlines* (1995) 185 CLR 410 at 465-8 per McHugh and Gummow JJ.

¹⁸ Exhibit A2.

¹⁹ Exhibit A2 Annexure JS2.

²⁰ Exhibit A2 Annexure JS3.

²¹ Exhibit A2 Annexure JS4.

²² Transcript of proceedings PN176-181.

²³ Exhibit A3 Annexure PW-2.

²⁴ Exhibit R3.

²⁵ Exhibit R4.

²⁶ Transcript of proceedings PN391-392.

²⁷ Exhibit R2 Annexure AR2.

²⁸ Transcript PN739.

²⁹ Transcript PN770 – 777.

³⁰ Exhibit R5 Annexure MH3.

³¹ Exhibit R5 Annexure MH4.

³² Exhibit R5 Annexure MH5.

³³ Transcript PN941 – 942.

³⁴ Exhibit R5 Annexure MH3.

³⁵ Transcript PN897 – 903.

³⁶ *Chubb Security Australia Pty Ltd v Thomas*, Print S2679 (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at para. 41.

³⁷ *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport*, Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at paras 70–73, [(2000) 98 IR 137].

³⁸ *Previsic v Australian Quarantine Inspection Services*, Print Q3730 (AIRC, Holmes C, 6 October 1998).

³⁹ (2000) 98 IR 151 at [73].

⁴⁰ (1998) 88 IR 21.

⁴¹ [2013] FWCFB 431.

⁴² [2014] FWCFB 8683.

⁴³ [2015] FWCFB 2267.