

[2023] FWC 1517 [Note: An appeal pursuant to s.604 (2023/4773) was lodged against this decision - refer to Full Bench decision dated 18 September 2023 [[\[2023\] FWCFB 165](#)] for result of appeal.]



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Wael Al-Buseri**

v

**NSW Trains T/A NSW TrainLink**  
(U2023/2213)

DEPUTY PRESIDENT BOYCE

SYDNEY, 24 JULY 2023

*Application for an unfair dismissal remedy – Applicant (a Train Driver) engaged in a physical and verbal altercation with a member of the public at Bankstown Railway Station on his way to work – sufficient connection to work – law of self-defence considered – self-defence established – no valid reason for dismissal – Applicant’s dismissal harsh, unjust and unreasonable – remedy – reinstatement appropriate – reinstatement ordered, along with lost wages and continuity of employment.*

## Introduction

[1] On 17 March 2023, Mr Wael Al-Buseri (**Applicant**) filed an unfair dismissal application (**Application**) with the Fair Work Commission (**Commission**) alleging that he was unfairly dismissed (within the meaning of s.385 of the *Fair Work Act 2009* (**Act**)) by his former employer, NSW Trains T/A NSW TrainLink (**Respondent**).

[2] The Respondent, owned by Transport For New South Wales (the New South Wales Government’s transport and road agency), provides intercity and regional rail and coach services across its network in New South Wales and neighbouring States and Territories. At the time of his dismissal on 2 March 2023, the Applicant was employed by the Respondent as an Intercity Train Driver in New South Wales.

[3] The Respondent says that the Applicant was dismissed for serious misconduct (engaging in violence at Bankstown Railway Station with a member of the public, on his way to work on 29 July 2022), and otherwise denies that the Applicant was unfairly dismissed.

[4] At the hearing, Mr *Peter Matthews*, Legal Officer, Australian Rail Tram and Bus Industry Union (**RTBU**), appeared for the Applicant. Mr *Jamie Darams*, of Counsel, instructed by Ms *Katie Kossian*, Senior Associate, Maddocks lawyers, appeared with permission on behalf of the Respondent.

## **Evidence and submissions**

[5] The matter was allocated to my Chambers on 2 May 2023. Pursuant to directions issued that day, the parties filed evidence and submissions prior to the Hearing held in Sydney on 13 June 2023.

[6] The Applicant relies upon his:

- (a) Outline of Submissions, dated 16 May 2023;
- (b) Witness Statement of Mr Wael Al-Buseri (Applicant), dated 16 May 2023;<sup>1</sup>
- (c) Outline of Submissions In Reply dated 6 June 2023;
- (d) Witness Statement of Paul Dornan, Train Driver and Assistant Secretary (Passenger) of the Locomotive Division of the NSW Branch of the RTBU, dated 6 June 2023;<sup>2</sup> and
- (e) the Respondent's Transport Managing Conduct and Discipline Policy.<sup>3</sup>

[7] The Respondent relies upon its:

- (a) Outline of Submissions, dated 30 May 2023;
- (b) Witness Statement of Mr Dale Robert Merrick, Chief Operating Officer, dated 30 May 2023;<sup>4</sup>
- (c) Letter to the Applicant from Wayne Powell, Senior Investigations Officer, dated 7 September 2022;<sup>5</sup> and
- (d) the Transport for NSW and related entities Code of Conduct.<sup>6</sup>

## **Factual findings**

[8] Based upon the evidence relied upon by both parties at the hearing, I make the findings of fact set out in the paragraphs that follow.

[9] The Applicant is 49 years old and has worked at the Respondent (in its various iterations) since 2003 (i.e. 20 years). He is married with three children, and is the sole income earner in his family. For reasons which are relevant to the issues to be resolved between the parties, I note that the Applicant is of Muslim faith, with a middle eastern heritage.

[10] The Applicant has held the role of Intercity Train Driver in New South Wales with the Respondent since 2017. Over the years the Applicant has also held the roles of Train Crew Team Member and Customer Service Attendant.

[11] During his employment with the Respondent, the Applicant has never been:

- a) the subject of a disciplinary investigation; or
- b) involved in an incident involving violence or aggression towards other staff or members of the public.<sup>7</sup>

[12] On 29 July 2022, the Applicant was rostered to commence duty as an Intercity Train Driver, commencing at Everleigh Depot, at 4:04pm.

[13] To get to work at his starting time at Everleigh Depot on 29 July 2022, the Applicant attended upon Bankstown Railway Station to catch the 3:22pm train service to Central Station (and thereafter catch a further train to Everleigh Depot). The Applicant was wearing his full NSW Trains uniform, and was carrying his work-issued fluorescent orange coloured bag (on his back), his lunch bag (imprinted with a Sydney Trains logo), and his work jacket.

[14] As I understand it, Bankstown Railway Station is operated and controlled by Sydney Trains (being a different entity to the Respondent, NSW Trains T/A NSW TrainLink). Employees who work at Bankstown Railway Station are employed by Sydney Trains.<sup>8</sup>

[15] As at 29 July 2022, arising from the COVID-19 pandemic, social distancing rules requiring a safe distance between individuals of 1.5m were in force at all places associated with public transport in New South Wales (including at Bankstown Railway Station) (**Safe Distance Rule**). The Applicant gives the following evidence, which I accept, as to the implications for him of contracting COVID-19:

“21. I was required to test for Covid-19 regularly and if I had symptoms. I was also legally required to report a positive test to the NSW Government and my employer. I was also legally required to isolate and not attend work if I tested positive to Covid-19.

22. As a train driver, testing positive to Covid-19 at work was always a possibility, and testing positive could have significant and substantial financial implications, including being paid less and losing the value of any overtime recently worked.

23. As a family man, I was always worried about bringing Covid-19 home to my family.”<sup>9</sup>

[16] As he entered the concourse at Bankstown Railway Station the Applicant was tripped from behind by a male member of the public unknown to him (**Offender**).<sup>10</sup> Whilst the CCTV video footage does not show this trip from behind, I accept the Applicant’s evidence that he

was tripped from behind by the Offender in the lead up to him entering the concourse.<sup>11</sup> The Applicant's evidence in this regard is also supported by the contemporaneous statements he made throughout his engagement with the Offender to the effect that "he [the Offender] tried to trip me over".

[17] When the Applicant stopped to ascertain why he had just been tripped, he was confronted by the Offender, who was standing in very close proximity to his person, in breach of the Safe Distance Rule. I observe from the CCTV video footage that the Applicant and Offender are of similar physical stature and build.

[18] The Respondent tendered two pieces of CCTV video footage into evidence.

[19] One of the pieces of CCTV video footage is an unedited video without sound or audio, that has been obtained or derived from CCTV video cameras owned or used by Sydney Trains (**Station Footage**).<sup>12</sup> These CCTV video cameras are permanently fixed or in place at Bankstown Railway Station. The Station Footage runs for 5 minutes.

[20] The other piece of CCTV video footage appears to have been obtained from the social media application (or app) called "Snapchat" (**Snapchat Footage**).<sup>13</sup> The Snapchat Footage has been edited and reproduced (out of sequential order) by a member/s of the public, but does contain some sound and audio. The Snapchat Footage runs for just 34 seconds.

[21] In making my findings in this decision, it is appropriate that I have regard to both the Station Footage and the Snapchat Footage, but the latter only to the extent that it provides for sound or audio, or a different angle to the Station Footage. In other words, in terms of the sequence of the interaction between the Applicant and the Offender, I have relied upon the Station Footage. I have only relied upon the Snapchat Footage to the extent that it:

- a) captures (visually) the Applicant and the Offender from an angle behind the ticketing gates; and
- b) provides some sound or audio to the interaction between them.

[22] Having viewed both the Station Footage, and the Snapchat Footage, my findings as to the interaction between the Applicant and the Offender at Bankstown Railway Station (by reference to the time stamps 15:16, 40 seconds, and 15:20, 30 seconds, on the Station Footage), are as follows:

- a) At 3.16pm, a Sydney Train's employee, whom I understand to be the Bankstown Railway Station Duty Manager (**Duty Manager**), can be seen wearing a face mask and standing under a doorway (with the door of the doorway closed or slightly ajar behind him). This doorway is the entrance to the Duty Manager's office.
- b) Members of the public are transiting in and out of the Station along the concourse.

- c) At 3.17pm the Applicant enters the concourse and can be seen to stop directly across from where the Duty Manager is standing. Right behind, essentially on top of the Applicant when he stops, is the Offender. They appear to exchange words (noting that the Station Footage does not contain audio, and the Snapchat Footage does not capture this initial interaction). The Duty Manager can be seen observing this initial interaction between the Applicant and the Offender.
- d) The Applicant, within seconds of his initial engagement or interaction with the Offender, makes a gesture to the Offender to move on past him. The Applicant then steps backwards, moving away from the Offender, and again gestures for the Offender to move past him. The Duty Manager can still be seen observing the interaction.
- e) Further conversation between the Applicant and the Offender occurs, and the Applicant can be seen stepping in a forward direction, away from the Offender, and towards the ticketing gates.
- f) Yet a further conversation ensues between the Applicant and the Offender, and the Applicant is seen to take a step towards the Offender. Further words are then exchanged, and the Applicant can be seen to swing his right leg towards the Offender, striking the Offender in the side of the lower leg (in between the Offender's knee and the foot). I observe that the Applicant's kick is swung from the knee (as opposed to the hip). The Duty Manager continues to observe the interaction, but does not intervene, and cannot be seen to say anything to the Applicant or the Offender. At the same time, another Sydney Trains employee can be seen walking towards the Duty Manager's office in a fluorescent orange vest.
- g) The Offender then kicks the Applicant back, and escalates the physical interaction by attempting to grab the Applicant around the shoulders and/or the neck area. A scrummage ensues, whereby the Applicant is attempting to fend off the Offender, by pushing and kicking him, whilst the Offender has a hold of the Applicant's jumper with his left hand, and pushes his right hand straight into the Applicant's face. The Offender successfully pushes the Applicant towards the wall on the other side of the concourse, but the Applicant is able to use the Offender's momentum to swing the Offender around and into the wall, leaving the Offender on the floor. As this occurs, the Duty Manager and the other Sydney Trains employee (in the fluorescent orange vest) make a speedy retreat into the Duty Manager's office and close the door (which does not appear to be accessible without a key). In other words, the two Sydney Trains employees provide no assistance whatsoever to the Applicant, and close off the Duty Manager's office as an available retreat space for the Applicant to seek immediate refuge. The Applicant is left on his own with the Offender on the concourse, as they continue to engage in a physical struggle immediately outside and directly in front of the door of the Duty Manager's office.

- h) The Applicant slaps the Offender (with an open hand) across the side of his head. The Offender responds by attempting to return to his feet, and as he does so, he grabs at the Applicant's legs and the straps of the Applicant's carry bag (which is on the floor in between the Applicant's feet). The Offender then proceeds to attempt to tackle (or hold) the Applicant by grabbing him around the upper legs. The Applicant then seeks to take control of (or subdue) the Offender by placing his hands around the back of the Offender's head, holding him in a head hold, and grappling with him. Eventually the Applicant pushes the Offender back towards a second closed (shut) doorway (being a second entrance to the Duty Manager's office (right beside the first entrance), and releases him.
- i) The Offender then attempts to get back to his feet, moving towards the Applicant, so the Applicant pushes the Offender back on the floor. When the Offender does get back to his feet, he again moves forward towards the Applicant. A conversation between the pair ensues, as the Applicant seeks to retrieve his belongings from the floor (that he dropped during the physical altercation).
- j) The Applicant can then be seen to walk away from the Offender, but the Offender continues to follow the Applicant. When the Offender comes within arms' length of the Applicant, the Applicant pushes the Offender away. The Offender becomes overbalanced and falls into the wall. The Applicant walks away towards the ticketing gates.
- k) Upon realising that his sunglasses had been dropped during the altercation with the Offender, and are lying on the floor of the train station (behind where the Offender is standing), the Applicant walks back past the Offender and retrieves his sunglasses. The Offender then follows the Applicant. The Applicant attempts to keep a wide berth of the Offender, but the Offender approaches him, and pushes his belly into the Applicant. Again, the Applicant pushes the Offender away, but the Offender comes back at him, and follows the Applicant closely from behind as the Applicant again attempts to walk away towards the ticketing gates. The Duty Manager can be seen opening, and then closing, the door to the Duty Manager's office (i.e. taking a quick peep).
- l) The Offender continues to invade the Applicant's personal space, and saying things to the Applicant. On three occasions outside the ticketing gates the Offender approaches the Applicant and invades his personal space, and the Applicant pushes him away. The Applicant can also be seen to be saying something (or gesturing) to Sydney Trains' employees, being the Duty Manager and another employee who have opened the door to the Duty Manager's office (but remain in the doorway of the office), and another female Sydney Train's employee who has only recently arrived at the scene.

- m) As the Applicant seeks to pass through the ticketing gates, the Offender continues to pursue the Applicant and saying things to him. The Applicant again pushes the Offender away. At this point, an unknown male youth can be seen to intervene and hold the Offender back from his pursuit of the Applicant (i.e. a stranger, not a Sydney Trains' employee, intervenes to stop the Offender's on-going pursuit of the Applicant). Despite the intervention of the male youth, the Offender continues to move towards the ticketing gates. Eventually the Offender gives up, and the Duty Manager can be seen to engage in a discussion with the Offender, who eventually departs the Station concourse and back onto the street.
- n) The whole interaction between the Applicant and the Offender lasted less than three minutes (i.e. 15:17 and 9 seconds, to 15:20 and four seconds).
- o) The evidence does not disclose that the Offender was a customer of Sydney Trains (i.e. he cannot be seen to purchase a ticket, or head towards a platform to catch a train). It appears that the Offender is a transient.

[23] During the interaction, I find that the following words were exchanged between the Applicant and the Offender:

- a) At the point that the Applicant and Offender initially meet:

Applicant: Why did you do this?

Offender: Keep going you fucking cunt.

Applicant: Why did you do this?

Offender: Keep going you fucking cunt.<sup>14</sup>

- b) During the interaction between the Applicant and the Offender, the Applicant stated: "he tried to trip me over", and "this dickhead he tried to trip me over".<sup>15</sup>
- c) During the interaction between the Applicant and the Offender, the Offender:
  - called the Applicant a "fucking terrorist";
  - used the following terms towards the Applicant: "fucking railway workers", "fuck'n terrorist railway workers", "dickhead" and "terrorist"; and
  - repeatedly stated to the Applicant: "kill me, kill me, I want you to kill me".<sup>16</sup>
- d) During the interaction between the Applicant and the Offender, the Applicant:

- told the Offender to “piss off” and said to the Offender “You fuck’n tried to trip me over mate”; and
- also said to the Offender: “piss off mate”, “you’re a dickhead”, “piss off you’re a fuck’n loser”, and “go fuck yourself”.<sup>17</sup>

[24] During the interaction, I find that the Applicant stated to Station staff (within earshot): “What’s wrong with this guy, he tried to trip me over?”<sup>18</sup>

[25] The Applicant’s unchallenged evidence is that given the Offender was so close to his person, he could see small saliva spits or droplets emanating from the Offender’s mouth as the Offender spoke to him. The Applicant’s evidence is that he was also confronted with the stench or foul odour of the Offender’s putrid smelling breath.

[26] The Applicant’s uncontested evidence, after passing through the ticketing gates and down onto a train platform, is as follows:

“43. When I arrived at the platforms, I went to find the Duty Manager to ask some questions to work out why this guy had targeted me.

44. Ultimately the Duty Manager found me, and asked that I shelter in one of the lockable CSA rooms on the platform as the man was still looking for me.

45. I was advised by the Duty Manager that the Police and Security had been called.

46. After a while sheltering in the CSA room, I decided that I would leave because I didn’t want to be so late to work that I would delay the train I was supposed to driving down to Kiama. I was advised the man had apparently left when he was told the police had been called.

47. I cleaned my hands and face with soap, Dettol and sanitiser, and caught a train to central so I could sign on and commence my shift without delaying the train to Kiama.

48. Upon arriving to begin my shift, I wasn’t able to find my shift manager to advise him of what happened, so I simply commenced my shift. During my shift I spoke to Carmelo Ferraro, Shift Manager Central Intercity, and advised what had happened.

49. My shift finished around 2215hrs at Mortdale Maintenance Centre. I was feeling very shaken by what had happened. I was picked up by my wife and daughter. I then went to Bankstown Police Station to file a Police report.

50. I followed up this Police report numerous times to try and find out what had happened. I even filed a GIPA. I was advised information couldn’t be provided as the



investigation was ongoing and that in their opinion, I was a victim of assault and I would not be charged.

51. After attending the Police Station, I wrote an email to Carmelo providing a recount of what had happened, which is annexure B referred to previously in this statement. By the time I had finished this I was exhausted. It was 3:30am.

52. On 1 August 2022 I started to feel sick and tested positive to Covid-19. I attribute this to the altercation.

53. On 8 August 2022 I was due to return back to work. I was advised that I wouldn't be required to work and that my employer wanted to arrange a meeting and that I should probably bring a support person.

54. On 11 August 2022 I attended a meeting with my employer, and I was advised that I was going to be subject to a workplace disciplinary investigation to be conducted by investigator Wayne Powell and that I was being suspended from duty. The Notification of Investigation letter I received dated 11 August 2022 is annexed and marked "D". The Suspension from Duty letter I received on 11 August 2022 is annexed and marked "E".<sup>19</sup>

[27] On 7 September 2022 the Respondent issued the Applicant with a letter of allegations, which reads:

**"Allegation**

At about 3:17pm on Friday 29 July 2022, you acted inappropriately when you engaged in a physical altercation with a member of the public on the concourse at Bankstown Railway Station.

The particulars of this allegation are:

- At about 3:17pm on Friday 29 July 2022, you entered the Bankstown Railway Station Concourse wearing your NSW Trains uniform.
- As you entered the Concourse, an unidentified male member of the public walking closely behind you makes contact with you.
- You stopped and turned towards the other male and you both engage in conversation for a short time while standing face to face.
- You then kicked the male in the lower leg with your right foot and the male retaliates by kicking you back.

- You and the other male then engage in a physical altercation resulting in the male stumbling and falling backwards onto the ground and striking the wall in the vicinity of the platform indicator screens.
- As the male attempted to get to his feet, you struck him in the head using your right hand and placed your arms around his head and neck for several moments before pushing him back onto the ground.
- After regaining his feet, the male stepped towards you and you thrust your right hand against his throat pushing him backwards causing him to fall onto the ground against the wall as you turned and walked towards the gate arrays.
- As you approached the gate arrays, you turned back in the direction the other male was standing and you engaged in a further conversation with the male before walking towards the Station Manager's office to retrieve your sunglasses from the floor.
- As you did so the male approached you and you placed your left hand against his throat and pushed him backwards.
- You then continued to walk towards the gate arrays and the male followed behind you, you turned towards the male and used your forearm on at least three occasions to shove the male in the throat and chest area.
- As you arrived at the entry gate, you again turned towards the male and placed your left hand against his throat and pushed him backwards before a second male intervened by coming between you both and moved the other male away.
- The incident was recorded by a member of the public and uploaded to a social media website.
- The recording included audio and you are heard making comments to the effect of, *"Piss off mate, you're a fucking loser"* and *"he's a dickhead, he tried to trip me over"*

This conduct, if proven, may represent a breach of the following:

Transport for NSW Code of Conduct (Our Code of Conduct) specifically:

- *Section 3 - Staff responsibilities.*
- *Section 9 - Workplace health and safety.*

NSW Trainlink Safework Instruction - Customer Initiated Violence which states:

- *Think the SAFER approach - Step back, Assess the threat, Find help, Evaluate options and then Respond in a considered manner.*
- *Step Back - don't rush in. Step back physically so you can see more and maintain a reactionary gap (approx. 2 arm lengths) between yourself and the aggressor(s). Step back psychologically- you are more likely to assess the situation correctly if you give yourself some thinking space.*
- *Maintain your personal safety, e.g. take refuge inside the cab, control room, garrison, for your own wellbeing and to enable you to organise help for others.*

General Instruction 1033/2021 - Anti Social Behaviour on NSW Trainlink Services and Stations, states in part:

*When you are faced with a difficult customer, ensure you follow the SAFER and THREAT model below:*

- *S - Step back.*
- *A - Assess the threat.*
- *F - Find help.*
- *E - Evaluate options.*
- *R - Respond.*

I have enclosed copies of the aforementioned instruments for your reference.”<sup>20</sup>

[28] On 15 September 2022, the Applicant viewed the CCTV video footage of the Incident, but was not permitted to retain a copy. He responded to the Respondent’s allegations on 30 September 2022.<sup>21</sup>

[29] On 6 December 2022, the Respondent wrote to the Applicant advising him that dismissal was the appropriate disciplinary outcome, and provided him 14 days to respond to this conclusion (**Show Cause Letter**). The Show Cause Letter relevantly reads:

“The allegation and finding

The investigation examined the following allegation:

At about 3:17pm on Friday 29 July 2022, you acted inappropriately when you engaged in a physical altercation with a member of the public on the concourse at Bankstown Railway Station.

The particulars of this allegation are:

- a. At about 3:17pm on Friday 29 July 2022, you entered the Bankstown Railway Station Concourse wearing your NSW Trains uniform.
- b. As you entered the Concourse, an unidentified male member of the public walking closely behind you makes contact with you.
- c. You stopped and turned towards the other male and you both engage in conversation for a short time while standing face to face.
- d. You then kicked the male in the lower leg with your right foot and the male retaliates by kicking you back.
- e. You and the other male then engage in a physical altercation resulting in the male stumbling and falling backwards on to the ground and striking the wall in the vicinity of the platform indicator screens.
- f. As the male attempted to get to his feet, you struck him in the head using your right hand and placed your arms around his head and neck for several moments before pushing him back onto the ground.
- g. After regaining his feet, the male stepped towards you and you thrust your right hand against his throat pushing him backwards causing him to fall onto the ground against the wall as you turned and walked towards the gate arrays.
- h. As you approached the gate arrays, you turned back in the direction the other male was standing and you engaged in a further conversation with the male before walking towards the Station Manager's office to retrieve your sunglasses from the floor.
- i. As you did so the male approached you and you placed your left hand against his throat and pushed him backwards.
- j. You then continued to walk towards the gate arrays and the male followed behind you, you turned towards the male and used your forearm on at least three occasions to shove the male in the throat and chest area.
- k. As you arrived at the entry gate, you again turned towards the male and placed your left hand against his throat and pushed him backwards before a second male intervened by coming between you both and moved the other male away.
- l. The incident was recorded by a member of the public and uploaded to a social media website.
- m. The recording included audio and you are heard making comments to the effect of[, *"Piss off mate, you're a fucking loser"* and *"he's a dickhead, he tried to trip me over"*

The finding of allegation is substantiated.

Relevant breaches

Having regard to your substantiated conduct, I consider that you have breached the following sections of the *Transport Code of Conduct*:

- Section 3 - Staff responsibilities
  - treat our customers and colleagues fairly, consistently and with respect.
  - behave in a lawful, professional and reasonable manner and always act in the best interest of Transport.
  - not discriminate, harass, bully or engage in inappropriate workplace conduct.
  
- Section 9 - Workplace Health and Safety
  - take reasonable care of your own health and safety.
  - take reasonable care that your acts or omissions do not adversely affect the health and safety of other persons.

Proposed disciplinary action – dismissal

NSW Trains must have trust and confidence in its employees to conduct themselves appropriately and represent its best interests. By engaging in the substantiated conduct, you put the personal safety of yourself and others at risk and adversely affected the reputation of the organisation. Your conduct amounts to serious misconduct and warrants disciplinary action.

Accordingly, it is my preliminary view that the appropriate disciplinary action is dismissal.”<sup>22</sup>

**[30]** On 20 December 2022, the Applicant provided a written response outlining why he ought not be dismissed. In that response, the Applicant relevantly states:

“Dear Peter,

I write to you into detail my response to the Preliminary decision of dismissal in my matter.

In response to the decision, I am very disappointed with the preliminary outcome. The investigator has found that the allegations are substantiated, but I feel that several pertinent facts in my initial response have been overlooked or not considered. I will attempt to detail my concerns in this letter and pray that you can consider my response as showing that I was the victim of an unprovoked attack by this person. I will also

attempt to show that NSW Trains can continue to have trust and confidence in me in the future.

Firstly, with regard to the allegations a to m. Because the way in which the allegations have been set out, they do not properly convey that this was in fact one long incident, instead of a series of separate issues. From the moment that this person approached me from behind with an unprovoked attack, to the time I was able to get to a place of safety, was only a couple of minutes. I agree the timeline of events above is largely correct, but critically incomplete.

From the moment I entered the station and was attacked by the unknown male, I was subjected to a highly aggressive series of insults and threats. He was saying things like:-

- “You’re a fucking cunt” and,
- “Fucking Railway workers are all terrorists” and,
- “Kill me, kill me, kill me, I want you to kill me” and,
- “You’re a dickhead”.

During the whole incident and while shouting these things at me, he was attempting to kick and push me, invading my personal space, spitting at me and spraying me with saliva. I believe that his behaviour was partly driven by the Government and Media’s reaction to our ongoing industrial action at the time, where Rail Workers had been labelled as “Un-Australian”, “Industrial Terrorists”, “Thugs”, “Money Hungry”, and many more highly offensive terms by our Premier, Transport Minister and Industrial Relations Minister. I believe this to be the case because his threats of violence referenced the ongoing industrial action. I would also like to note that I contracted Covid19 and attribute this event as the cause of my infection.

As the Allegations state, on several occasions I attempted to get away from this person, but he just kept coming at me. The only time I actually moved towards him was when I attempted to step around him to retrieve my sunglasses that had fallen to the floor. He continually followed me, and I was forced to defend myself several times. He kept on referring to me as a terrorist.

These comments reinforced my belief that he was partly motivated by the media reports I have already identified.

All I wanted to do at this point was to get myself away from this person. I received no help from any other person or member of staff. I was breathless, anxious and afraid for my life during the incident. I feel that I had no choice in how this incident played out, I was simply reacting to a highly aggressive, irrational and confrontational attack.

Further, I sincerely believe that during that period of unfortunate media coverage, I was put in an unsafe position, as there was a failure to condemn the aforementioned

statements with their violent undertones that were widely reported and repeated in the media. This had the effect of inflaming tensions between railway workers and the travelling public. I have always been proud to wear my uniform in public, but since this event I constantly feel nervous and unsafe doing so.

I have never had any complaints against me or have been involved in any arguments and or altercations with any member of the public since the day I joined the railways.

I was on my way to work on goodwill for a good day, and I never thought of causing any harm to anybody, and I was provoked from behind as I was on my way to catch the train to work. After the incident, I continued to work, reported the incident to my shift manager and worked my normal shift. I was not offered any relief or assistance in my agitated state.

The Police deemed the male as the aggressor and that I had been assaulted when I made the police report.

I believe that I have been victimised and discriminated against due to the organisation's negligence in protecting its employees, and in the knowledge that the transport minister and other high-profile managers made public unfair and discriminative comments describing us as terrorists and industrial bastards.

<https://inqld.com.au/news/2022/02/21/snap-shutdown-of-sydney-train-networkterrorist-like-says-transport-minister/>

<https://www.2gb.com/industrial-bastardry-of-the-worst-form-minister-slams-unionshutting-down-sydney/>

<https://www.theguardian.com/australia-news/2022/may/12/nsw-minister-accusedof-trying-to-blow-up-negotiations-with-rail-union>

I believe that our management has failed in providing safety at the workplace, by ignoring the racial and offensive comments made to the media, which as a result have caused serious safety threats to its workers, by not providing any Police or Security personnel at hotspot locations and stations, such as Bankstown Railway Station, where the incident has occurred.

I have not been supported when I was found COVID-19 Positive and have not been tested when my manager knew about how the incident occurred and how the male covered my face with Saliva.

I believe that the management failed to relieve me during my shift, as a result of the incident, as I was anxious and upset about what happened.

- I would like for it to be considered that I have 20 years of experience with
- NSW Trains and known by its former names.
- I have a very good record in relation to discipline and operational safety record.
- I have achieved this as I have a great work ethic, am trustworthy and have always followed the rules and procedures.
- I was appointed as a Driver Team Leader for 6 years.
- I was a Driver Trainer for 2 years
- I am a Peer Support Volunteer – and constantly help employees, family, and friends in this space.

My Response to SAFER:

S- Step Back: I have stepped back as this can be seen clearly in the CCTV

A- Assess the threat: I have assessed the threat and found the man to be abusive and aggressive.

F- Find Help I looked at the spot where they normally the Police stand, and or if the security guard was around. I could not spot any of those two available to help me out.

I only found the Duty manager who was nearby, and I did not see the other 2 CSAs who were near the barrier and the other one in the concourse. I talked to the duty manager when I was wondering about the man and why he tried to trip me over, by asking him:

What is wrong with this guy?, He tried to trip me over.

I was hoping that he was going to intervene and say something, rather, I had no verbal response from him, and he did not inform me that he has contacted Security to report it. As a result, no help was offered when it was only verbal with the man at that stage.

E- Evaluate Options What options I was left with when the man was not showing any signs of apology or explanation as to why he was aggressive and why he tried to trip me over?

R- Respond I was provoked when the man tried to trip me over, and I said to him “here you go mate”, to end this problem, and when he called me a terrorist, I got agitated and puzzled as to why he called me that, which I acted upon his shameful comment and unprovoked attack.

I hope that you can consider that dismissal is not an appropriate outcome in this instance

Kind Regards,

Wael Al-Buseri<sup>23</sup>



[31] On 20 January 2023, the Respondent wrote to the Applicant advising him that it had formed a final view to dismiss him.<sup>24</sup>

[32] After the Applicant filed a request for review of the Respondent's decision to dismiss him on 8 February 2023,<sup>25</sup> the Respondent advised the Applicant (on 2 March 2023) that the review had not overturned its decision to dismiss him, and that his dismissal would be effective on and from 2 March 2023.<sup>26</sup>

[33] There is no evidence of any physical injury (at all) sustained to the Applicant, or the Offender, arising from their interaction on 29 July 2022.

[34] It is accepted by both parties that whilst the Applicant's conduct in this matter was outside of work hours, it has a sufficient and relevant connection to his work with the Respondent in the *Rose v Telstra Corporation Limited*<sup>27</sup> sense. I equally make this finding.

### **The Law of Self-Defence**

[35] The Respondent's reasons, for its decision to dismiss the Applicant, do not extend to an express allegation of assault. Rather, the Respondent frames its reasons for dismissal as the Applicant acting inappropriately in a physical altercation with a member of the public on 29 July 2022, and, in doing so, breaching the Transport Code of Conduct (see paragraph [57] of this decision).

[36] In my view, whilst the Applicant was not expressly dismissed for "assault", or the use of excessive force beyond the realms of self-defence, the fundamental issues underlying the Respondent's reasons for dismissal are intertwined with same (i.e. whether the Applicant was entitled to believe he was faced with a threat, whether the Applicant's actions in responding to that threat were necessary, and whether the Applicant's actions in dealing with that threat were proportional and appropriate (the latter also by reference to workplace policies and training)). Further, it is apparent from the CCTV video footage of the interaction between the Applicant and the Offender (putting aside defences) that they both engaged in assault.<sup>28</sup>

[37] In these proceedings, the Applicant squarely raises the issue of self-defence in asserting that he was not dismissed for a valid reason, and that his dismissal was harsh, unjust and unreasonable. The issue of self-defence was also raised by the Applicant in his written responses to the Respondent prior to his dismissal,<sup>29</sup> and in his Form F2 Unfair Dismissal Application.<sup>30</sup>

[38] In the circumstances set out in paragraphs [35] to [37] above, I consider it appropriate in these proceedings to gauge or measure the issue of whether the Respondent had a valid reason to dismiss the Applicant by reference to the law of self-defence. In other words, these proceedings are not criminal proceedings, and the Respondent is not prosecuting the Applicant

for the crime of assault. But the issues for resolution in these proceedings going to whether the Applicant:

- a) acted inappropriately and breached the Transport Code of Conduct (as claimed by the Respondent); or
- b) acted appropriately notwithstanding the terms of the Transport Code of Conduct, or any other of the Respondent's policies or training (as asserted by the Applicant),

call for an analysis of all of the circumstances of the case,<sup>31</sup> including, in my view, whether the Applicant was indeed acting in "self-defence" (i.e. as that term (or defence) has been applied in case law, including by reference to statute).

[39] Case law in Australia on the issue of self-defence (as it concerns, for example, crimes such as murder and/or assault) reflects or articulates the principles contained in British and United States criminal jurisprudence. In *Palmer v R*<sup>32</sup>, the basic principle of self-defence was stated:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary."<sup>33</sup>

[40] Sections 418 and 419 of the *Crimes Act 1900 (NSW)* codify the law in New South Wales with respect to self-defence.<sup>34</sup> They read:

"418 Self-defence - when available

- (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
  - (a) to defend himself or herself or another person, or
  - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
  - (c) to protect property from unlawful taking, destruction, damage or interference, or
  - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

#### 419 Self-defence - onus of proof

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.”

[41] A person need not wait to be struck first before they may engage in actions to defend themselves (i.e. simply because a person strikes first does not mean that they cannot thereafter rely upon self-defence).<sup>35</sup> Further, a person need not show that he or she walked away from an interaction to prove that he or she did not want to engage in violence.<sup>36</sup> A failure to retreat, when it is possible to do so, is not conclusive evidence that a person was not acting in self-defence (i.e. a failure to retreat is but one factor to be taken into account in the context of the overall interaction being considered having regard to questions of necessity and proportionality).<sup>37</sup>

[42] The Criminal Trials Courts Bench Book (NSW),<sup>38</sup> contains the following commentary on the law as to self-defence in New South Wales:

“Section 418(1) provides that a person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence. Section 418(2) sets out the circumstances where self-defence is available. The questions to be asked by the jury under s.418(2) are succinctly set out in *R v Katarzynski* [2002] NSWSC 613 at [22]–[23] which was approved in *Abdallah v R* [2016] NSWCCA 34, at [61]. Section 419 provides that the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

#### [6-452] Raising/leaving self-defence

In order for self-defence to be raised or left to the jury there must be evidence capable of supporting a reasonable doubt in the mind of the tribunal of fact as to whether the prosecution has excluded self-defence: *Colosimo v DPP* [2006] NSWCA 293, at [19]. It is not essential that there be evidence from the accused as to the accused’s beliefs and perceptions: *Colosimo v DPP*, at [19]; but it must be raised fairly on the evidence: *Mencarious v R* (2008) 189 A Crim R 219, at [61], [78], [90]; *Douglas v R* [2005] NSWCCA 419, at [99]–[101]. A tactical decision not to raise self-defence does not of itself foreclose the obligation of the trial judge, in appropriate circumstances, to leave the issue to the jury: *Flanagan v R* (2013) 236 A Crim R 255, at [76].

#### [6-455] Essential components of self-defence direction

A direction for self-defence in cases other than murder must contain the following essential components:

1. The law recognises the right of a person to act in self-defence from an attack or threatened attack.
2. It is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that the accused's act was not done in self-defence.
3. The Crown may do this by proving beyond reasonable doubt either:
  - (a) the accused did not believe at the time of the act that it was necessary to do what he or she did in order to defend himself or herself; or
  - (b) the accused's act was not a reasonable response in the circumstances as he or she perceived them.
4. In determining the issue of whether the accused personally believed that his or her conduct was necessary for self-defence, the jury must consider the circumstances as the accused perceived them to be at the time.
5. If the jury is not satisfied beyond reasonable doubt that the accused did not personally believe that his or her conduct was necessary for self-defence, it must then decide whether the Crown has proved beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as perceived by him or her. If the Crown fails to do so it will have failed to eliminate self-defence.
6. If the Crown fails to prove both numbers 3(a) or (b) [above], it will have failed to eliminate self-defence. If it proves one or the other, it will have succeeded.”<sup>39</sup>

[43] In *Doran v Director of Public Prosecutions; Brunton v Director of Public Prosecutions*,<sup>40</sup> Simpson AJA, stated:

“3. Where an issue under s.418 is raised, two questions arise for determination. They are:

- (i) has the prosecution proved beyond reasonable doubt that the accused did not believe that the conduct said to constitute the offence was necessary for one (or more) of the four purposes specified in subs [418](2)(a)-(d)? and
- (ii) has the prosecution proved beyond reasonable doubt that the conduct was not a reasonable response in the circumstances as perceived by the accused?

4. Proof by the Crown beyond reasonable doubt of one or the other will defeat any defence of self-defence. That is, an affirmative answer to either question will be sufficient for the Crown to have proved that the conduct was not carried out in self-defence.

5. An alternative way of framing the questions, avoiding the awkwardness of requiring proof of a negative, is that proposed by Howie J in *R v Katarzynski* [2002] NSWSC 613, at [22]:

“(i) is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and, (2) if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.”

A negative answer to either question will be sufficient for the prosecution to have proved that the conduct was not carried out in self-defence.”<sup>41</sup>

[44] The following additional points are worth highlighting:

- a) What is “necessary” to defend oneself is based not upon the facts as a trier of fact finds them to be, but on the facts as that the trier of fact finds the accused to have reasonably believed them to be at the ‘time’ of the relevant interaction or altercation. In other words, the test is not based upon the facts as they actually were, but the facts as the accused “reasonably” believed them to be at the time of the relevant interaction or altercation. For example, if an accused reasonably believed an offender or assailant to have a gun, and took what he or she considered to be necessary self-defensive action based upon that belief, the fact (or reality) that the offender or assailant did not have a gun is not the measure by which “necessity” is to be judged.
- b) What force is necessary or proportional in a case of self-defence cannot be expected to be measured by mathematical exactitude, or detached reflection.<sup>42</sup> A “person under attack is not required to measure the force necessary to protect himself ‘with as much exactness as an apothecary would drugs on his scales’. The measure is what in the exercise of a reasonable judgement under the circumstances [as the accused reasonably believed them to be] is required to avert the danger.”<sup>43</sup>
- c) The case law is clear that once a real issue of self-defence is raised (by way of justification), it is for the prosecution (or in this case, the Respondent) to establish or prove that the accused was not acting in self-defence at all, or exceeded the limits of what was reasonably necessary as regards to the means or force used.<sup>44</sup> In other words, a mere joinder of issue by a prosecutor (or respondent in a civil case, for example, in respect of tortious conduct) is not sufficient. The legal burden of proof does not ever change from a prosecutor, and despite an accused (immediately after

the legal onus is first discharged) carrying an evidential burden in support of their defence, the legal burden of proof on the ultimate issue (or conviction) at all times lays with the prosecutor (or in this case, the Respondent). In short, the prosecutor (or in this case the Respondent) carries the legal burden of proving the elements of the relevant offence, and the legal burden of proving the absence of a defence to same.

- d) In the ordinary course, the party that carries the legal burden also carries the evidential burden. If a decision-maker is not satisfied on the evidence as to any issue, the issue must be determined against the party carrying the legal burden of proof. There is no ability to achieve ‘justice’ by adopting some form of half-way approach.
- e) In civil cases where an issue of self-defence arises, the level of proof required to be met by a prosecutor (or plaintiff) is on the balance of probabilities, at a reasonable level of satisfaction.<sup>45</sup> The *Briginshaw* standard<sup>46</sup> does not create an intermediate standard of proof between the civil and criminal standards of proof.
- f) In a civil case it is for the prosecutor (or plaintiff) to establish that the preponderance of evidence clearly establishes that self-defence does not arise, or is not available in the circumstances of the particular case.<sup>47</sup> A defendant need only show that there was a ‘real possibility’ that they were acting in self-defence for the prosecution to fail.
- g) Injuries sustained from a physical interaction between persons are relevant, but not determinative. The fact that severe injuries resulted from a physical interaction said to arise in self-defence does not mean that the relevant force used was unreasonable. Equally, the fact that no, or only minor, injuries arose from an interaction may well be relevant (but not determinative) to an analysis as to whether the force used was reasonable and/or proportionate.

[45] Finally, to the extent that the decision of McCarthy DP in *John Whittaker v EDI Rail-Bombardier Transport (Maintenance) Pty Ltd*<sup>48</sup> might be said to suggest that there is a legal onus upon an employee to prove that he or she was acting in self-defence, I do not consider it correct as matter of law, and respectfully decline to follow it in that respect.

### **Relevant law regarding unfair dismissal**

[46] Section 385 of the Act qualifies a claim for unfair dismissal:

#### **“385 What is an unfair dismissal**

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) the person has been dismissed; and

- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.”

**[47]** The parties are not in dispute as to the following:

- (a) The unfair dismissal application was made within the period required by s.394(2) of the Act.
- (b) The Applicant is a person protected from unfair dismissal within the meaning of s.382 of the Act.
- (c) The Applicant was “dismissed” by the Respondent within the meaning of s.386 of the Act.
- (d) The Small Business Fair Dismissal Code (as provided for in s.388 of the Act) does not apply.
- (e) The Applicant’s dismissal was not a case of genuine redundancy within the meaning of s.389 of the Act.

**[48]** I accept and make findings consistent with the foregoing position of the parties.

**Whether the Applicant’s dismissal was harsh, unjust, and/or unreasonable**

**[49]** Section 387 of the Act provides what matters must be taken into account in determining whether a dismissal was harsh, unjust or unreasonable.

**“387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (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”.

[50] The terms “harsh”, unjust” and “unreasonable” are to be given their ordinary meaning.

[51] An Applicant (employee) carries the onus to prove that his or her dismissal was unfair.

[52] It is well settled that a statutory requirement to ‘have regard to’ or ‘take into account’ requires the Commission to give a matter(s) weight as a fundamental element in the decision-making process. However, as Kitto J noted in *Rathborne v Abel*<sup>49</sup>:

“Finally, to require that regard be had to a particular matter in making a discretionary judgment is not to require that that matter shall be allowed an actual influence upon the ultimate result. The matter is to be considered for such bearing as it may have upon the question to be decided, and it is to be allowed such weight (if any) as the tribunal thinks it ought to be given; but if the tribunal thinks it ought to have no weight, then no weight is required to be given to it: cf. *Beresford v. Ward* [1961] YR 632, at 634.”<sup>50</sup>

(my emphasis)

**s.387(a) — Whether there was a valid reason for the Applicant’s dismissal which is related to her capacity or conduct**

[53] An employer bears the persuasive onus of establishing or proving that there was a valid reason for an employee’s dismissal.<sup>51</sup> The level of proof is on the balance of probabilities, at a reasonable level of satisfaction.<sup>52</sup> The fact that serious allegations are made does not alter the position in civil proceedings that the level of proof is based upon the balance of probabilities.<sup>53</sup>



[54] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”, and should not be “capricious, fanciful, spiteful or prejudiced”.<sup>54</sup> Further, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>55</sup>

[55] Where a dismissal relates to conduct, the reason for the dismissal may be valid because the conduct occurred and justified dismissal. However, the reason may not be valid because the conduct did not occur, or it did occur but did not justify dismissal.<sup>56</sup>

[56] The question of whether the alleged conduct took place, and what it involved, is to be determined by the Commission on the basis of the evidence in the proceedings before it,<sup>57</sup> and reasonable minds may differ.

[57] The onus of proof in relation to misconduct rests with an employer, and again, the standard of proof in respect of such misconduct is based upon the balance of probabilities.<sup>58</sup>

[58] Where a reason for dismissal concerns or involves workplace fighting, the Commission must have regard to all of the circumstances in which the fight occurred, and there is no presumption that fighting in the workplace will automatically mean that a dismissal is not unfair.<sup>59</sup> As was stated by the Full Court of the Federal Court in *Qantas Airways Ltd v Cornwall*<sup>60</sup> (a case involving fighting):

*“We accept that in this case, as in Allied Express Transport Pty Ltd v Anderson, it is necessary to examine the circumstances surrounding the conduct relied on, which constitute the “relevant factual matrix”, to decide whether the termination was supported, in the words of the statute, by “a valid reason ... connected with the employee’s ... conduct”.*

*“... conduct is not committed in a vacuum, but in the course of the interaction of persons and circumstances, and the events which lead up to an action and those which accompany it may qualify or characterize the nature of the conduct involved.”<sup>61</sup>*

[59] The Respondent submits that there was a valid (conduct) reason for the Applicant’s dismissal. That valid reason is said to be:

“[A]t about 3:17pm on Friday, 29 July 2022, [the Applicant] acted inappropriately when [he] engaged in a physical altercation with a member of the public on the concourse at Bankstown Railway Station”, and by doing so breached the Transport Code of Conduct:

Section 3 (Staff Responsibilities)

- treat our customers and colleagues fairly, consistently and with respect.
- behave in a lawful, professional and reasonable manner and always act in the best interest of Transport.

- not discriminate, harass, bully or engage in inappropriate workplace conduct.

Section 9 (Workplace Health and Safety)

- take reasonable care of your own health and safety.
- take reasonable care that your acts or omissions do not adversely affect the health and safety of other persons.”<sup>62</sup>

**[60]** In support of the foregoing reasons for dismissal, Mr Merrick, Chief Operating Officer, NSW TrainLink, gives the following evidence:

- a) Being a customer facing employee, the Applicant has undertaken training to deal with challenging situations (including those involving members of the public). This training emphasises the need for de-escalation techniques to be used when interacting with member of the public. Such de-escalation (or diffusion) techniques include, walking away, seeking internal or external help, and seeking refuge in a safe place whilst the situation passes.<sup>63</sup>
- b) Whilst the Respondent’s records indicate that the Applicant undertook this type of training in April 2017, Mr Merrick, expects (or suspects) that the Applicant would have received similar training at some point thereafter. However, Mr Merrick’s evidence travels no further than such an ‘expectation’.<sup>64</sup>
- c) Employees are also “regularly given what is known as ‘General Instructions’ before their shift to remind them of their obligations, and to refresh aspects of training”. The Applicant would have been given a General Instruction on Anti-Social Behaviour on NSW Trains or TrainLink Services and Stations in September 2021, covering the SAFER and THREAT models.<sup>65</sup> There is no evidence as the length of this pre-shift training, or its content.
- d) The SAFER model provides that when faced with a difficult customer, “de-escalation techniques must be applied wherever possible”, and an employee is to:
  - S – take a step back, keep a gap of at least two arm lengths, and take refuge in a safe place;
  - A – assess the threat – Do I feel threatened? Am I hidden? Am I at risk? Is there an escape route? Can I raise the alarm? Am I working at a risky time?
  - F – What level of help is needed? If the situation life threatening or time critical call 000.
  - E – evaluate options and consider if there is a safe way to de-escalate the situation or should you choose a way to take refuge and await help?

- R – choose the response that is most likely to maintain your personal safety and that of others, make sure the appropriate level of assistance/support is obtained, ensure immediate risks to others are communicated.<sup>66</sup>
- e) The Customer Initiated Violence policy refers to risks assessments and controls being conducted, but there is no evidence of such risk assessments or controls in place at Bankstown Railway Station, let alone the Applicant being informed of, or trained in, same.<sup>67</sup>

**[61]** Mr Merrick gives evidence that he was a member of the Disciplinary Review Panel (**DRP**) that considered the conduct of the Applicant on 29 July 2022.<sup>68</sup> Mr Merrick gives the following evidence as to his (or the **DRP**'s) reasoning in reaching the conclusion that the Applicant acted 'inappropriately' in his engagement with the Offender on 29 July 2022, and breached the Transport Code of Conduct, and that such conclusions warranted the sanction of dismissal:

- a) Physical violence is not and will not be tolerated by the Respondent, irrespective of an employee's long length of service, or absence of a disciplinary record.<sup>69</sup>
- b) The altercation between the Applicant and the Offender was witnessed by bystanders (including children), and a video clip of parts of the interaction was uploaded onto social media (including the Applicant using words such as "piss off mate, you're a fucking loser", and "he's a dickhead, he tried to trip me over"). This created a risk to the reputation of NSW Trains.<sup>70</sup> The Applicant's behaviour "also had the real potential to undermine the trust and confidence in [the Respondent] with the general public".
- c) The Applicant's account of the altercation (between himself and the Offender) is in stark contrast to what the CCTV video footage shows. For example, in his response made on 30 July 2022 (the day after the incident), the Applicant said that he did not hit or hurt the Offender, and did not kick or punch the Offender. The CCTV video footage shows that this is untrue.
- d) The Applicant's assertion that he was concerned about social distancing rules being breached, and saliva spraying from the Offender's mouth, is not consistent with the conduct of the Applicant in his altercation with the Offender.
- e) The Applicant and the Offender were of similar physical stature. If anything, the Applicant was heavier set than the Offender.
- f) The Applicant was the aggressor, who, despite being followed and pursued by the Offender, initiated all of the physical assaults against the Offender.

- g) There were a number of instances during which the Applicant could have de-escalated the situation, if the Applicant was indeed afraid for his safety, by entering the Station Duty Manager's Office.
- h) The Applicant's engagement with the Offender was "completely disproportionate" to the situation he faced.
- i) The Applicant has undertaken de-escalation training (and even made reference to the SAFER model in his reply submissions during the disciplinary process).<sup>71</sup>
- j) The Applicant, in engaging in the manner that he did with the Offender, placed himself and others at a significant and unnecessary risk.<sup>72</sup>

**[62]** In my view, there are a number of aspects of Mr Merrick's evidence (going to the Respondent's reasoning in forming the view to dismiss the Applicant) that are of concern and/or troubling. I say this not because Mr Merrick is other than a witness of truth, but because his (or the Respondent's) reasoning process fails to have proper regard to the totality of the circumstances confronting the Applicant in his interaction with the Offender on 29 July 2022, and the Applicant's claims as to self-defence. In this regard:

- a) In making the decision to dismiss the Applicant, Mr Merrick (and the DRP) did not consider any witness evidence, beyond that of the Applicant.<sup>73</sup> Likewise, in these proceedings, the Respondent has not relied upon any witness evidence from persons (such as the Duty Manager) who witnessed the interaction between the Applicant and the Offender on 29 July 2022. The failure to call witness evidence from persons (such as the Duty Manager) who witnessed the interaction, and allow that evidence to be tested at the hearing, is completely unexplained.<sup>74</sup> I draw the inference that such evidence would not have assisted the Respondent in its case before this Commission.
- b) Mr Merrick considered that a Sydney Trains or NSW TrainLink employee, whether on or off duty, would have access to any area in a train station (falling under Sydney Trains), including the ability to take safe refuge in a Duty Manager's office. However, Mr Merrick was not familiar with Bankstown Station as it relates to Sydney Trains or TrainLink employees, was not aware whether a Sydney Train or TrainLink employee would be in a position to unlock any relevant doors to obtain such access for refuge purposes, and was not aware if any special arrangements needed to be in place to obtain such access for refuge purposes.<sup>75</sup>
- c) The SAFER model, being one of the policies Mr Merrick took into account in determining to dismiss the Applicant,<sup>76</sup> does not:
  - i. allow for a physical intervention by an employee for any reason (including to defend themselves);<sup>77</sup> or

- ii. consider or apply concepts or principles concerning self-defence and/or provocation.<sup>78</sup>
- d) Mr Merrick does not condone violence in any circumstances.<sup>79</sup> In other words, taking such a position at face value, the circumstances of a violent interaction are irrelevant. It is not clear to me how such a position is valid, fair, or practicable.
- e) Mr Merrick during cross-examination gave evidence that he did not rely upon any audio of the interaction (“The decision that I came to didn’t depend on audio at all”).<sup>80</sup> In re-examination, Mr Merrick’s evidence was that he did rely upon audio of the interaction.<sup>81</sup> Whilst the discrepancy in Mr Merrick’s evidence is clearly one of confusion,<sup>82</sup> the upshot of Mr Merrick’s evidence is that he relied upon audio of the interaction to conclude that the verbal interaction between the Applicant and the Offender was passive (or not aggressive): “It appeared to me like quite a passive conversation. So yes, that’s – that’s the reference I make around audio”.<sup>83</sup> I do not accept Mr Merrick’s evidence in this regard. In short, I do not accept this evidence of Mr Merrick in circumstances where the Applicant has given uncontested evidence that the Offender was being aggressive in his verbal engagement with the Applicant, the Station Footage contains no audio, the Snapchat Footage is incomplete, and Mr Merrick has not relied upon any witness evidence of persons (such as the Duty Manager) to determine the nature or extent of any verbal aggression being engaged in by the Offender towards the Applicant.

**[63]** On 29 July 2022, the Applicant was on his way to work. He entered Bankstown Railway Station at 3:17pm, to catch a 3:22pm train (i.e. he had a five minute window to get from the station concourse to the train platform).

**[64]** Despite the incident itself having a sufficient connection to the Applicant’s work, he was not at work, but was going to work. Bankstown Railway Station is not his place of work. It is not a place at which the Applicant is a member of staff on shift, or a place that the Applicant has access to staff or non-public rooms or facilities. There is no suggestion on the evidence that an off duty employee of the Respondent is able to casually wander into (or otherwise access) staff facilities at any train station, or carries keys or passes (or alike) to access same.<sup>84</sup> The Applicant’s familiarity with Bankstown Station does not change this.<sup>85</sup>

**[65]** As he was entering Bankstown Railway Station on 29 July 2022, the Applicant apprehended being tripped from behind by a person unknown (and unidentified) to him.<sup>86</sup> Upon turning to attempt to clarify what had just occurred in respect of this trip, the Applicant was confronted by a male (the Offender) standing in close (face-to-face) proximity to his person (i.e. in breach of the 1.5 metre Safe Distance Rule, and close enough for the Applicant to see (or apprehend) saliva droplets, and sample the Offender’s foul breath).

**[66]** The Applicant initially invites the Offender to move on past him on two occasions, but the Offender remains defiant, and does not move on. It is apparent that the Offender seeks to have the Applicant move on, and follow him. It is equally apparent that the Applicant is not willing to:

- a) place himself in a position (with his back to the Offender whilst walking away) that might result in the Offender going out of his line of sight, or the Applicant being (without warning) struck in the back, or the back of the head; or
- b) enable the Offender to position himself in such a way that the Applicant's ability to defend himself (on zero or short notice) is compromised (e.g. by having to turn around to deal with an attack, as opposed to facing the attack (and attacker) front-on the moment that an attack commences).<sup>87</sup>

**[67]** The Applicant yet again steps away from the Offender, and towards the ticketing gates (i.e. subtly attempting to end the interaction), but the Applicant finds himself still in close proximity to the Offender who:

- a) will not move on; and
- b) seeks to keep the interaction going.

**[68]** At this juncture, it is appropriate to note that the Applicant, in attempting to transit to work on 29 July 2022 via Bankstown Railway Station (with only five minutes to catch his train), is suddenly and unexpectedly confronted by a male who is not known to him, presenting in an angry and agitated (and possibly confused or delusional) state, breaching the Safe Distance Rule, invading the Applicant's personal space (with saliva droplets and poor oral hygiene), refusing to move on or away despite being asked to do so, and swearing at and slandering the Applicant (with terms such as a "fucking cunt", "dickhead", and "terrorist") whilst at the same time asking the Applicant to "kill me, kill me, I want you to kill me". And all of this is occurring in the few minutes of the first point in time that the Applicant and the Offender make each other's acquaintance.

**[69]** The physical melee that ensues between the Applicant and the Offender commences (and arises) in the foregoing context. It is equally appropriate to appreciate (or accept) that the foregoing context also extends to encompass the Applicant's own subjective thoughts or concerns as to the situation he found himself in, based upon his perceptions of the interaction. In this regard, the Applicant highlights that he:

- a) does not know, and has never seen nor met the Offender (i.e. the Applicant did not know if the Offender had a violent criminal record, or was on bail for a violent offence, or holds violent tendencies arising from, for example, drug or alcohol intoxication/addiction/abuse, personality disorder, conspiracy theories, and/or mental illness).

- b) had not been involved in an interaction such as this before;
- c) felt threatened, provoked and alone;<sup>88</sup>
- d) considered himself to be in danger (as the Offender's voice and body language were indicating to the Applicant that the Offender was getting more and more angry and upset as the seconds ticked over);
- e) was anxious and concerned about catching COVID-19 (and bringing it home to his family);
- f) was concerned that the Offender may be carrying a weapon (or sharp object);<sup>89</sup> and
- g) was stressed about being called a terrorist by the Offender (noting that the Applicant is Muslim).<sup>90</sup>

**[70]** Despite the Duty Manager being present and witnessing the initial interaction between the Applicant and the Offender, at no point does he seek to intervene or say anything. When the interaction escalates and turns physical, rather than remaining present, or offering the Applicant the opportunity to take refuge in the Duty Manager's office, the Duty Manager retreats (vanishes) and shuts the door to his office. This leaves the Applicant all alone to deal with the Offender, and without any secure place to escape to.

**[71]** Turning back to the reasoning of Mr Merrick (and the DRP), I make the following points:

- a) The fact that the interaction between the Applicant and the Offender was witnessed by members of the public, and a video clip (edited and reproduced) was uploaded onto social media, does not change the circumstances or the context of the interaction itself. In other words, the issue for determination is whether the Applicant was acting in self-defence, not whether a video of the interaction found its way onto social media. This is especially so in circumstances where the Snapchat Footage does not accurately portray the totality of the events that occurred. If the Respondent is so concerned about its public image, it has the ability to issue a media statement advising that the Snapchat Footage is inaccurate to the extent that it purports to represent the totality of the CCTV video footage, and perhaps say something about its employees being subjected to aggression and bad conduct from members of the public.
- b) It is not clear to me how the Applicant's concerns about catching COVID-19 from the Offender are inconsistent with the Applicant's conduct in his interaction with the Offender, or ought be minimalised. Simply because the Applicant had to take certain actions to defend himself, does not undermine his (in my view genuine)

concerns about catching COVID-19 (or any other respiratory illness) from the Offender (who is unknown to him). As it turns out, only two days after the interaction, the Applicant tested positive to COVID-19, and was required to self-isolate.

- c) I do not accept that there were a number of instances where the Applicant could have deescalated the situation, and/or escaped to the Duty Manager's office. The CCTV video footage shows that the Applicant did attempt to diffuse or deescalate the situation by asking the Offender to move on, but the Offender would not move on. The CCTV video footage also shows that the Duty Manager retreated to his office and shut the door. Nowhere in the evidence is there a suggestion that there was a place (other than the Duty Manager's office) for the Applicant to escape to.<sup>91</sup> The only point in the CCTV video footage where it is clear that the Applicant had a chance to 'escape' is after the physical altercation with the Offender, where the Applicant can be seen standing in close proximity to the ticketing gates. The fact that the Applicant did not proceed through the ticketing gates at that time, however, is wholly explained by the fact that the Applicant's sunglasses had been dropped on the ground and he needed to retrieve them (i.e. he did not want to lose a pair of \$350 sunglasses, and needed them to perform his shift).<sup>92</sup>
- d) When an employee is confronted by someone exhibiting anti-social behaviours or engaging in harassment or threats of violence, workplace training and "general instructions" will be of assistance. However, whether or not that training will achieve its desired outcomes will very much depend upon the circumstances, including the manner in which the offender decides to act or respond. In this case, the evidence does not disclose that the Applicant had a place to escape to, or take refuge, from the Offender. Despite the Duty Manager being well aware of the Applicant's predicament, he provided no assistance to him. In other words, the core aspects of the SAFER model simply did not apply. Further, there is no evidence before me from the Duty Manager, explaining:
- i. why the Duty Manager chose to retreat into the Duty Manager's office and close the door, thus closing off an available escape route or place for the Applicant to take refuge;
  - ii. why the Duty Manager did not provide, or offer the Applicant, any assistance (verbally or physically), but left the Applicant totally alone on the Station concourse to deal with the Offender; and
  - iii. what actions the Duty Manager took to call for assistance for the Applicant, and/or why such assistance was not forthcoming.
- e) The training that was provided to the Applicant prior to his interaction with the Offender on 29 July 2022 (in terms of dealing with violent or anti-social behaviours



by members of the public) can hardly be said to be extensive or comprehensive. The evidence discloses that apart from a training session in April 2017 (dealing with challenging situations), the Applicant attend a General Instruction session (before work one day) in September 2021.<sup>93</sup>

- f) The Respondent's claim that the Applicant was the aggressor, who initiated all of the physical assaults against the Offender, ignores all of the circumstances (and the context) in which the interaction between the Applicant and the Offender occurred. It is equally relevant to note that:
- i. whilst the Applicant did initially kick at the Offender, this kick is explained by the Applicant as one that he intended to feign (i.e. a mistake);<sup>94</sup>
  - ii. when the Applicant slapped the Offender across the side of the head, grappled with his head, and pushed him back to the ground, the Applicant's evidence is that he was concerned that the Offender was attempting to get up to engage in a further physical interaction, or might spit at, or bite, him;
  - iii. the video footage shows that whilst the Applicant is grappling with the Offender's head, the Offender has his arms around the Applicant's legs. Short of letting himself be tackled around the legs, it is not clear to me exactly what the Applicant should have done differently (I say this even with the benefit of hindsight, which the Applicant did not have at the time);
  - iv. during the physical interaction between the Applicant and the Offender, I do not observe the Offender showing any signs that he is giving up, or that he considers the interaction with the Applicant to be at an end. Again, it is worth highlighting at this point that the Applicant:
    - is still dealing with the Offender on his own, and attempting neutralise the physical threat posed by the Offender and/or place himself in a position that he considers safe to escape from the Offender; and
    - does not have a place at which he can take refuge (with the Duty Manager's office door remaining shut).
- g) The test to be applied in a case of self-defence is a general test of reasonableness (or reasonable proportionality) in the circumstances as perceived by the accused (in this case the Applicant). There was no supervening event in the interaction between the Applicant and the Offender (like the production of a knife or a gun, or a knockout punch), such that a 'blow by blow' analysis is warranted to the extent that one particular blow (or action), in my view, can be said to turn the totality of the interaction from reasonable to unreasonable. This is not a case in which each blow of the melee or fracas ought be treated as a separate assault, and thereafter justified

individually, such that one blow might be justified, but another or other blows are determinative of the outcome of the case adversely to the Applicant. As the case law identifies, who strikes first is not determinative, whether a retreat takes place is not determinative, and determining whether or not self-defence is excluded as an answer to an assault does not require the imposition of measurements of mathematical exactitude, or detached reflection, or the identification of exacting balances.

[72] In its submissions, the Respondent says that none of the words said by the Offender to the Applicant during their initial interaction can be said to constitute a threat to the Applicant's person.<sup>95</sup> In other words, the words exchange during this initial interaction were not threatening such that the Applicant was justified in kicking the Offender, noting that this kick was the catalyst for the further physical interaction between the pair.<sup>96</sup> I do not accept this submission. It seeks to isolate the words used from all of the circumstances confronting the Applicant at the time he is initially confronted by the Offender (i.e. the tension (evident from the Station Footage) between the Applicant and the Offender arising from the Applicant being tripped, and the Offender standing in close proximity to the Applicant (in breach of the Safe Distance Rule), and refusing to move on despite being asked to do so). Justification, in terms of being threatened, or acting in self-defence, does not come down to whether the actual words used were or were not threatening. Indeed, a person can be threatened absent the use of threatening words, or provocative language.<sup>97</sup>

[73] On the evidence before me, and having regard to the submissions of the parties, I find that:

- a) the Applicant was entitled (as a matter of law) to defend himself from the Offender on 29 July 2022;
- b) the Respondent has failed to satisfy me on the evidence, on the balance of probabilities, that the actions of the Applicant (in his interaction with the Offender) were not undertaken in self-defence, in that the Respondent has failed to exclude the reasonable possibility that:
  - i. the Applicant believed (at the time) his conduct was necessary in order to defend himself from the Offender; and
  - ii. the actions of the Applicant were a reasonable response by the Applicant in the circumstances as he perceived them to be (at the time).
- c) the actions of the Applicant in respect of his interaction with the Offender on 29 July 2022 were:
  - i. believed by the Applicant to be necessary in the circumstances confronting him at the time; and

- ii. a reasonable response in the circumstances as the Applicant perceived such circumstances to be.

[74] Having made the foregoing findings, I equally find that there was no valid reason for the dismissal of the Applicant by the Respondent, in that the Respondent's reasons for dismissal (as set out at paragraph [59] of this decision) are not sound, defensible or well founded. In this regard, the Respondent's reasons:

- a) rely upon a blanket rule that violence is never to be tolerated;<sup>98</sup>
- b) do not properly take into account all of the circumstances, including that the Applicant was (or may have been) acting in self-defence; and
- c) wrongly conclude that the Applicant:
  - i. acted inappropriately when he sought to lawfully defend himself from the Offender; and
  - ii. breached the Transport Code of Conduct (in circumstances where the Applicant was entitled to lawfully defend himself from the Offender, and did no more than he was lawfully entitled to do in protecting himself).

[75] The absence of a valid reason in this case, leans strongly towards a finding that the Applicant's dismissal was harsh, unjust and unreasonable.

**s.387(b) - Whether the Applicant was notified of the valid reason; and s.387(c) - Whether the Applicant was given an opportunity to respond to any reason related to her capacity or conduct**

[76] Proper consideration of s.387(b) of the Act requires a finding to be made as to whether the Applicant "was notified of that reason" and given an opportunity to respond to same.

[77] Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a) of the Act.<sup>99</sup> Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment, and in explicit, plain and clear terms.<sup>100</sup>

[78] In order to be given an opportunity to respond for the purposes of s.387(c), the employee must be made aware of allegations concerning the employee's conduct so as to enable them to respond to the allegations and must be given an opportunity to defend themselves. As Justice Moore has stated in *Wadey v YMCA Canberra*<sup>101</sup>:

"the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer

may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That... does not constitute an opportunity to defend.”<sup>102</sup>

[79] The Applicant was notified of the asserted reason/s for his dismissal in plain and clear terms prior to his dismissal, and given an opportunity to respond to same. I consider the criterion under ss.387(b) and (c) of the Act to be neutral considerations in determining whether the Applicant’s dismissal was harsh, unjust or unreasonable.

**s.387(d) — Whether there was any unreasonable refusal by the Respondent to allow the Applicant to have a support person present to assist at any discussions relating to dismissal**

[80] As noted by a Full Bench of this Commission, “[t]he subsection is not concerned with whether or not the employee was informed that he or she could have a support person present”.<sup>103</sup>

[81] The Applicant provided his responses to the allegations made against him in writing. I therefore consider this criterion to be a neutral consideration in determining whether the Applicant’s dismissal was harsh, unjust or unreasonable.

**s.387(e) — Whether the Applicant was warned about that unsatisfactory performance before her dismissal**

[82] A warning for the purposes of s.387(e) of the Act must clearly identify:

- the areas of deficiency in the employee’s performance;
- the assistance or training that might be provided;
- the standards required; and
- a reasonable timeframe within which the employee is required to meet such standards.<sup>104</sup>

[83] In addition, the warning must “make it clear that the employee’s employment is at risk unless the performance issue identified is addressed.”<sup>105</sup> In order to constitute a warning for the purposes of s.387(e), it is not sufficient for the employer merely to exhort their employee to improve their performance.<sup>106</sup>

[84] As the Applicant’s dismissal did not relate to unsatisfactory performance (i.e. it concerned his ‘conduct’ on 29 July 2022), this factor is not relevant to the present circumstances.

**The degree to which the size of the Respondent’s enterprise would be likely to impact on the procedures followed in effecting the dismissal (s.387(f)); and 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))**

[85] The Respondent employs dedicated human resources management specialists.

[86] There is no evidence to suggest that the (large) size of the Respondent's enterprise likely impacted upon the procedures it followed in effecting the Applicant's dismissal.

[87] Neither party put forward substantive or relevant submissions that go directly to either of the criterion under ss.387(f) and (g) of the Act. I treat both of these criterion as neutral considerations in this case.

**s.387(h) - Any other matters that the Commission considers relevant**

[88] The evidence before me establishes that:

- a) the Applicant is a long serving employee of the Respondent, with an unblemished work history and disciplinary record over a period of 20 years;
- b) the Applicant's suspension between August 2022 and March 2023 has resulted in a significant loss of income (arising from him his inability to work the overtime he normally would have worked if he had not been suspended);<sup>107</sup>
- c) the Applicant's dismissal (and the resulting loss of income) has had significant economic and financial consequences for the Applicant and his family (including his wife, and their three dependent children), noting that the Applicant is the sole breadwinner in his family;<sup>108</sup>
- d) the Applicant's suspension and subsequent dismissal has had a significant impact upon the Applicant's social interactions;<sup>109</sup>
- e) having worked for the Respondent as a Train Driver for the past 6 years, his ability to retrain and/or obtain other suitable or comparable employment has been limited;<sup>110</sup>
- f) the ordeal that the Applicant has had to endure, from the date of the incident on 29 July 2022, to the date of this decision, has been extremely lengthy (noting that the Respondent took nearly seven months to investigate and ultimately dismiss the Applicant). In other words, the Applicant has basically spent a year of his life having to deal with the fallout of his rightful attempts to defend himself from an unknown member of the public on his way to work. As the Applicant states:

“I did not intend to become entangled with a person from the public on this day, or ever, and I wish it had not happened. I have paid a price for the incident with stress and anxiety, COVID, and the following investigation. This has impacted on my family and my health.”<sup>111</sup>

- g) The Applicant has expressed his deep sorrow and remorse for the incident, including for any negatives that have been brought to bear on the business of NSW Trains.<sup>112</sup>

[89] In my view, all of the foregoing matters weigh in favour of a finding that the Applicant’s dismissal by the Respondent was harsh, unjust and unreasonable.

[90] During cross-examination, the Respondent raised with the Applicant the fact that, in his email sent at 3:29am on 30 July 2022 (around 12 hours after the incident on 29 July 2022), he stated that he had not hit, hurt, kicked or punched the Offender. The Applicant’s evidence is that at the time he sent this email he had been involved in the incident, had then worked his shift, had thereafter attended upon the police station to make a statement, and was writing the email at 3:00am with the assistance of his son. He says that when he wrote the email he thought it to be correct, but had not seen the CCTV video footage, and his recollection of the incident was not completely clear in terms of exactly what had happened and when.<sup>113</sup> The Applicant readily conceded in cross-examination that the statements he made in his email of 30 July 2022 were incorrect. In my view, the Applicant’s case does not rise and fall based upon the erroneous statements he made in his 30 July 2022 email.

[91] The Applicant (or more specifically, the RTBU on his behalf) has raised that he considers a motive for the Offender engaging with him on 29 July 2022 relates to statements made by the Premier and other NSW Government Ministers labelling rail workers engaging in protected industrial action as “industrial terrorists”, “economic bastards” and “un-Australian”.<sup>114</sup> There is no evidence before me of any causal link or motivation in this regard by the Offender.

[92] Mr *Matthews*, on behalf of the Applicant, also pointed to the Applicant’s Muslim faith and middle eastern heritage as heightening the nature of the Offender’s provocation of the Applicant by calling him a “terrorist”. However, the Applicant in his evidence did not seek to overplay this issue.<sup>115</sup> Rather, the Applicant’s evidence highlighted that he is a person who tries hard not to offend, and tries even harder not to be offended. It is to be accepted that a person calling another person (who they do not know) a terrorist is offensive and provocative, irrespective of their religion or heritage. What motivated the Offender to make these comments to the Applicant is not apparent on the evidence, which is part of the difficulty that the Applicant faced at the time he was confronted by the Offender (see, for example, paragraph [69] of this decision).

### **Was the Applicant’s dismissal unfair?**

**[93]** I have made findings in relation to each of the criterion specified under s.387 of the Act (as relevant). I have also considered and given due weight to each of the criterion as a fundamental element in determining whether the Applicant's dismissal was harsh, unjust or unreasonable.<sup>116</sup>

**[94]** In relation to the criterion set out under s.387 of the Act, I have found that:

- (a) various criterion (under ss.387(a) and (h)) weigh in favour of a finding that the Applicant's dismissal was harsh, unjust and unreasonable; and
- (b) other relevant criterion are neutral considerations.

**[95]** In view of the findings and conclusions set out in this decision, I find that the Applicant's dismissal was harsh, unjust and unreasonable (i.e. unfair).

### **Remedy**

**[96]** Being satisfied that the Applicant:

- (a) has made a valid application for an order granting a remedy under s.394 of the Act;
- (b) was a person protected from unfair dismissal; and
- (c) was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the Act, order the reinstatement of the Applicant, or the payment of compensation to him.

**[97]** Under s.390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

- a. I am satisfied that his reinstatement is inappropriate; and
- b. I consider that an order for payment of compensation is appropriate in all the circumstances of the case.

**[98]** The Applicant seeks reinstatement, continuity of service, and restoration of lost pay. He makes the following submissions in support of such remedies:

“31. Reinstatement is the primary remedy for unfair dismissals under the FW Act. Pursuant to s 390(3)(a), there must be a finding that reinstatement is inappropriate before the Commission has power to make an order for compensation. The relevant question,

therefore, in determining whether to order reinstatement in relation to an unfair dismissal is whether reinstatement is appropriate in the particular case.

32. A salient factor in determining whether reinstatement is appropriate is whether there has been a loss of trust and confidence in the employment relationship. Whether there has been a loss of trust and confidence is an objective matter.

33. Reinstatement is manifestly appropriate in the current case. There are, in fact, no compelling factors which would make reinstatement impracticable. The following factors weigh in favour of this conclusion:

a. Mr Al-Buseri has been a loyal and long-serving employee of the Respondent, and had a *perfect* employment record over his 20 years' service;

b. Mr Al-Buseri's conduct was out-of-hours and had nothing to do with his duties as an Intercity Train Driver;

c. the Respondent is a substantial employer and is doubtless able to accommodate Mr Al-Buseri's reinstatement. Further the Respondent, and its related entities in which it is engaged in a common-enterprise, are the only employers of passenger train drivers in NSW35 – presenting a difficulty in finding alternative employment;

d. the Respondent bears some responsibility for the violent rhetoric used by Transport Officials to describe Mr Al-Buseri and others during their Industrial campaign that seemed to precipitate this confrontation;

e. there is no evidence to demonstrate that Mr Al-Buseri would ever engage in the conduct for which he was terminated ever again; and

f. Mr Al-Buseri was cooperative, consistent, honest, polite and forthright throughout the investigation process.

34. In the interests of achieving a *fair go all round*, the Commission should reinstate Mr Al-Buseri, with orders for continuity of employment and restoration of lost pay.”<sup>117</sup>

**[99]** The Respondent opposes the Applicant's reinstatement, and makes the following submissions:

“53. NSW TrainLink's primary submission is that the Commission will not find the dismissal of the Applicant to be unfair. In those circumstances, there is no basis to order any remedy (s 390(1)(b)).



54. Against that primary submission, NSW TrainLink submits that the Commission should not order the reinstatement of the Applicant. It submits that it is inappropriate as reinstatement is impracticable in all of the circumstances. NSW TrainLink's evidence is that it cannot be satisfied that the Applicant would not engage in similar conduct in the future. Given the amount of training the Applicant had and his extensive experience in customer service roles, that demonstrates a breakdown in trust it once had with, and in, the Applicant. NSW TrainLink's view was fortified by the Applicant's lack of understanding and implementation of appropriate deescalating techniques with him instead resorting to physical violence. Those concerns are sound and rationally held on the evidence before the Commission."<sup>118</sup>

**[100]** The only evidence led by the Respondent, as to the reinstatement of the Applicant being inappropriate and impracticable, comes from Mr Merrick, who states:

“33. I understand that in his application to the Fair Work Commission, Mr Al-Buseri has sought reinstatement into his role. I do not believe that it would be appropriate for Mr Al-Buseri to be re-instated into his position with NSW TrainLink because I have no way of knowing whether Mr Al-Buseri will revert to using physical violence if he was faced with a similar situation. I cannot expose our customers and staff to the risk that he will conduct himself in the same (or similar) way again.

34. Further, I believe that Mr Al-Buseri's submissions to the DRP and his Witness Statement demonstrate that he still considers that he is the victim of an attack or physical assault. In my view, and based on the CCTV video footage of the relevant incident, if there was a victim in that altercation, it was not Mr Al-Buseri and his lack of insight about the proportionality of his response to the situation re-affirms to me that the decision to terminate his employment was the appropriate disciplinary action in this case.”<sup>119</sup>

**[101]** The principles espoused by the Full Bench decision in *Nguyen v Vietnamese Community in Australia*<sup>120</sup> are relevant:

“[27] The following propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate may be distilled from the decided cases:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its

viability but in most cases the employment relationship is capable of withstanding some friction and doubts.

- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to reemploy an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

[28] Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party".<sup>121</sup>

[102] I observe that none of the managers or supervisors who had responsibility for the work of (or worked with) the Applicant were called to give evidence about their views on his reinstatement.<sup>122</sup> The analysis of Gray J in *AMIEU v G&K O'Connor Pty Ltd*<sup>123</sup> is thus germane to the present case:

“The law relating to the need for trust and confidence in an employment relationship was developed at a time when employment invariably involved a close personal relationship between employer and employee. The advent of corporate employers has diminished the importance of this element of the employment relationship. A corporation has no sensitivity. The crucial question must be what effect, if any, loss of trust by a manager in an employee is likely to have on the operation of the workplace concerned. It might be more significant, for instance, to know the name of Mr Voss's immediate supervisor and to know the attitude of that person towards him. If the immediate supervisor had no trust in Mr Voss, it might also be relevant to know whether it would be possible to place Mr Voss in another part of the workplace, under another supervisor, who did have such trust. It would also be relevant to know what effect any lack of trust by any manager or supervisor in a particular employee might have on the conduct of operations in the workplace. There is no evidence as to any of these matters”.<sup>124</sup>

**[103]** I am not satisfied that reinstatement is inappropriate in the circumstances of this case, for the following reasons:

- a) the Applicant is a long serving employee, with an unblemished employment record;
- b) I have found that there was no valid reason for the Applicant's dismissal;
- c) the interaction between the Applicant and the Offender on 29 July 2022 is appropriately classified as an extraordinary or one off incident;
- d) I have found that the Applicant was entitled to defend himself in his interaction with the Offender on 29 July 2022, notwithstanding the views of Mr Merrick that violence in the workplace is not to be tolerated under any circumstances, and notwithstanding that the Respondent's policies and procedures (including the Transport Code of Conduct) do not make mention of an employee's right to self-defense;
- e) the fact that the Applicant holds the view that it was appropriate to defend himself from the Offender on 29 July 2022 is a view he is entitled (rationally) to hold;<sup>125</sup>
- f) the fact that the Applicant holds the view that he would consider it appropriate to defend himself again if he was attacked by another person is a view he is entitled to hold, and is consistent with the law of self-defense;<sup>126</sup>
- g) the fact that the Applicant holds the view that he has been failed by management because they failed to provide appropriate safety and security measures to protect him from the Offender, and instead suspended him from duties and terminated his employment, is a view that the Applicant rationally holds.<sup>127</sup> It is not a view directed to any specific individual, let alone an individual that he works with. I do not accept that because the Applicant holds this view, it is something that weighs against his reinstatement (or makes his reinstatement inappropriate); and
- h) post the Applicant's dismissal, there is no evidence of any animosity between the Applicant and any individual in the Respondent's employ.

**[104]** In the circumstances, I find that there is no sound or rational basis for concluding that it is inappropriate to restore the employment relationship. To the contrary, I consider that reinstatement is manifestly appropriate and should be ordered. I am equally of the view that in ordering the Applicant's reinstatement, that orders for backpay and continuity of service should also be made.

**[105]** On the issue of backpay (or remuneration lost), I consider it appropriate to place the Applicant in a position that he would have likely been in had he not been dismissed.<sup>128</sup> The

order I will make is for backpay to be in the amount (or at the rate) that the Applicant would have received but for his dismissal, based upon his average weekly earnings (including overtime and/or penalty rates) in the six months prior to his suspension on 8 August 2022, less any income earned by the Applicant between 3 March 2022 and the date of his reinstatement.

### **Conclusion**

**[106]** In all the circumstances, my evaluative assessment is that the appropriate remedy in this matter is an order under s.391(1)(a) of the Act, reinstating the Applicant to the position in which he was employed immediately before his dismissal, namely as an Intercity Train Driver. I also consider it appropriate to make an order under s.391(2) of the Act as to continuity of employment, and an order under s.391(3) as to lost remuneration, being remuneration lost by the Applicant between the date of his dismissal and the date he is reinstated.

**[107]** Section 381(2) of the Act is a significant overarching object of Part 3-2 of the Act. It is expressed as follows:

#### **“381 Object of this Part**

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:

- (i) the needs of business (including small business); and
- (ii) the needs of employees; and

(b) to establish procedures for dealing with unfair dismissal that:

- (i) are quick, flexible and informal; and
- (ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

Note: The expression “fair go all round” was used by *Sheldon J* in *Re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.”

**[108]** In my judgment, the outcome in this case is consistent with the object of Part 3-2 of the Act of providing a ‘fair go all round’ to both the applicant and the employer.

**[109]** Separate Orders will be issued giving effect to this decision.



DEPUTY PRESIDENT

Mr *Peter Matthews*, Legal Officer, Rail, Tram & Bus Union, appeared for the Applicant.

Mr *Jamie Darams*, of Counsel, instructed by Ms *Katie Kossian*, Senior Associate, Maddocks lawyers, appeared with permission on behalf of the Respondent.

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<sup>1</sup> Exhibit A1.

<sup>2</sup> Exhibit A2.

<sup>3</sup> Exhibit A3.

<sup>4</sup> Exhibit R1.

<sup>5</sup> Exhibit R2.

<sup>6</sup> Exhibit R3.

<sup>7</sup> That is, prior to the incident on 29 July 2022 with an unknown and unidentified member of the public that led to his dismissal.

<sup>8</sup> As opposed to NSW Trains, the Applicant's employer.

<sup>9</sup> Exhibit A1, Applicant Statement, 16 May 2023, at [21] to [23], Court Book, p.56.

<sup>10</sup> I note that whilst the Applicant regularly travels or transits through Bankstown Railway Station (Transcript, PN110-PN111), he had never before seen the Offender there, or anywhere else (Court Book, p.73, at page point 0.3).

<sup>11</sup> Transcript, PN164.

<sup>12</sup> Exhibit R1, at [18], Annexure 'DM3' (Station Footage).

<sup>13</sup> Exhibit R1, at [19], Annexure 'DM4' (Snapchat Footage).

<sup>14</sup> This evidence of the Applicant is not contested. Mr Merrick's evidence is that he does not know what was said during the Applicant's initial interactions with the Offender, and the Respondent has not relied upon any evidence from a person who was present (e.g. the Station Duty Manager).

<sup>15</sup> Exhibit R1, at [19], Annexure 'DM4' (Snapchat Footage).

<sup>16</sup> This evidence of the Applicant is not contested. Mr Merrick's evidence is that he does not know what was said during the Applicant's initial interactions with the Offender, and the Respondent has not relied upon any evidence from a person who was present (i.e. the Station Duty Manager).

<sup>17</sup> Exhibit R1, at [19], Annexure 'DM4' (Snapchat Footage).

<sup>18</sup> This evidence of the Applicant is not contested. Mr Merrick's evidence is that he does not know what was said during the Applicant's initial interactions with the Offender, and the Respondent has not relied upon any evidence from a person who was present (i.e. the Station Duty Manager).

<sup>19</sup> Exhibit A1, at [43] to [54], Court Book, pp.58-59.

<sup>20</sup> Exhibit R2, Letter from Mr Wayne Powell, Senior Investigations Officer to the Applicant, dated 7 September 2022.

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- <sup>21</sup> Exhibit A1, at [40], Annexure “C”, Court Book, p.58, and pp.72-76.
- <sup>22</sup> Exhibit R1, Merrick Statement, 30 May 2023, Annexure ‘DM5’, Court Book pp.144-147. I note that this letter states that the Applicant’s response was considered, however, there are no details (in the Respondent’s correspondence before me) as to the basis upon which the issues raised by the Applicant in his response were fully considered or otherwise fully evaluated by the Respondent.
- <sup>23</sup> Exhibit R1, Merrick Statement, 30 May 2023, Annexure ‘DM6’, Court Book pp.148-151.
- <sup>24</sup> Exhibit R1, Merrick Statement, 30 May 2023, Annexure ‘DM7’, Court Book pp.152-154. I note that this letter states that the Applicant’s response was considered, however, there are no details (in the Respondent’s correspondence before me) as to the basis upon which the issues raised by the Applicant in his response were fully considered or otherwise fully evaluated by the Respondent.
- <sup>25</sup> Exhibit R1, Merrick Statement, 30 May 2023, Annexure ‘DM8’, Court Book pp.155-157.
- <sup>26</sup> Exhibit R1, Merrick Statement, 30 May 2023, Annexure ‘DM9’, Court Book pp.161-162. I note that this letter states that the Applicant’s response was considered, however, there are no details (in the Respondent’s correspondence before me) as to the basis upon which the issues raised by the Applicant in his response were fully considered or otherwise fully evaluated by the Respondent.
- <sup>27</sup> [1998] AIRC 1592.
- <sup>28</sup> *R v Burstow; R v Ireland* [1998] 1 AC 147.
- <sup>29</sup> Exhibit A1, Annexures “B” and “C”, Court Book, pp. 66-76.
- <sup>30</sup> Form F2 Unfair Dismissal Application, Item 3.2.
- <sup>31</sup> See *Newton v Toll Transport Pty Ltd* [2021] FWCFCB 3457; , at [171]-[176] (and the authorities cited therein).
- <sup>32</sup> *Palmer v R* [1971] AC 814 (approved in *R v McInnes* 55 Cr App R 551).
- <sup>33</sup> *Ibid.*
- <sup>34</sup> See *Crimes Amendment (Self-Defence) Act 2001 (NSW)*.
- <sup>35</sup> *R v Deana* 2 Cr App R 75.
- <sup>36</sup> *Ibid.*
- <sup>37</sup> *R v Bird* 81 Cr App R 110; *R v Howe* [1958] HCA 39; (1958) 100 CLR 448.
- <sup>38</sup> Found at: <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/>
- <sup>39</sup> *Ibid.*, at [6-450] to [6-455] (found at: <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/self-defence.html>)
- <sup>40</sup> [2019] NSWSC 1191.
- <sup>41</sup> *Ibid.*, at [3]-[5].
- <sup>42</sup> *Brown v United States* (1920) 256 US 335, at 343.
- <sup>43</sup> *Sikes v Commonwealth* (1947) 304 Ky. 429; 200 SW 2d 956 (<https://casetext.com/case/sikes-v-commonwealth>).
- <sup>44</sup> *McCelland v Symons* [1951] VLR 157, at 171-172.
- <sup>45</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 361-362 (per Dixon J); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, at 170-171 (per Mason CJ, Brennan, Deane and Gaudron JJ). See also *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691, at 700-702, per Starke J; *Hocking v Bell* (1944) 44 SR (NSW) 468, at 475, per Davidson J. See also, *Exchange Hotel Ltd v Murphy* [1947] SASR 112; *Teaciuc v Broken Hill Pty Co Ltd* [1962] NSW 830; *Rejfeč v McElroy* (1965) 112 CLR 517; *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125.
- <sup>46</sup> *Ibid.*
- <sup>47</sup> *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691, at 700-702, per Starke J.
- <sup>48</sup> [2013] FWC 7908, especially at [7].
- <sup>49</sup> (1964) 38 ALJR 293.
- <sup>50</sup> *Ibid.*, at 301.
- <sup>51</sup> *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, at 412; *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201, at 204.
- <sup>52</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 361-362 (per Dixon J); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, at 170-171 (per Mason CJ, Brennan, Deane and Gaudron JJ).
- <sup>53</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, at 170-171 (per Mason CJ, Brennan, Deane and Gaudron JJ).

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- <sup>54</sup> *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333; (2000) IR 371, at 373.
- <sup>55</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, at 685.
- <sup>56</sup> *Edwards v Justice Giudice* (1999) 94 FCR 561; (1999) 169 ALR 89; [1999] FCA 1836, at [7]; *Gelagotis v Esso Australia Pty Ltd* [\[2018\] FWCFCB 6092](#), at [117]; *Titan Plant Hire Pty Ltd v Van Malsen* [\[2016\] FWCFCB 5520](#), 263 IR 1, at [28].
- <sup>57</sup> *King v Freshmore (Vic) Pty Ltd* [2000] AIRC 1019, Print S4213, at [23] to [24].
- <sup>58</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Evidence Act 1995* (Cth), s.140.
- <sup>59</sup> See *Newton v Toll Transport Pty Ltd* [\[2021\] FWCFCB 3457](#), at [171]-[176] (and the authorities cited therein).
- <sup>60</sup> [1998] FCA 865; 84 FCR 483.
- <sup>61</sup> *Ibid*, at 491-492.
- <sup>62</sup> Exhibit R1, Annexure ‘DM5’, Court Book, pp. 144-146.
- <sup>63</sup> *Ibid*, at [13]-[16], Court Book, pp.112-113.
- <sup>64</sup> *Ibid*.
- <sup>65</sup> *Ibid*.
- <sup>66</sup> *Ibid*, Annexure “DM2’, Court Book, pp.138-139.
- <sup>67</sup> *Ibid*, Annexure “DM2’, Court Book, pp.140-143.
- <sup>68</sup> *Ibid*, at [9], and [23].
- <sup>69</sup> Transcript, PN493; Exhibit R1, at [25], Court Book, p.114.
- <sup>70</sup> Exhibit R1, at [19]-[20].
- <sup>71</sup> The Applicant’s reference to the SAFER model in his responses arises because the SAFER model was referred to in the Respondent’s letter of allegations dated 7 September 2022 (see Exhibit R2).
- <sup>72</sup> Exhibit R1, at [21]-[30]. Note Applicant’s Response dated 30 July 2022 (Exhibit A1, Annexure ‘B’, Court Book, p.67.
- <sup>73</sup> Transcript, PN525.
- <sup>74</sup> The only explanation provided by Mr Merrick as to a failure to call a witness concerns the Offender (Exhibit R1, at [32]).
- <sup>75</sup> Transcript, PN487-PN491.
- <sup>76</sup> *Ibid*, PN484.
- <sup>77</sup> *Ibid*, PN492 and PN495.
- <sup>78</sup> *Ibid*, PN494.
- <sup>79</sup> Exhibit R1, at [25]; Transcript, PN493.
- <sup>80</sup> Transcript, PN546.
- <sup>81</sup> *Ibid*, PN595-PN597.
- <sup>82</sup> Noting that the Letter of Allegations dated 7 September 2022 (Exhibit R2) refers to words used during the interaction at Item (m).
- <sup>83</sup> Transcript, PN598.
- <sup>84</sup> Albeit the Applicant regularly travels or transits through Bankstown Railway Station (Court Book, p.73, at page point 0.3).
- <sup>85</sup> Transcript, PN110-PN111.
- <sup>86</sup> *Ibid*, PN164.
- <sup>87</sup> *Ibid*, PN150.
- <sup>88</sup> *Ibid*, PN130-PN131, PN152 and PN175. I note that provocation is not a defense. Rather, it is to be considered as part of the overall factual matrix.
- <sup>89</sup> Transcript, PN150 and PN190.
- <sup>90</sup> *Ibid*, PN207.
- <sup>91</sup> *Ibid*, PN181.
- <sup>92</sup> *Ibid*, PN185-PN189.
- <sup>93</sup> Compare, Transcript, PN735 and PN748.
- <sup>94</sup> Transcript, PN140-PN143.
- <sup>95</sup> Transcript, PN681-PN685, PN690-PN692, and PN717.
- <sup>96</sup> *Ibid*.

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- <sup>97</sup> The Applicant's evidence is that he was called a "terrorist" during his initial interaction with the Offender: Transcript, PN94, PN141, and PN415. Compare Respondent's oral closing submissions: Transcript, PN681-PN690. See also, Transcript, PN757 and PN761.
- <sup>98</sup> Exhibit R1, at [25], Court Book, p.114; Transcript, PN493. Compare, Transcript, PN748.
- <sup>99</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFCB 6429, at [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFCB 533, at [55]; *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, at 151.
- <sup>100</sup> *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998). See also *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), at [41]; *Read v Gordon Square Child Care Centre Inc* [2013] FWCFCB 762 (Acton DP, Deegan C and Gregory C), at [46] to [49].
- <sup>101</sup> [1996] IRCA 568.
- <sup>102</sup> Ibid.
- <sup>103</sup> *Jurisic v ABB Australia Pty Ltd* [2014] FWCFCB 5835, at [84].
- <sup>104</sup> *McCarron v Commercial Facilities Management Pty Ltd t/a CFM Air Conditioning Pty Ltd* [2013] FWC 3034, at [32].
- <sup>105</sup> *Fastidia Pty Ltd v Goodwin*, Print S9280 (AIRCFCB, Ross VP, Williams SDP, Blair C, 21 August 2000), at [43] to [44].
- <sup>106</sup> Ibid.
- <sup>107</sup> Transcript, PN387-PN406.
- <sup>108</sup> Exhibit A1, at [69]-[87], Court Book pp.61-62. Compare, Transcript, PN750-PN755, and PN765.
- <sup>109</sup> Transcript, PN337.
- <sup>110</sup> Ibid, PN37-PN40, and PN388-PN406.
- <sup>111</sup> Exhibit A1, Annexure "C", Court Book, p.76.
- <sup>112</sup> Ibid. Transcript, PN435. (Compare cross-examination, Transcript, PN342, PN346-PN348, and Respondent's oral submissions, PN727-PN734. See also, Transcript, PN764).
- <sup>113</sup> Transcript, PN43-PN96.
- <sup>114</sup> See, for example, Exhibit A1, Annexure "L", Court Book, pp.97-98.
- <sup>115</sup> Transcript, PN320.
- <sup>116</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, at [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), at [92]; *Edwards v Justice Giudice* [1999] FCA 1836, at [6] to [7].
- <sup>117</sup> Applicant's Submissions, 16 May 2023, at [31] to [34], Court Book, pp.52-53; See also Transcript, PN613-PN675.
- <sup>118</sup> Respondent's Submissions, 30 May 2023, at [53] to [44], Court Book, pp.108-109; See also Transcript, PN677-PN755.
- <sup>119</sup> Exhibit R1, Merrick Statement, 30 May 2023, at [33] and [34], Court Book p.117.
- <sup>120</sup> [2014] FWCFCB 7198.
- <sup>121</sup> Ibid, at [27] to [28].
- <sup>122</sup> Noting that Mr Merrick does not work with the Applicant, and does not suggest that he has otherwise conferred with anyone the Applicant worked with about the Applicant's reinstatement (Exhibit R1, Merrick Statement, 30 May 2023, at [4] to [6], and [11] to [12], Court Book pp.110-112). See also, Transcript, PN766-PN768.
- <sup>123</sup> [2000] FCA 627.
- <sup>124</sup> Ibid, at [42].
- <sup>125</sup> Transcript, PN191-PN197, PN205 and PN349-PN350.
- <sup>126</sup> Ibid.
- <sup>127</sup> Transcript, PN328-PN334.
- <sup>128</sup> See s.391(4) of the *Fair Work Act 2009*.