



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Mrs Mary Philippe, Mr Joel Lewin & Mr Benjamin Comer**

v

**Rentokil Initial Pty Ltd**

(U2023/2833, U2023/2868 & U2023/2870)

DEPUTY PRESIDENT ROBERTS

SYDNEY, 15 AUGUST 2023

*Application for relief from unfair dismissal*

[1] On 4 April 2023, Mary Phillippe (Ms. Philippe), Joel Lewin (Mr. Lewin) and Benjamin Comer (Mr. Comer) (jointly, the Applicants) each applied to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, having alleged that they had been unfairly dismissed from their employment with Rentokil Initial Pty Ltd (the Respondent). The Applicants each sought reinstatement and/or compensation.

[2] The three matters were originally listed for directions at the same time on 16 May 2023. After hearing from the parties, directions were made on that date that the applications be heard concurrently and that the evidence in each one of the three matters be taken as evidence in each of the other matters. The parties were given liberty to apply in relation to those directions after the filing of evidence and submissions. Neither party sought to disturb the original directions and the matter proceeded to hearing on 26 and 27 June 2023 on that basis.

## **When can the Commission order a remedy for unfair dismissal?**

[3] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[4] It was not in issue that the Applicants were protected from unfair dismissal within the meaning of s.390(a) at the time of being dismissed and I am satisfied that that is the case in each matter.

[5] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

[6] The Applicants were all dismissed on 15 March 2023 and lodged their application for relief on 4 April 2023 within the requisite time period.<sup>1</sup> The matters referred to at points (a), (c) and (d) above were not in issue. No jurisdictional issues arise with any of the applications. Accordingly, the question of whether any of the Applicants have been unfairly dismissed will depend on whether the Commission is satisfied that the dismissal was harsh, unjust or unreasonable within the meaning of s.385. Before turning to consider whether the Applicants have been unfairly dismissed, it is convenient to set out some of the factual background relevant to the proceedings.

### **Background**

[7] The Respondent is in the business of supplying, amongst other things, residential and commercial pest control and extermination services.<sup>2</sup> The Respondent's work consists of either contracted work or 'jobbing'/ad hoc work. The former refers to clients who require a number of visits over a period of time. The latter usually refers to one-off pest control treatments.

[8] The Respondent employed various sales personnel to service the interests of existing clients and seek out new contracts. The Applicants were, at the time of the termination of their employment, employed in the Pest, Commercial Sales Team (Sales Team) of the Respondent. They were each paid a fixed annual salary which was paid monthly. They each participated in a 'Commission Plan' under which a monthly commission could also be paid if monthly sales targets determined by the Respondent were met by the employee.

[9] Ms. Phillippe commenced her employment with the Respondent in 2019 as a sales consultant in the Sales Team.<sup>3</sup> Prior to that, she worked as a sales consultant with Pink Hygiene Solutions (Pink Hygiene) from approximately 2007. She remained with Pink Hygiene until 2009 or 2010.<sup>4</sup> Pink Hygiene ultimately merged with the Respondent. Since commencing her employment with the Respondent, Ms. Phillippe reported to three different sales managers. From 2022 until the date of her termination on 15 March 2023, Ms. Phillippe reported to Sales Manager, Mr John Franco (Mr. Franco).<sup>5</sup> Ms. Phillippe was absent from work on maternity leave during the period 5 April 2022 until 1 February 2023. Shortly after returning to work, Ms. Phillippe found out that she was pregnant again. She advised Mr Franco and a person from the Human Resources Department of the Respondent, Ms. Rajendra (Ms. Rajendra), of this on 28 February 2023.<sup>6</sup>

[10] Ms. Phillippe's duties as a sales consultant involved engaging with customers and potential customers about pest control and extermination services in a range of industries. She would meet with potential clients at the client's site and discuss the type of services they required. She would then provide a quotation and if the client was willing to proceed, she would have them sign a contract for the Respondent's services.<sup>7</sup> Ms. Phillippe's geographical area of responsibility was West Sydney.<sup>8</sup>

[11] Mr. Comer commenced employment with the Respondent in 2011. For the first nine years of his employment Mr. Comer worked in the Operations Team as a termite technician and local service manager. From November 2020 until August 2022, he was employed as a Residential Termite Sales Consultant in the Residential Sales Team. That team dealt with all termite inquiries, regardless of whether it was residential or commercial work.<sup>9</sup> From August 2022 until November 2022, he worked as a Sales Consultant in the Sales Team. In this role Mr. Comer engaged with customers in various industries on pest control and extermination services. In November 2022 Mr. Comer was asked by the Respondent to work in both the Commercial and Residential Sales Teams as a Sales Consultant. This meant he was responsible for both commercial sales and termite referrals and inquiries. He worked in that role until the date of his dismissal in 2023.<sup>10</sup> His geographic area of responsibility was Southwest Sydney.<sup>11</sup> Towards the end of 2021, Mr. Comer began reporting to Mr. Franco.<sup>12</sup>

[12] Mr. Lewin commenced employment with the Respondent in November 2018 as Customer Care Manager and later, in 2020, as a Key Account Manager in the Sales Team.<sup>13</sup> In the latter role, his responsibilities included managing and monitoring large accounts, checking to see if contracts needed to be renewed or various sites required servicing.<sup>14</sup> He also conducted reviews of client accounts. He did not make ‘cold calls’ or solicit potential clients other than during the last month of his employment when there was a change in policy. He did not have a specific geographic area of responsibility.<sup>15</sup> Over the period of his employment Mr. Lewin reported to different sales managers but from on or about October 2021 until the termination of his employment in 2023, he reported to Mr. Franco.

[13] Mr Franco is employed by the Respondent in the role of Sales Manager Pest Control. He has held that position since October 2021. In that role he is responsible for a team of Sales Consultants and Key Account Managers, which included, until the date of their termination, each of the Applicants. He is also responsible for his team adhering to and hitting monthly sales targets set by the Respondent.<sup>16</sup>

[14] Mr. Christian Driver (Mr. Driver) is the Respondent’s Head of Sales. He has held that position since May 2022. Mr. Driver was the person who issued the letters dated 15 March 2023 terminating the employment of each of the Applicants.

[15] Ms. Melissa Adams (Ms. Adams) is the Sales Coordinator for the Respondent and has held that role since December 2020.<sup>17</sup> Ms. Adams’ responsibilities include maintaining a ‘Master File’ which stores financial data relating to the sales activity of the Respondent.<sup>18</sup> This includes data relating to each salesperson employed by the Respondent, including the Applicants.

[16] The Applicants were all dismissed by the Respondent for their participation in the practice of sharing sales credits under the Commission Plan with other work colleagues. The Respondent maintains that the practice in question and the activities of the Applicants relating to that practice in February and March 2023 was misconduct and that the misconduct included a breach of company policy and the Respondent’s Code of Conduct (Code) on the part of the Applicants. The Applicants say there was no misconduct. They each denied an awareness of any policy prohibiting the practice and maintained that the transfer of sales credits was a longstanding practice that was well known to and condoned by management. They maintained that if there had been a change to policy underpinning the practice, they had not been made

aware of it. It is these competing contentions as to the Commission Plan and the transfer of sales credits which are central to the determination of the present applications.

**Was the dismissal harsh, unjust or unreasonable?**

[17] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[18] I am required to consider each of these matters, to the extent they are relevant to the factual circumstances before me.<sup>19</sup> I set out my consideration of each below.

***Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?***

[19] The Respondent maintains that the employment of each of the Applicants was terminated for a valid reason connected with each Applicant's individual and collective conduct in February 2023.<sup>20</sup> This conduct related to their involvement in the Commission Plan that the Respondent had established, and which applied to its sales staff. The Applicants dispute that the conduct in question constituted a valid reason.

**The Commission Plan**

[20] In the contracts of employment for Messrs Comer and Lewin there is a 'Terms of Employment Summary' which includes the following:

*Section 3 – Variable Remuneration Details – Further details will be provided to you in a separate document by your manager and do not form terms and conditions under these Terms of Employment.*

*Company Incentives, Commission and other Bonus Schemes – You may be eligible to participate in Incentive, Commission or other Bonus Schemes specific to your role and as amended from time to time.*

*Any payment is at the sole discretion of Rentokil.*<sup>21</sup>

[21] A similar provision appears at Clause 2.2 of the Terms of Employment agreement for Ms Philippe.<sup>22</sup>

[22] Notwithstanding these references to a commission scheme, no such document was put into evidence. However, some details of the Respondent's Commission Plan that applied to each of the Applicants were provided by various witnesses in the proceedings.

[23] Under the Commission Plan, employees were paid a monthly commission if they achieved certain sales targets for the relevant month. There was some variation in those targets as between employees. There was also variation in the amounts that were paid by way of commission when sales targets were met.<sup>23</sup> Where the commissions were payable, they were paid at the same time as the individual's fixed monthly remuneration.

[24] Sales were recorded in the Master File which was progressively updated as they were confirmed. Regular sales meetings were held to discuss monthly progress as against the sales targets. Ordinarily, sales would be credited to the person in whose geographic area the customer was located.

[25] Beyond the most basic aspects of the Commission Plan, much of its history and operation in practice, including the transfer of sales credits between participants, was in dispute.

### **Commission Plan and Transfer of Sales Credits**

[26] The Applicants contended that there was an accepted practice and culture of transferring sales. Mr. Lewin's evidence was that where a colleague had done a substantial amount of work on a sale or had provided assistance, then there would be a transferring of credit for sales assigned to one person but worked on by another, through adjustment of the Master File.<sup>24</sup> He said that any transfer of credit for sales had to go through the Sales Coordinator, Ms. Adams. He said the details in the Master File were accessible by everyone, but only Ms. Adams and a limited number of management personnel had the authority to 'move' the sale from one person to another.<sup>25</sup> Mr. Lewin said transfer of sales credits was discussed openly in office meetings, in internal chat fora and in emails. He said he learnt about how to transfer sales credits from two previous managers. He said they had asked him to hold off on sales and transfer them to the following month because 'the team' had already achieved the monthly sales target. Mr. Lewin said Mr Franco engaged in the practice of moving sales from one month to the following month, in this case December 2021 to January 2022, to ensure the team met its KPI in the latter month. He said he had confirmed this approach by email with Mr. Franco and it was approved. Mr. Lewin said this practice was referred to as 'sand bagging.' Mr. Lewin said that any

commissions due on sales were viewed and approved by Mr. Franco during monthly meetings before they were released.<sup>26</sup>

[27] Mr. Comer gave evidence about the practices within the Respondent during his period in the Operations Team. He said there was a different bonus structure but a strong team culture and that various managers within that Team would discuss transferring customers from one month to another month to meet servicing KPIs. He also gave evidence about the practices within the Sales Team. He said at weekly Sales Team meetings, each person gave an indication as to whether they would be able to meet their monthly KPI. He said that even if one person was not going to meet their KPI it was still possible to ‘meet team KPIs’ if one or more members had exceeded their KPI for the month. He said it was a ‘team effort’ to make sure no-one fell behind making budget. He said transferring of credit was openly discussed and was not done in a secretive fashion. He said transfers would occur to ‘meet team KPIs’ or where a colleague had done work to secure a sale or had provided other assistance. He said he had heard Mr. Franco instruct colleagues to ‘hold off’ on sales for one month and move them to the succeeding month because it was no longer possible to meet sales targets for the first month. Mr. Comer said he was not aware of any policy of the Respondent that prevented the practice of transferring credits and did not recall any training about the matter. He said the practice was ‘done routinely in all parts of the business.’<sup>27</sup>

[28] Ms. Philippe’s evidence was that as well as her individual sales target, the Sales Team’s monthly performance was also assessed by reference to KPIs. She said the Team’s KPI was the sum of the individual KPIs within the team. She said it was ‘widespread company practice for team members to help each other out to meet individual and team KPIs.’ She said if one team member helped another with a sale, they would transfer credit for that sale or another future sale, to them. She said that she had shared sales and had sales shared with her both during her initial employment with Pink Hygiene and after her return to the Respondent in 2019. She said she was unaware of any policy of the Respondent dealing with the issue, was not provided with copies of policies and never provided with training in relation to policies.

[29] Two former work colleagues gave evidence supporting the Applicants. Mr. Paul Burke (Mr. Burke) had worked with the Respondent since 2014, initially as a Senior Termite Technician and from 2016 as a Sales Consultant in the Pest, Residential Team. He resigned in early 2023 due to a workplace injury. Mr. Burke was involved in commercial sales on rare occasions where a commercial facility had a termite problem. Mr. Burke said that on numerous occasions he had asked Ms. Adams to change his Master File details including because of the omission of sales or to transfer sales credits between different months. He said when this occurred, he was not asked by Ms. Adams for supervisor approval. The changes were simply made. He said that although the practice of swapping credits did not occur in Residential Sales, it was routinely and openly discussed in Commercial Sales and was ‘an entrenched part of Rentokil culture’. He said he had never heard a manager say that transferring credits was a breach of company policy and was not aware of anyone being warned or terminated for engaging in the practice until the Applicants’ dismissal.<sup>28</sup>

[30] Mr. Albert Tin commenced employment with the Respondent in March 2017, initially in the planning and residential department and later in the Sales Team. He was dismissed by the Respondent on 15 March 2023 as a result of an allegation as to the transfer of a sales credit with Ms. Philippe. He did not challenge his dismissal. He said it was ‘common practice’ during

his time with the Respondent to have credit for sales transferred from one person to another to meet individual and team sales targets and KPIs. He said Ms. Adams had never asked him for management approval for any transfer or share of a sales credit and that he understood Ms. Adams had authority to transfer sales between individuals or time periods and that this was a 'longstanding practice'. He said he had never been warned that the practice was a breach of company policy and had never been reprimanded for requesting a change to the Master File. He said he was unaware of any employee of the Respondent being disciplined or dismissed for transferring sales credits.<sup>29</sup>

[31] Mr. Franco gave evidence that he was the person responsible for his team adhering to and hitting the monthly sales targets set by the Respondent for Commission Plan participants. He said that all commissions had to be approved by him on a monthly basis. He said all sales activity was recorded on the Master File maintained by Ms. Adams. He said Ms. Adams did not have the authority to change Master File data in any way or to approve changes to data. He said only himself and Mr. Driver were authorised to change sales data or credits, including any transfer. He said team members were not permitted to unilaterally 'swap' or share sales credits and that none of the Applicants had discussed a transfer or sharing of credits with him. According to Mr. Franco, requests for sharing or transferring of sales were rare, although he was aware of one such arrangement in February 2023 which did not involve any of the Applicants.<sup>30</sup>

[32] Mr. Driver's evidence in chief was that the Commission plan was an 'individual' plan. He said the Plan did not provide for and were not designed to promote group objectives or outcomes. He said sales were recorded in a semi-automatic way by reference to sales within an individual's territory. Like Mr. Franco, Mr. Driver said that plan participants did not have authority to approve the transfer or sharing of sales or sales credit. Only the relevant Sales Manager and himself had such authority. Ms. Adams did not have authority to do so. He could recall only one occasion where he had been approached by a Sales Manager about the sharing of a sale. This occurred in the fourth quarter of 2022.<sup>31</sup>

[33] Ms. Adams gave evidence as to the maintenance of the Master File. She said that the sales would either be credited semi-automatically on that file when a client within a particular area made an online booking or would occur on advice from a salesperson confirming that a particular client had agreed to the Respondent providing them with services. Once the details were confirmed, Ms. Adams would manually input the sale to the file and 'credit' it to the employee responsible. She said that she was aware that from time to time an employee would contact her about a transfer or credit of sales that had been agreed to by the employee's Sales Manager. She said although this was not a common occurrence, that on each occasion where she was contacted by an employee with a transfer request, she would ask the individual if they had the approval of their Sales Manager. She said she did not have the authority to make changes to an individual's sales ledger on the Master File.<sup>32</sup>

### **Events of February and March 2023**

[34] In late February 2023, each of the Applicants was involved in the transfer of sales credits under the Commission Plan. In or about the last week of February, Mr. Lewin called Mr Comer and asked him if he would transfer credits for the Supagas account from Mr. Comer to Mr. Lewin.<sup>33</sup> Mr. Comer agreed. Mr. Comer emailed Ms. Adams and asked her to transfer the sale.

[35] The second transfer involved the movement of sales credit from Ms. Philippe to Mr. Tin. According to Ms. Philippe, she offered to transfer three sales to Mr. Tin and he accepted. Mr. Tin then rang Ms. Adams to transfer the sale and Ms. Adams rang Ms. Philippe to confirm whether Ms. Philippe approved the transfer.<sup>34</sup>

[36] Both Mr. Lewin and Ms. Philippe offered explanations for the transfer of sales credits. According to Mr. Lewin, he had assisted Mr. Comer in the past with work on an ADF account which had involved numerous site attendances for Mr. Lewin because only Mr. Lewin had the necessary security pass for those sites and had to accompany Mr. Comer each time he attended. He said he went to these sites with Mr. Comer on average once a week and spent more than half a day at each site. He also assisted Mr. Comer with the Supagas account, although not by attending the site with him.<sup>35</sup> Mr. Lewin asked Mr. Comer for the transfer of the sale and the latter agreed.<sup>36</sup> In his statement Mr. Lewin said he asked Mr. Comer for help ‘as (he) was not going to meet (his) contracted sales target for the month.’<sup>37</sup>

[37] Ms. Philippe said that Mr. Tin had assisted her with the sales process and the use of the MyPA app after she returned from maternity leave. She said he also assisted her with sales work for three clients which took ‘more or less half a day.’<sup>38</sup> Because Mr Tin assisted with those sales Ms. Philippe agreed to transfer the sales, valued at \$2,708, to him.

[38] In both instances, Ms. Adams transferred the sales on the Master File.

[39] On 6 March 2023, Mr. Lewin met with Mr. Franco. There were differing accounts of the conversation. However, both accounts accepted that Mr. Franco raised the fact that Mr. Lewin had not met his monthly sales target and Mr. Lewin responded to the effect that he had and that he had done so because of the transfer of sales from Mr. Comer. On Mr. Lewin’s version of events Mr. Franco simply replied ‘OK’ and then congratulated him for meeting the monthly target.<sup>39</sup> On Mr Franco’s version, Mr Franco asked if Mr. Lewin had obtained approval for the transfer and Mr. Lewin replied that he had not.<sup>40</sup> Mr. Lewin denied that the issue of approval was raised.<sup>41</sup>

[40] According to Mr. Franco, following the meeting on the 6 March he spoke with Ms. Adams about the Comer/Lewin transfer and asked her how it had happened. He said Ms. Adams had responded that she had assumed Mr Franco had approved the transfer.

[41] On 9 March a meeting occurred, via video, between Mr. Lewin, Mr Franco and Mr. Driver. Accounts of the meeting differ. On Mr. Lewin’s version he was told at the meeting that a ‘SOX audit’ had found the transfer from Mr. Comer. He was told the transfer was a breach of the company’s Code of Conduct and policies. He said that he told Messrs Driver and Franco that it was company practice to move sales to meet targets and that Mr. Franco was well aware of the transfer because Mr Lewin had told him about it on 6 March. He said that he told Driver and Franco that he was owed the transfer because he had helped Mr Comer close the ADF deal. He accepted that he was asked whether others in the Team transferred sales credits and he replied that everyone did and gave some names.

[42] According to Mr. Franco, Mr. Driver asked Mr Lewin about anomalies with the Supagas account. Mr. Lewin replied that the sale had been shared between himself and Mr. Comer. He said Mr. Lewin acknowledged that he had asked Mr. Comer for a favour and said he (Mr.



Lewin) was ‘desperate for money as (he) had not hit commission for the last few months and had creditors knocking on (his) door.’ He said Mr Lewin asked whether he should resign. He said Mr. Lewin said ‘this had been going on for years’ and that a previous manager knew about it. He said Mr. Lewin was asked who else was involved and Mr Lewin responded with names of those who were not involved. He said Mr. Lewin accepted that he had not sought approval for the transfer, that he was sorry that he had done it and that he had done it out of desperation because of financial hardship.<sup>42</sup> He said Mr. Lewin was visibly upset during the meeting. Mr. Driver gave a similar account.<sup>43</sup>

[43] On the same day Messrs Driver and Franco met with Mr. Comer. Mr. Comer was asked about the sales transfer to Mr. Lewin. He explained that he had done it at Mr. Lewin’s request and in return for the help Mr. Lewin had given him on ADF sites. According to Mr. Franco<sup>44</sup> and Mr Driver,<sup>45</sup> Mr. Comer said it was not a common practice and could not remember if he had done it in the past.

[44] Arising out of these meetings on 9 March, both Mr. Lewin and Mr Comer were sent ‘investigation and show cause’ letters by Mr. Franco asking them to attend another meeting the next day at 2pm and 3pm respectively. The letters advised that their actions represented misconduct and deliberate falsification of sales records and were a breach of the company’s Code of Conduct and policies. The letters said that the company was considering the termination of their employment.

[45] Neither Mr Lewin nor Mr. Comer attended the meeting the following day. Email correspondence followed and they were each given until 4pm on 15 March to provide their responses.

[46] Meetings with Mr. Tin and Ms. Philippe followed on 13 March. Ms. Rajendra from the Respondent’s human resources department attended the meeting with Ms. Philippe. Messrs Driver and Franco gave identical accounts of both meetings in their statements. Mr. Tin did not take issue with their account of the meeting with him. Ms. Philippe’s account of her meeting included that she denied that she knew the transfer of sales was against company policy and said it had been historical behaviour. According to Ms. Philippe she said: *‘If I had known that this was against company policy, I would not have had the sales moved at all, but registered directly in his (Tin’s) name.’*

[47] After the meetings with Ms. Philippe and Mr. Tin on 13 March, ‘investigation and show cause’ letters were sent by Mr. Franco asking them to attend another meeting the next day at 1.30pm and 2.30pm respectively. As with the Lewin and Comer letters, these letters advised that their actions represented misconduct and deliberate falsification of sales records and were a breach of the company’s Code and policies. The letters said that the company was considering the termination of their employment.

[48] Ms Philippe and Mr. Tin did not attend a further meeting. Instead, they responded to the letters by email to Mr. Driver on 14 March 2023.

[49] On 15 March 2023, Mr. Driver issued letters of termination to each of the Applicants and Mr. Tin. The letters provided that each of them had ‘...taken a number of actions which constitute misconduct, including breach of company policy and the Code of Conduct’ and that

on the basis of that finding the company had elected to terminate their employment, effective immediately.<sup>46</sup>

### **The Code of Conduct**

[50] The Respondent's Code provides, inter alia, that:

*All sales and customer contracts must be appropriately documented and correctly recorded in the relevant contract administration system.*

*All colleagues are expected to:*

- *Ensure all our books, records, data and accounts are accurate and complete*
- *Never artificially inflate sales or profit figures, or move them between reporting periods*
- *Never make any false or misleading entry into any report, record or expense claim*
- *Record and document all transactions appropriately.*

[51] There was little detailed argument about which, if any, of the above terms of the Code were engaged by the transfer of sales credits scenario. The focus in cross-examination was on the obligation to ensure that records were accurate. The Respondent contended that the terms of the Code applied directly to the present situation involving the transfer of sales credits however there was no detailed submission as to which specific terms of the Code had been infringed. Nor was there any specificity in the letters of termination as to which part of the Code had been breached. In final submissions the Respondent's case was put on the basis that the Applicants engaged in 'unauthorised manipulation' of the Plan.<sup>47</sup> This suggests that the Respondent's broad contention that the Code had been breached includes some reliance on the obligation not to make 'misleading entries' into records and, at the very least, that there had been a failure by the Applicants to record and document all transactions appropriately. The focus of the inquiry for present purposes is on the reason of the employer for the terminations and in that respect, the reasons in the termination letters referred to the Code in its totality. The Applicants submitted that there was no misconduct or breach of policy and rather that the practice was condoned by the Respondent.

### **Evidence About Knowledge of Code and Training**

[52] There was some limited evidence as to how the Code was distributed and implemented within the Respondent's workforce. Mr Franco said that the Code was done through a "*safety, health and environment training [module] ... sent out to all employees*" which had "*three questions on the end, for employees to answer.*"<sup>48</sup> It took about 5 to 10 minutes to complete, depending on the module.<sup>49</sup> Ms Philippe accepted that she had received training on the Code<sup>50</sup> but had forgotten about it. Mr. Comer said he knew of the Code's existence but did not recall attending training about it.<sup>51</sup> He accepted that he was obliged not to make any false or misleading entry into any report, record or expense claim.<sup>52</sup> Mr. Lewin said he was aware of the Code but had not attended, or did not recall attending<sup>53</sup> training about it and that he did not believe the Respondent took the Code seriously.<sup>54</sup>

### **The Commission Plan and the 'Policy'**

[53] The Respondent's witnesses confirmed that the Commission Plan existed as a written document that was stored on the Respondent's share drives.<sup>55</sup> There was evidence that payment of a commission under the Plan was at the sole discretion of the Respondent and that the Plan did not form part of the terms and conditions of the Applicants' contracts of employment.<sup>56</sup> However, as is noted above, the Commission Plan itself was not put in evidence. Putting the Code to one side for the moment, the Respondent did not rely on any other written policy that dealt directly with the practice of transfer of sales amongst sales staff which explicitly prohibited the practice.

[54] The Respondent's evidence was that participants in the Commission Plan were not permitted to unilaterally swap or share sales credits and that only Mr. Franco and Mr. Driver were authorised to change sales data or credits, including any transfer.<sup>57</sup> The Applicants and other witnesses called by them denied knowledge of the existence of such a policy.<sup>58</sup> Mr. Comer gave evidence that he had never been asked to seek Mr. Franco's approval for a sale transfer.<sup>59</sup> Ms. Philippe said Mr. Franco's approval was not required.<sup>60</sup> Mr. Lewin said he was not aware of any company policy to the effect that management approval was required for the transfer of sales.<sup>61</sup> Mr. Tin said no manager had ever warned him that transferring sales credits was a breach of company policy.<sup>62</sup> Mr. Burke said that he was not aware that 'sharing sales, transferring credits and the like' was against the rules and did not recall any statement from management to that effect.<sup>63</sup>

[55] Mr. Franco accepted that he had never sent any written direction to staff that they were not to unilaterally swap or share sales credits.<sup>64</sup> He also agreed that he had never been involved in a meeting where he had told staff that the practice was prohibited and was not aware of anyone else having done so.<sup>65</sup> Mr. Driver ultimately accepted that none of the Applicants had been told 'in those exact words' that the transfer of sales was prohibited.<sup>66</sup> Ms. Adams said that 'the process (of managerial approval) was clear'<sup>67</sup> but accepted that no-one had ever given her a written copy of any such process.<sup>68</sup> On the basis of the evidence before me I conclude that, putting aside the Code, there was no written policy about transfer of sales credits which prohibited a transfer without managerial approval and no policy of that kind which had been conveyed verbally to the Applicants by any management representative of the Respondent.

### **The Practice of Transferring Sales**

[56] Each of the Applicants gave evidence that the transfer of sales was a well-known and longstanding practice within the Respondent's Sales Team. That evidence was supported by the accounts of Messrs Tin and Burke.<sup>69</sup> There was also evidence about the personal involvement of the Applicants (and Mr. Tin) in the practice. Ms. Philippe agreed that in her time under Mr. Franco's supervision, the only time she had been approached to transfer sales credit was the contact with Mr. Tin in February 2023.<sup>70</sup> Mr. Tin gave evidence in cross-examination that he had recently recalled a transfer that he was involved in in 2020 or 2021 where he asked Ms. Adams to transfer a sale and it was done without the approval of a manager.<sup>71</sup>

[57] Mr. Driver, the Respondent's most senior witness, agreed that this was a longstanding practice.<sup>72</sup> Mr. Franco said requests for *approval* for shared or transferred sales were rare although he did not say whether the practice itself was common or long-standing. In fact, he

accepted that as part of the investigation into transferring of credits that resulted in the terminations, he did not look into whether the practice had occurred in the past.<sup>73</sup>

**[58]** Ms. Adams gave evidence that ‘from time to time’ employees would contact her about a potential sales transfer that may have been agreed with their Sales Manager although she said this was not common. Her evidence in chief was that on each occasion she would ask the individual involved to confirm that they had obtained approval for the transfer from their sales manager.<sup>74</sup> In cross-examination she conceded that she transferred the sale from Mr Comer to Mr. Lewin without approval<sup>75</sup> and that on three other occasions she had transferred sales credits without managerial approval.<sup>76</sup> In relation to the Philippe-Tin transfer, Ms. Adams’ evidence was that she asked Ms. Philippe and Mr. Tin to confirm Mr. Franco’s approval of the transfer by email.<sup>77</sup> Ms. Philippe denied this in her evidence in chief but said she could not recall in cross-examination. Mr. Tin could not recall whether such a request had been made. Mr. Burke gave evidence that he had requested Ms. Adams to change the Master File in relation to his own records, including the transfer of sales credits from one month the another and that this was done without management approval.<sup>78</sup> Given Ms. Adams acceptance that she had previously approved transfers without management approval and her evidence that she had done so because she ‘assumed’ they had been pre-approved,<sup>79</sup> it seems unlikely that a single request was made in the Philippe-Tin case. There was no evidence of a similar request from Ms. Adams in the case of the Comer-Lewin transfer. Having observed the witnesses, I am not satisfied that a request was made. In any event the transfers were entered into the Master File by Ms. Adams without management approval.

**[59]** The preponderance of the evidence favours a conclusion that there was a longstanding practice of transferring sales credits within the Sales Team of the Respondent. In any event Mr. Driver expressly conceded the point. I find that to be the case. There is also sufficient evidence to allow me to conclude that other sales transfers had been effected through changes to the Master File without managerial approval prior to the transfers which led to the termination of the Applicants’ employment.

### **The Post-Sales Transfer Conduct**

**[60]** The Respondent argued that the evidence relating to the responses of the Applicants relating to the allegations of their misconduct supported a conclusion that each of the Applicants knew at the relevant time that they were engaging in misconduct.

**[61]** It was put that Mr. Comer was aware of the significance of his actions and was evasive in cross-examination as to the motivation behind the transfer to Mr. Lewin.<sup>80</sup> It was put that in the interview with Mr. Lewin on 9 March, he made a number of admissions, in particular that he acknowledged the need for Mr. Franco’s approval and accepted that the approval had not been obtained. Further, it was said that the evidence about Mr. Lewin asking whether he should resign at that meeting was consistent with an employee who was aware of his misconduct when confronted with the allegations and was an acknowledgment of wrongdoing on his part. In relation to Ms. Philippe, it was suggested that her evidence about the sharing of sales ‘within her circle’ disclosed an acknowledgement of a closed group engaged in conscious wrongdoing and that her evidence about not thinking about the relationship between a transfer and the payment of a commission was unreliable and should be rejected.

[62] In my view there is little doubt that the motivation for the request by Messrs Lewin and Tin for the transfer of sales credits was the desire of those individuals to reach the sales target and obtain a commission. Mr. Tin accepted as much in his evidence.<sup>81</sup> Mr. Lewin was less forthcoming. He denied that the commission was the motivation.<sup>82</sup> In fact at various points in cross-examination, Mr. Lewin denied that he had made the request of Mr. Comer. This contradicted his evidence in chief where he said he called Mr. Comer and asked for help and feared he was going to miss his sales targets for March.<sup>83</sup> To the extent Mr. Lewin's evidence was to deny that he requested the transfer from Mr. Comer and did so for some reason other than to qualify for his commission, I reject that evidence. I also regard it as implausible that Mr. Comer could not think that Mr. Lewin's request was related primarily to the receipt of a commission. When pushed in cross-examination Mr. Comer said that although he could not be '100%' certain that he had a 'suspicion'<sup>84</sup> that this was the case. However, I do not draw the conclusion from Mr. Comer's use of the word 'suspicion' here that he believed that the conduct in question was wrong or 'suspicious'.

[63] Ms. Philippe also gave evidence that she did not think that Mr. Tin's request<sup>85</sup> was necessarily related to the payment of a commission.<sup>86</sup> I also regard that much of Ms. Philippe's evidence as implausible. It is inconsistent with the other evidence about regular and open discussions about meeting sales targets. The idea that a transfer was solely to recognise the work that a colleague had done for a particular sale ignores the link between the sales credit and the payment of a commission. However, it does not necessarily follow that any reluctance to directly acknowledge the reason others had for the requests means that Ms. Philippe and Mr. Comer were somehow complicit in deliberate wrongdoing.

[64] I accept Mr. Lewin's evidence that he felt he was under a lot of pressure at the meeting on 9 March and that he felt he was being accused of fraudulent or criminal behaviour. I accept that this explains in large part his response when the allegations were put to him. Different people put in that situation can react very differently. The evidence of Messrs Driver and Franco was that Mr. Tin responded very differently to Mr. Lewin and was surprised to be told that what he had done was misconduct. I do not regard the evidence about Mr. Lewin's meeting on 9 March as indicating that he knew he had engaged in wrongdoing. The contemporaneous written responses by all of the Applicants supports a view that they were surprised by the allegations of misconduct given past practices within the Respondent.

### **Did the February Sales Transfers Constitute a Valid Reason Related to the Applicants' Conduct for the Termination the Employment of each of the Applicants?**

[65] The Applicants each maintained that there was no valid reason for the terminations. The Respondent submitted that there was a valid reason for the termination of the employment of the Applicants related to each of the Applicants' conduct. It is the employer's reason for the terminations that must be assessed.<sup>87</sup> The reason provided by the Respondent for each termination was 'misconduct, including breach of company policy and the Code of Conduct'.<sup>88</sup>

[66] The Full Bench of the Commission in *Sharp*<sup>89</sup> restated the proper approach to determining the issue of whether there is a valid reason for the purposes of s.387(a) as follows:

*[25] The correct approach to the assessment, pursuant to s.387(a) of the Act, as to whether there is a valid reason for an employee's dismissal relating to the employee's*

*capacity or conduct where the employee is alleged to have committed misconduct was that stated by the Full Bench (Lawler VP and Cribb C) B, C and D v Australian Postal Corporation T/A Australia Post [12](#) as follows:*

*“[34] In considering whether there was a valid reason for a dismissal under s.387(a), the reason(s) being considered are the employer’s reason(s). In a misconduct case, the Commission is concerned with whether the misconduct in fact occurred, not with whether the employer has reasonable grounds to believe that it occurred (eg. *Yew v ACI Glass Packaging Pty Ltd (1996) 71 IR 201*, *Sherman v Peabody Coal Ltd (1998) 88 IR 408*; *Australian Meat Holdings Pty Ltd v McLauchlan (1998) 84 IR 1*).*

*[35] Subject to that, as indicated by Northrop J in *Selvachandran*, “valid reason” is assessed from the perspective of the employer and by reference to the acts or omissions that constitute the alleged misconduct on which the employer relied, considered in isolation from the broader context in which they occurred. It is the reason of the employer, assessed from the perspective of the employer, that must be a “valid reason” where “valid” has its ordinary meaning of “sound, defensible or well founded”. As Northrop J noted, the requirement for a valid reason “should not impose a severe barrier to the right of an employer to dismiss an employee”.*

*[36] A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a “valid reason” for dismissal.”*

**[67]** For there to be a valid reason related to conduct, I must find that the conduct occurred and justified termination.<sup>90</sup> In this case there is no question that the conduct itself which is relied on by the Respondent to justify termination, occurred. That is, it is accepted that the Applicants participated in two transactions that involved a transfer of sales credits. The question then is whether that conduct provided a valid reason for the termination of employment.

**[68]** I accept that, as the Full Bench noted above, *a substantial and wilful breach of a policy will often, if not usually, constitute a “valid reason” for dismissal.*” The Respondent submitted that there was a deliberate attempt on the part of the Applicants to manipulate the Commission Plan in order for some of them to obtain a financial benefit that they were not otherwise entitled to. They maintained that the actions of the Applicants were a breach of the Code and the obligation to act with honesty and to ensure the accuracy of sales records. They said that it was open to each of the Applicants to seek and obtain managerial approval for the transfers and that each of them elected not to do so.

**[69]** Even though the Applicants were summarily dismissed, I note that in order to demonstrate that there was a valid reason for the purposes of s.387(a), it is not necessary to show there was misconduct sufficiently serious to justify summary dismissal.<sup>91</sup>

**[70]** In this case there was no documented policy that expressly prohibited the transfer of sales without management approval and nothing to indicate that such a policy had ever been conveyed verbally to the Applicants or other salespeople. The Commission Plan itself was not

in evidence. The Code makes no express reference to the practice or the requirement for approval. Nor was there any well-established practice of managerial approval. I do not believe that Ms. Adams would have approved the February transfers if there were such a practice.

[71] However, the Applicants were each aware that any sales transfer had potential implications for the payment of a commission. The transfers were not brought to the attention of anyone from the Respondent's management group by any of the Applicants before they were entered into the Master File. Even accepting that there had been a practice of sales transfers in the past, it would have been a straightforward matter for the Applicants to tell Mr. Franco what was happening. The Respondent had a direct and legitimate interest in the issue of eligibility for commission payments. They were entitled to expect that the Applicants would conduct themselves in a way that would ensure the records they contributed to would be maintained in a way that would allow the Respondent to properly assess the entitlement to the payment of a commission. A failure to do that was, in my view, at the very least, a failure to record and document transactions appropriately as described in the Code. In assessing whether there is a valid reason from the perspective of the employer by reference to the alleged misconduct and disregarding the broader factual context as I am required to do, I am satisfied that there was a valid reason for the termination of each of the Applicants related to their conduct given the particular facts of this case.

***Was the Applicant notified of the valid reason?***

[72] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).<sup>92</sup>

[73] 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,<sup>93</sup> and in explicit<sup>94</sup> and plain and clear terms.<sup>95</sup> In this case the Applicants contended that there was no valid reason. The Respondent's reason for termination was '*misconduct, including breach of company policy and the Code of Conduct*'. There was no issue that the Applicants were not notified of the reasons for their termination by correspondence dated 15 March. Having concluded that there was a valid reason the question here is whether the reason given was the reason that I have concluded existed under s.387(a). In my view the reasons given sufficiently describe the reason found to exist under s.387(a). The conduct was a breach of the Code at least insofar as it imposed an obligation to document and record transactions appropriately. I find that the Applicants were notified of the reason for their dismissal.

***Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?***

[74] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.<sup>96</sup>

[75] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.<sup>97</sup> Where the employee is aware

of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.<sup>98</sup>

[76] The Applicants submitted that the process was deficient and unfair in that it was rushed. In support of this contention the Applicants said:

- Mrs Philippe was only given 15 minutes to prepare for the first meeting.
- Mr Comer was not provided information for the first meeting.
- Mr Lewin was not provided information for the first meeting.

[77] The Applicants submitted that the Respondent denied the Applicants sufficient time to answer the allegations put before them, viz:

- Mr Driver testified that 24 hours was adequate for Mr Lewin to prepare and get a support person, and that he was guided to implement that process by the respondent's HR support person.
- Mr Driver opined that Mr Lewin was given "*plenty of time to come back ... and respond*" despite Mr Lewin suffering from high blood pressure of 149/98.
- Mrs Philippe and Mr Comer were likewise only given 24 hours to prepare.
- Mr Driver testified that despite Mrs Philippe being on sick leave and in a high-risk pregnancy, he did not see the need to put off the process.
- Mr Driver testified that he thought Mr Comer should still respond even if he was on sick leave. In an email he said he was aware that Mr Comer has "*submitted an application for personal sick leave*" but added that "*this does not mean that [he] cannot be required to respond to the findings of serious misconduct and the possibility of termination.*"
- Mr Driver, upon Mr Comer's request to be provided details of the allegations against him, says he "*had no obligation to give him my notes from our meeting.*"

[78] The Respondent submitted:

- each Applicant was stood down from their position on full pay following their initial interview where they were advised of the concerns of the Respondent arising out of the conduct of each Applicant that occurred in February 2023;
- each Applicant was issued with an Investigation and Show Cause Meeting letter, setting out in detail the matters alleged against each Applicant with regard to their conduct;
- each Applicant was invited to attend an in-person "*show cause*" meeting with a support person;
- each Applicant declined to attend the "*show cause*" meeting in-person;
- each Applicant elected to make a written response to the possibility of the termination of their employment to the Head of Sales, Mr Christian Driver; and
- the responses of each Applicant were considered by Mr Christian Driver prior to the termination of the employment.

[79] The Applicants were given an opportunity to respond to any valid reason related to their conduct. They were each given an investigation and show cause letter setting out the allegations



and were asked to attend an in-person meeting to provide their version of events and explanation. Ultimately each of them chose to respond in writing.

**[80]** However, there is also no doubt that the process was conducted with considerable haste. There was no notice to the Applicants that their initial meetings of 9 and 13 March respectively were about potential disciplinary matters. In each case the follow-up meeting was scheduled to take place the following day. In the case of Mr. Comer and Mr. Lewin they were given until 15 March to respond. In the case of Ms. Philippe, she was given only 24 hours to attend or respond. Following those first meetings each of the Applicants sought some allowance for the effect the situation was having on their health. On 14 March, Mr. Lewin told Mr Driver he was suffering from high blood pressure. Mr. Driver said he thought he had been given plenty of time to respond.<sup>99</sup> Mr. Comer had applied for sick leave but was still required to respond by Mr. Driver. His request for details of the first meeting was refused by Mr. Driver on 15 March. He did not seek legal advice and accepted he had time to do so, though he felt the process was rushed.<sup>100</sup> Ms. Philippe responded in writing on 14 March indicating that she was in the midst of a high-risk pregnancy and the process had taken a toll on her health. She supplied a medical certificate saying she was unfit for her usual occupation on 14 March. Mr. Driver did not think this was any cause to delay the process.<sup>101</sup> Ms. Philippe obtained legal advice in the drafting of her written reply and accepted in cross-examination that she ‘got everything out’ that she needed to say in that reply.<sup>102</sup> Mr. Lewin accepted in cross-examination that he had an opportunity to respond and put what was relevant in his response.<sup>103</sup>

**[81]** Given the circumstances and the seriousness of the consequences that were likely to follow, although there was an opportunity to respond, the opportunity was truncated and the process was rushed. Mr. Lewin and Mr. Comer had more time to respond than Ms. Philippe but in fairness to all of the Applicants, given the circumstances, they should have been afforded more time to respond to allegations which threatened their ongoing employment. The Applicants were put under intense and unexpected pressure. This would have affected their capacity to respond. The time limits that were imposed would have added to the pressure. The Respondent was made aware by the Applicants that allegations raised questions of past practices within the company going back over a number of years. An opportunity to respond in this context required a reasonable amount of time to prepare a response that dealt with the historical practice and could have the potential to make a difference to the Respondent’s decision.

***Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?***

**[82]** Where an employee who is protected from unfair dismissal has requested that a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present. Ms. Philippe was given just 15 minutes to arrange a support person for her meeting. Messrs Lewin and Comer were not advised to bring a support person to their first meeting.<sup>104</sup> However, it was not in issue that the Respondent offered each of the Applicants an opportunity to have a support person attend with them at their subsequent meetings. There was no request from any of the Applicants to bring a support person to any subsequent meetings and no unreasonable refusal.

***Was the Applicant warned about unsatisfactory performance before the dismissal?***

**[83]** As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

***To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?***

**[84]** The Respondent is a large company and its procedures reflected the fact that it had access to resources and standard processes for dealing with matters of this kind. The Applicants contended that notwithstanding access to resources, the process that was followed was deficient and unfair. The size of the Respondent's enterprise would have given it some capacity to undertake a reasonably thorough investigation and extend reasonable time to the Applicants to present their case without too much disruption to the business. I also consider that the Respondent could have devoted resources to examining its own records to see whether there was any substance to what the Applicants had said about past practices relating to sales transfers. Mr. Franco conceded that the Respondent did not bother to investigate past practices.<sup>105</sup> That is a significant shortcoming because it had the potential to provide an explanation and thereby mitigate the seriousness of the conduct and change the employer response to it. If it is not appropriate to take this into account under this heading, I consider it would be a relevant matter under s.387(h) and I would take it into account on that basis in the overall assessment in any event.

***To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?***

**[85]** The Respondent did not lack dedicated human resources expertise. There is nothing to take into account under this heading.

***What other matters are relevant?***

**[86]** Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. I have considered the evidence and submissions that relate to this heading. It is necessary to consider the broader context in which the acts of the Applicants occurred to form an overall view as to whether the terminations were harsh, unjust or unreasonable. I am of the view that there are a number of factors here that need to be taken into account.

**[87]** Firstly, in cases of misconduct the degree of seriousness of the misconduct may be taken into account as a relevant matter under s.387(h) when considering whether "dismissal was a proportionate response to the conduct in question."<sup>106</sup> Here, the Applicants were dismissed summarily for what the Respondent contends was misconduct. The Applicants contend that even if it were assumed that there was a policy in place that prevented the transfer of sales, the sanction of termination was a disproportionate response to the conduct in question.

**[88]** In *Australia Post*<sup>107</sup> the Full Bench majority made a number of observations relating to terminations based on breaches of company policy.

*[61] The formulation, implementation, dissemination and enforcement of policies are a matter within the prerogative of management. The almost infinite variety of businesses and their circumstances necessarily leads to great variability in employer approaches to those matters. In particular, there is great variability in the approach of employers to:*

- *The form and content of policies. (Employer policies come in all shapes and sizes. Some employers have voluminous policies filled with detailed prescription. Others have policies expressed in broad terms.)*
- *The way in which employees are educated as to the content of policies.*
- *The way in which policies are enforced (some employers enforce their policies rigorously, other employers allow a situation to develop where particular breaches of policy go unanswered) and in disciplinary procedures and the approach to disciplinary decision making.*

*[62] Breaches of policy can often cover a spectrum from the trivial, minor or technical to the very serious.*

*[63] All or virtually all medium to large employers have a range of policies that employees are required to observe..... Most employers train employees in the employer's policies. Many if not most employers require employees to familiarise themselves with the employer's policies. Many if not most employers have logon notices reminding employees using the employer's IT system that they are bound by the employer's policies. Common experience dictates that such policy training often does not result in enduring employee familiarity with the policies and that logon reminders become, as it were, part of the wallpaper.*

**[89]** In *National Union of Workers and AB Oxford Cold Storage Co. Pty. Ltd.*,<sup>108</sup> Senior Deputy President Williams said:

*Strict and inflexible adherence to and application of policy can and, often does, lead to unfairness. In my view, in determining to terminate Mr Millard's employment, the employer gave undue weight to the application of its policy and insufficient and inadequate consideration to circumstances which might have justified the application of an alternative penalty. In this respect, I particularly have in mind Mr Millard's record as an employee, the nature of the altercation and the lack of any injury suffered by either participant or onlooker and the likelihood that Mr Millard would act in the same way again. To have applied a lesser penalty than termination of employment would not have jeopardised the integrity of the Code of Conduct.*

**[90]** In this matter, there was no direct and explicit policy dealing with sales credit transfers. The Code was not, on the evidence, something that was regularly reinforced amongst the workforce in a way that would have made it abundantly clear that the employer would not tolerate sales credit transfers. It is unlikely that the Applicants would have had the Code at the forefront of their minds when they sought to have the credits transferred, let alone the prospect that what they were doing might amount to the termination of their employment.

[91] Although I have concluded that there was a valid reason for the terminations, I agree that termination of employment in the overall context of this workplace was a disproportionate response. It was open to the Respondent to take alternative action short of summary dismissal. They could have introduced a new and explicit policy delineating acceptable and unacceptable practices relating to the Commission Plan. They could have formally warned the Applicants or imposed disciplinary measures short of termination. There might have been other active steps taken to bring home to the Applicants, and all other participants in the Commission Plan for that matter, that the Respondent regarded the conduct as serious and meriting dismissal before dismissal occurred.<sup>109</sup> Disciplinary action short of summary dismissal would not have jeopardised the integrity of the Code. The failure of the Respondent to take other measures weighs in favour of a conclusion that the terminations were harsh, unjust or unreasonable.

### **The Workplace Context and ‘Shared’ and ‘Held’ Sales’**

[92] The question of whether the practice of transferring sales credits was accepted or condoned by the Respondent, even implicitly, was raised by the Applicants. There was evidence in relation to management knowledge of and involvement in changes to the Respondent’s sales records, including on the Master File. Mr. Comer gave evidence that sales credits were transferred for a variety of reasons including to ‘meet team KPIs’ or where a colleague had assisted with a sale. He said he had heard Mr. Franco instruct people to ‘hold off’ on sales for a certain month and move them to a succeeding month because it was no longer possible to meet targets for that first month.<sup>110</sup> Mr. Lewin gave similar evidence. He said he had been instructed by previous managers to transfer sales from one month to the next where the target had already been met for the first month.<sup>111</sup> Mr. Tin’s response to his ‘show cause’ letter refers to an instance where Mr. Franco asked a salesperson to ‘hold off’ on a sale to hit the team target in December 2021.<sup>112</sup>

[93] Mr. Burke gave the following evidence:

*The practice of transferring credit for sales was participated in by management. I observed, for example, instances where a sales consultant would ask the manager for help in meeting sales targets and the manager would “find something” for that person and have the credit for sales moved to them in the Masterfile. The sales consultant would not even know what sale was transferred to his or her account. Managers would do this to ensure that the entire team met its KPIs.*<sup>113</sup>

[94] In cross-examination, Mr. Burke accepted that he had no knowledge of a transfer of sales credit for any individual that he could nominate.<sup>114</sup>

[95] Mr. Driver accepted that the Commission plan included ‘team objectives’ for managers<sup>115</sup> and Mr. Franco confirmed that if the team as a whole meets a sales budget, the manager received a bonus under the Plan.<sup>116</sup> Mr. Franco denied Mr Lewin’s allegation about ‘holding off’ a sale until a subsequent month.<sup>117</sup> In my view there is enough evidence to be reasonably satisfied that there had been previous instances where sales had been ‘held’ and later transferred to maximise benefits to participants in the Plan.

[96] There was also a recognised practice within the Respondent of ‘sharing sales.’ Mr. Driver gave the following evidence:

*In circumstances where there were a number of people working on the same project - - ?---Yes.*

*- - - was it ever the situation that the sales were split between the people working on that particular project?---Yes.*

*All right. And I think your evidence is, isn't it, that the records of Rentokil were required to be accurate?---Yes.*

*So presumably, if there were two people working on the same sale, to have accurate records it would need to disclose that both of them had worked on that sale so that the sale could be split up between them?---Yes.*

*I see. And was that, in fact, the practice as you understood it, within Rentokil?---Yes.*

*I see. So just so that we're quite clear on this, if, for example two people worked on the ADF project, the money for that sale should have been split between them?---If two people had equal share in that project, they would have split that sale, yes.<sup>118</sup>*

**[97]** Mr. Franco's evidence was:

*So it's not correct that, at times, people will both work on one sale and share the commission for that sale?---If it is a combined share, there was one - one example, which I believe is in my statement, where I had two sales people work on one sale, at my instigation.*

*Right. And in those circumstances they would share the commission, wouldn't they?---Correct.*

*And it would be important for the records of the company to be accurate, wouldn't it?---Correct.*

*So if two people, for example, had worked on the same sale it would be important that the records properly reflected that, wouldn't it?---If they were approved by myself.*

*Well, whether they were approved or not, it would be necessary for that record to be made, wouldn't it?---If it was approved by myself, correct.*

*Perhaps if you listen to my question. If the records were to be accurate it would require that both of the people who worked on the sale would be recorded, wouldn't it?---Yes.<sup>119</sup>*

**[98]** On the basis of the evidence before me, I consider it more likely than not that the practice of transferring sales credits was something that was engaged in with the knowledge and acceptance of previous managers of the Respondent. I am not satisfied that this was the case under the management of Messrs Driver and Franco.

[99] However, both Mr. Driver and Mr. Franco accepted the proposition that if more than one person worked on a particular sale, that it was appropriate that all involved should receive a benefit for that work. They accepted that for the records to be accurate, they should reflect the fact that all involved were appropriately recorded. Exactly how the benefit of these types of sales is divided between participants was not made clear. It may be that a shared sale is divided equally between participants or on some other basis depending on the allocation of work. A transfer of sales credits on the other hand might involve a different allocation or even swapping of one sale for another. This would in turn have implications for the eligibility of a participant to receive a commission. In any event, there are similarities between the two practices and the acceptance of the shared sale practice by the Respondent's witnesses serves to demonstrate that the company accepted the notion that people should be recognised for the work that they had undoubtedly undertaken. The transfer of sales is not necessarily inconsistent with that idea. A clear policy and an explicit requirement for management authorisation before sales could be transferred would have avoided any doubts of the kind that arose in this case. Ultimately though, the legitimacy of the claims by the Applicants that the 'recipients' of the transfer had in each case performed work that was of financial benefit to the Respondent relating to the sales in question was not seriously challenged.

### **Other Matters as to the Conduct**

[100] I also consider it appropriate to take into account the fact that even though the conduct in question was carried out without the approval of management, it was not done in a covert way. The Master File was accessible by everyone, including Mr. Franco and Mr. Driver.<sup>120</sup> The sales figures were routinely reviewed by Mr. Franco. It was not suggested that any of the Applicants attempted to disguise the request or the change to the Master File. This is consistent with the Applicants' evidence and the evidence of Messrs Tin and Burke, who had no interest in the proceedings, that the practice of transferring sales was openly discussed over a lengthy period and that no-one in the Sales Team considered it to be a practice that was contrary to company policy. I accept that to be the case. It is also consistent with my conclusion that the practice had been going on for some time with at least the tacit approval of previous managers.

[101] Further, the conduct was not engaged in 'unilaterally' by the Applicants in the sense that they changed the Master File themselves. It was accepted that that was not possible. Ms. Adams had the responsibility for maintaining the Master File. The changes required some action on her part. Ultimately, Ms. Adams' evidence that she did not transfer sales without managerial approval did not survive cross-examination. She conceded that she did so in the case of the two February transfers and had done so in the past. This is also consistent with the notion that the practice was a longstanding one and that Ms. Adams herself did not regard the practice as inconsistent with policy.

### **Lack of Benefit**

[102] In the case of Mr. Comer and Ms. Philippe, I consider it to be a relevant factor that neither of them stood to receive any benefit from the conduct that they engaged in. The Applicants accepted that this was not the case for Mr. Lewin.

### **Differential Treatment**

[103] The Applicants submitted that other employees had engaged in the practice of transferring sales without managerial approval with no apparent consequences.<sup>121</sup> Some care must be taken in taking into account potential differential treatment.<sup>122</sup> There was evidence that transfers had occurred without managerial approval but no evidence that management had later become aware that the past transfers had taken place and decided to take no action. In the case of the Tripathi transfer, the evidence was that a manager, Mr. Baretto, was made aware of the transfer. However, Ms. Adams had transferred sales credits in the matters involving the Applicants and had done so previously. Mr. Franco said he had concluded that she had also acted in breach of company policy.<sup>123</sup> There was no evidence that she had faced any disciplinary consequences for that conduct. The leniency extended to Ms. Adams in this respect I consider to be of some relevance in assessing the response of the Respondent to the conduct of the Applicants.

### **Employment History and Personal Circumstances**

[104] I also take into account the employment history of each of the Applicants and their length of service. There was no evidence to suggest that they had anything other than a good record of service for the Respondent. The Applicants argued and I accept, that the question of harshness arises starkly in the case of Ms. Philippe. She was pregnant at the time of her dismissal. She has lost access to parental leave benefits because of the termination. In his written response to the ‘show cause’ letter, Mr. Comer said that since he had now been made aware that transfers were regarded as a matter of misconduct, he could only apologise for his part in bringing himself and a colleague into an uncomfortable situation. This shows remorse on Mr. Comer’s part. Each of the Applicants cooperated with the investigation process and provided an honest account and a reasonable response given the time available to them. The Respondent will no doubt review the policies relating to the operation of the Plan as a result of this matter but in any event, I regard it as extremely unlikely that any of the Applicants would re-engage in conduct of the kind that led to these proceedings.

### **Conclusion**

[105] The majority in *Australia Post*<sup>124</sup> observed that ‘(A) determination as to whether a dismissal was harsh, unjust or unreasonable involves the application of a broad discretionary standard. The discretion is nevertheless one that must be exercised judicially, that is, in accordance with applicable legal principles.’ They also referred to the ‘bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be ‘harsh unjust or unreasonable’ notwithstanding the existence of a ‘valid reason’ for the dismissal.’<sup>125</sup>

[106] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicants was harsh and unreasonable. I am therefore satisfied that the Applicants were unfairly dismissed within the meaning of section 385 of the FW Act.

### **Remedy**

[107] In considering an appropriate remedy in a case of unfair dismissal, regard must also be had to the legislative object set out in s.381 of the FW Act. This includes an emphasis on the

remedy of reinstatement<sup>126</sup> and on ensuring that a “fair go all round” is accorded to both the employer and employee concerned.<sup>127</sup>

***Is reinstatement of the Applicant inappropriate?***

[108] The Applicants seek reinstatement to their previous positions. The Respondent opposed reinstatement. Messrs. Driver and Franco gave evidence about their loss of trust and confidence in the Applicants. They said, amongst other things, that they regarded the actions of the Applicants as lacking in honesty and as being deliberately undertaken for financial advantage. Mr. Driver pointed to the need to have trust in the Applicants given that they worked relatively independently.

[109] The Applicants said that there was a reasonable chance that the employment relationship could be restored with the necessary level of mutual trust. They pointed to the evidence of Mr. Driver to the effect that the Applicants could be suitably directed to ensure that sales transfers did not occur in the future without managerial approval.<sup>128</sup>

[110] A Full Bench of the Commission has identified the following propositions relevant to the impact of a loss of trust and confidence on the appropriateness of an order for reinstatement:

- *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 re-employ 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.”<sup>129</sup>*

[111] The Full Bench concluded that, “[u]ltimately, 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>130</sup>

[112] In my view having regard to the circumstances leading up to the terminations and reasons for the terminations and notwithstanding the views expressed by Messrs Driver and



Franco, I do not consider that the level of trust and confidence cannot be restored to make the relationship viable and productive. I consider that reinstatement is the appropriate remedy. I am satisfied that I should make an order reappointing each of the Applicants to the position in which they were employed immediately before the dismissal within fourteen days of the date of this decision pursuant to s.391(1)(a). An order to that effect will accompany this decision.

[113] My preliminary view is that I should also make an order to maintain the continuity of the employment and the period of continuous service of each of the Applicants with the employer pursuant to s.391(2). However, I propose to allow the Respondent a period of seven days to make any submissions as to why such an order should not be made. The Applicants should reply to any submission to that effect within three days after any submission by the Respondent.

*Reinstatement - is it appropriate to make an order to restore lost pay?*

[114] Section 391(3) of the FW Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to cause the employer to pay to the Applicant an amount for the remuneration lost, or likely to have been lost, by the Applicant because of the dismissal.

[115] Section 391(4) of the FW Act provides that, in determining an amount for the purposes of such an order, the Commission must take into account:

(a) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the Applicant during the period between the making of the order for reinstatement and the actual reinstatement.

**[116]** An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission may only make an order if it considers it appropriate to do so and only make an order that the Commission considers appropriate.<sup>131</sup> Where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay.<sup>132</sup>

**[117]** I consider it to be appropriate in the circumstances to make an order to restore lost pay. Such amount should take account of each of the matters referred to in s.391(4). Mr Lewin has taken reasonable steps to mitigate his loss. He obtained comparable employment from 1 May 2023. His earnings should be taken into account in accordance with s.391(4)(a). I note that the parties had indicated an intention to file Agreed Facts as to the employment of Mr. Lewin post-dismissal.<sup>133</sup> Mr. Comer had made only limited efforts to obtain further employment by the time of the hearing. Ms. Philippe had not applied for alternative employment at the time of the hearing. Ms. Philippe's pregnancy may have impacted on her capacity to mitigate loss through alternative employment. I consider that any amounts payable to Mr. Comer and Ms Philippe should be reduced given the limited attempts to mitigate their loss. Given the conduct engaged in by each of the Applicants that resulted in the terminations I also consider it appropriate to reduce that amount otherwise payable to Mr. Comer and Ms. Philippe by an amount of 20%. In the case of Mr. Lewin I consider it relevant that he was the only one of the Applicants who stood to gain any benefit from the sales transfer and in his case the relevant amount should be reduced by an amount of 35%.

**[118]** The parties are directed to confer and provide agreed orders as to the amount of lost pay for each of the Applicants within seven days from the date of this decision. In the absence of agreement, brief written submissions should be provided to enable me to determine the appropriate amount to be included in any order.



DEPUTY PRESIDENT

*Appearances:*

Mr Ian Latham, Counsel for the Applicants  
Mr Paul Brown, Solicitor for the Respondent

*Hearing details:*

In-person, Monday 26 June 2023 and Tuesday 27 June 2023 in Sydney.

*Final written submissions:*

Applicant final written submissions filed 19 July 2023.

Respondent final written submissions filed 1 August 2023.

Applicant final written submissions in Reply filed 7 August 2023.

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<sup>1</sup> s 394(2).

<sup>2</sup> Statement of M. Philippe 29 May 2023, Exhibit A1 paragraph 7 (M. Philippe).

<sup>3</sup> Ibid paragraph 3.

<sup>4</sup> Ibid paragraph 2.

<sup>5</sup> Ibid paragraph 4.

<sup>6</sup> Ibid paragraph 6.

<sup>7</sup> Ibid paragraphs 8 and 9.

<sup>8</sup> Statement of J. Franco 9 June 2023, Exhibit R2, paragraph 11 ('J. Franco').

<sup>9</sup> Statement of B. Comer 29 May 2023, Exhibit A4, paragraph 14 ('B. Comer').

<sup>10</sup> Ibid paragraph 2.

<sup>11</sup> Statement of J. Franco 9 June 2023, Exhibit R2, paragraph 11(a).

<sup>12</sup> Ibid paragraph 4.

<sup>13</sup> Statement of J. Lewin 29 May 2023 Exhibit A6, paragraph 2 ('J. Lewin').

<sup>14</sup> Ibid paragraph 10.

<sup>15</sup> J. Franco (n 8), paragraph 11(c).

<sup>16</sup> Ibid, paragraphs 1, 5 and 6.

<sup>17</sup> Statement of M. Adams 9 June 2023, Exhibit R3, paragraph 1 ('M. Adams').

<sup>18</sup> Ibid paragraph 7.

<sup>19</sup> *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

<sup>20</sup> Respondent's Outline of Submissions, paragraph 8.

<sup>21</sup> Statement of C. Driver, Exhibit R1, Annexures CD17 and CD19 ('C. Driver').

<sup>22</sup> Ibid Annexure CD 21, Clause 2.2.

<sup>23</sup> C. Driver (n 21), paragraph 9.

<sup>24</sup> J. Lewin (n 13), paragraph 15.

<sup>25</sup> Ibid paragraph 16.

<sup>26</sup> Ibid paragraphs 18-20.

<sup>27</sup> B. Comer (n 9), paragraphs 11, 12, 27, 28-35.

- <sup>28</sup> Statement of P. Burke, Exhibit A9, paragraphs 2 to 11 ('P. Burke').
- <sup>29</sup> Statement of A. Tin, Exhibit A10, paragraphs 2 to 14 ('A. Tin').
- <sup>30</sup> J. Franco (n 8), paragraphs 6 to 16.
- <sup>31</sup> C. Driver (n 21), paragraphs 9 to 14.
- <sup>32</sup> M. Adams (n 17), paragraphs 7 to 12.
- <sup>33</sup> B. Comer (n 9), paragraph 28.
- <sup>34</sup> M. Philippe (n 2), paragraph 25.
- <sup>35</sup> J. Lewin (n 13), paragraph 27.
- <sup>36</sup> Ibid paragraph 28 but see transcript PN 912.
- <sup>37</sup> Ibid paragraph 29.
- <sup>38</sup> M. Philippe (n 2), paragraph 24.
- <sup>39</sup> J. Lewin (n 13), paragraph 30 and 31.
- <sup>40</sup> J. Franco (n 8), paragraph 27.
- <sup>41</sup> Statement of J. Lewin in Reply filed 20 June 2023 Exhibit A7, paragraph 15 ('J. Lewin 2').
- <sup>42</sup> J. Franco (n 8), paragraphs 32 to 35.
- <sup>43</sup> C. Driver (n 21), paragraphs 17 to 24.
- <sup>44</sup> J. Franco (n 8), paragraph 39.
- <sup>45</sup> C. Driver (n 21), paragraph 31.
- <sup>46</sup> C. Driver (n 21), Annexures 13 to 16.
- <sup>47</sup> Respondent's Final Submission, paragraph 6.
- <sup>48</sup> Transcript PN2151.
- <sup>49</sup> Transcript PN 2152.
- <sup>50</sup> Transcript PN 413.
- <sup>51</sup> Transcript PN 761-762.
- <sup>52</sup> Transcript PN 768.
- <sup>53</sup> Transcript PN 1215.
- <sup>54</sup> Transcript PN 1205-1207.
- <sup>55</sup> Transcript PN 1474-1475 and PN 1886.
- <sup>56</sup> C. Driver (n 21), Annexures 17, 19 and 21.
- <sup>57</sup> J. Franco (n 8), paragraphs 14 – 15; C. Driver (n 21), paragraph 12.
- <sup>58</sup> M. Philippe (n 2), paragraph 22; B. Comer (n 9), paragraph 34; J. Lewin (n 13), Annexure JL-A.
- <sup>59</sup> Transcript PN 609 and PN 611.
- <sup>60</sup> Transcript PN 187.
- <sup>61</sup> J. Lewin 2 (n 41), paragraph 5.
- <sup>62</sup> A. Tin (n 29), paragraph 11.
- <sup>63</sup> P. Burke (n 28), paragraph 11.
- <sup>64</sup> Transcript PN 1968.
- <sup>65</sup> Transcript PN 1967 and 1969.
- <sup>66</sup> Transcript PN 1792.
- <sup>67</sup> M. Adams (n 17), paragraph 21.
- <sup>68</sup> Transcript PN 2295.
- <sup>69</sup> P. Burke (n 28), paragraph 9; Transcript PN 1314 and PN 1321.
- <sup>70</sup> Transcript PN 150 and PN170.
- <sup>71</sup> Transcript PN 1393 to PN 1398.

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- <sup>72</sup> Transcript PN 1791.
- <sup>73</sup> Transcript PN 1965.
- <sup>74</sup> M. Adams (n 17), paragraphs 11 and 12.
- <sup>75</sup> Transcript PN 2253.
- <sup>76</sup> Transcript 2250-2251. On one of the three occasions a manager had been copied into an email about the transfer.
- <sup>77</sup> M. Adams (n 17), paragraph 14 and 16.
- <sup>78</sup> P. Burke (n 28), paragraph 6.
- <sup>79</sup> Transcript PN 2277.
- <sup>80</sup> Respondent's Submissions, paragraphs 20, 25, 26 and 27.
- <sup>81</sup> Transcript PN 1402 – 1405.
- <sup>82</sup> Transcript PN 913 and PN 984.
- <sup>83</sup> J. Franco (n 8), paragraph 28 and 29.
- <sup>84</sup> Transcript PN 593.
- <sup>85</sup> Transcript PN 143.
- <sup>86</sup> Transcript PN 149 and PN 263.
- <sup>87</sup> *B, C and D v Australia Postal Corporation t/as Australia Post* [2013] FWCFB 6191, [34] ('Australia Post').
- <sup>88</sup> C. Driver (n 21), Annexures 13, 14 and 15.
- <sup>89</sup> [2015] FWCFB 1033 ('Sharp').
- <sup>90</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- <sup>91</sup> *Sharp* (n 89) [25].
- <sup>92</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].
- <sup>93</sup> *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.
- <sup>94</sup> *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- <sup>95</sup> *Ibid.*
- <sup>96</sup> *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- <sup>97</sup> *RMIT v Asher* (2010) 194 IR 1, 14-15.
- <sup>98</sup> *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
- <sup>99</sup> Transcript PN 1655.
- <sup>100</sup> Transcript PN 750 – 753.
- <sup>101</sup> Transcript 1767.
- <sup>102</sup> Transcript PN 409.
- <sup>103</sup> Transcript PN 1194-1195.
- <sup>104</sup> J. Lewin (n 13), paragraph 32; B. Comer (n 9), paragraph 50.
- <sup>105</sup> Transcript 1965.
- <sup>106</sup> *Gelagotis v Esso Australia Pty Ltd t/a Esso* [2018] FWCFB 6092, [117].
- <sup>107</sup> *Australia Post* (n 87).
- <sup>108</sup> C No. 30469 of 2000, [23].
- <sup>109</sup> *Ibid* at [70].
- <sup>110</sup> B. Comer (n 9), paragraph 30 and 31.
- <sup>111</sup> J. Lewin (n 13), paragraph 18.
- <sup>112</sup> C. Driver (n 21), Annexure 9.
- <sup>113</sup> P. Burke (n 28), paragraph 10.
- <sup>114</sup> Transcript PN 1315.

<sup>115</sup> Transcript PN 1479.

<sup>116</sup> Transcript PN 1890.

<sup>117</sup> J. Franco (n 8), paragraph 20.

<sup>118</sup> Transcript PN 1486 to 1491.

<sup>119</sup> Transcript PN 1892-1897

<sup>120</sup> J. Lewin (n 13), paragraph 16.

<sup>121</sup> Exhibit A11 and Exhibit A13; Transcript PN 2240.

<sup>122</sup> *Australian Postal Corporation t/as Australia Post v. Rishiti* [\[2012\] FWAFB 7423](#).

<sup>123</sup> Transcript PN 1941.

<sup>124</sup> *Australia Post* (n 87) [53].

<sup>125</sup> *Ibid* [41].

<sup>126</sup> s 381(1)(c).

<sup>127</sup> *BlueScope Steel Limited v Sirijovski* [\[2014\] FWCFB 2593](#) at [73].

<sup>128</sup> Transcript PN1843-1845.

<sup>129</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#), [27].

<sup>130</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#), [28].

<sup>131</sup> *Aurora Energy Pty Ltd v Davison* [PR902108](#) (AIRCFB, Watson SDP, Williams SDP, Holmes C, 8 March 2001), [25].

<sup>132</sup> See, eg, *Regional Express Holdings Ltd v Richards* [\[2010\] FWAFB 8753](#), [29].

<sup>133</sup> Written Submissions of the Respondent paragraph [83].