DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Tahmina Zobair
v
Sydney International Container Terminals Pty Limited T/A Hutchison Ports
(U2023/4406)

DEPUTY PRESIDENT ROBERTS SYDNEY, 5 OCTOBER 2023

Application for relief from unfair dismissal

[1] On 19 May 2023 Ms. Tahmina Zobair (Applicant) 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 she had been unfairly dismissed from her employment with Sydney International Container Terminals Pty Ltd (Respondent or SICTL). The Applicant sought reinstatement to her former position, orders to maintain continuity of employment and continuous service[1] and orders for remuneration lost[2] because of the dismissal. In the alternative, the Applicant sought orders for compensation pursuant to s.392 of the FW Act.

When can the Commission order a remedy for unfair dismissal?

[2] Section 390 of the FW Act provides, inter alia, that the Commission may order a remedy for unfair dismissal if:

> (a) the Commission is satisfied that the person was protected from unfair dismissal at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed.

[3] It was not in issue that at the time of being dismissed the Applicant was protected from unfair dismissal within the meaning of s.390(a) and I am satisfied that the Applicant was so protected.

[4] 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.

[5] The Applicant was dismissed on 17 May 2023 and lodged her application for relief within the requisite time period.[3] The matters referred to at points (a), (c) and (d) above were not in issue. No jurisdictional issues arise with the application. That being the case, the question of whether the Applicant has 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 dealing with that question, I set out below some of the factual background relevant to the proceedings.

Background

[6] The Applicant commenced employment with the Respondent as a stevedore on a casual basis in October 2016. In May 2017, she was offered, and accepted, a permanent full-time position in that role. She worked at the Respondent's site at the Port Botany Container Terminal in Sydney. At all material times the Applicant and Respondent were bound by the terms of the *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021* (the 2021 Agreement).

[7] In addition to her position with the Respondent, the Applicant works as a singer/performer. She undertakes paid and unpaid performances at various venues, including as in this case, venues in other countries. The Applicant is a member of the Construction, Forestry, Maritime, Mining and Energy Union (Maritime Union of Australia Division) (MUA).

[8] In January and February 2023, the Applicant applied to the Respondent to take two separate periods of paid annual leave. The periods of leave were from 20 February 2023 to 5 March 2023 and then from 13 March 2023 to 26 March 2023.

[9] The Applicant applied for leave to attend separate performances in Tashkent, Uzbekistan and Istanbul, Türkiye respectively. The first of those performances was scheduled to take place in late February 2023, the second in the later part of March 2023. In between the two performances and the two separate periods of annual leave, the Applicant was scheduled to work for the Respondent on her rostered shifts at Port Botany on 9 and 10 March 2023. The leave was approved by the Respondent.

[10] The Applicant did not return to perform her rostered shifts on 9 and 10 March 2023. According to the Applicant, she fell ill in Tashkent and was unable to fly back to Australia to perform those shifts. The Applicant obtained a medical certificate from a doctor in Tashkent stating that she was unfit for travel. The Applicant sent this certificate to the Respondent on 7 March 2023 with a covering note.

[11] When the Applicant returned to Australia, the Respondent asked her to attend a meeting on 6 April 2023 to discuss her correspondence of 7 March and to provide further information, including documentation relating to her flights, changes or cancellation of flights and supporting receipts or bank statements. In that correspondence the Respondent alleged that the Applicant had used her personal leave entitlements inappropriately and "had no intention of returning to Australia on 6 March as stated in (her) correspondence."

[12] The Applicant attended the meeting on 6 April with the Respondent accompanied by a delegate from the MUA. She provided a copy of the medical certificate she had provided earlier to the Respondent and a document relating to travel arrangements in her name for a journey from Tashkent to Sydney on 6 March 2023.[4]

[13] Further meetings and correspondence between the Respondent and the MUA on behalf of the Applicant followed the meeting on 6 April. At various points the Respondent pressed the Applicant to provide further documentation. Ultimately, on 17 May 2023, the Respondent terminated the Applicant's employment.

[14] The Applicant maintained that at all times she had intended to return to Australia to perform her rostered shifts on 9 and 10 March 2023. She said that illness intervened and prevented her from doing so. The Respondent submitted that the Applicant had no intention of returning to work the relevant shifts at the time she applied for and was granted annual leave. They submitted that if the Applicant had such intention, she would have been able to provide documentation relating to her travel arrangements that supported her narrative and that her failure to do so confirmed the Respondent's view that the Applicant had been dishonest at the point at which she had applied for annual leave. This dishonesty, according to the Respondent, was misconduct which the Respondent said provided them with a sufficient reason to terminate the Applicant's employment.

Was the dismissal harsh, unjust or unreasonable?

[15] 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.

[16] I am required to consider each of these matters, to the extent they are relevant to the circumstances before me.[5] I set out my consideration of each below.

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

The Evidence in Detail

The Leave Application Process

[17] The Respondent gave evidence, through Mr. Hughes (Manager of Terminal Operations) and Mr. Barron (Manager HR Operations), as to the process of applying for annual leave. They said that the usual practice was for employees to email or send text message requests to "leave allocators" who were employees of the Respondent with authority from the Respondent to approve leave requests for single weeks of annual leave. They said an employee seeking four or more consecutive weeks of annual leave had to apply for the approval of such leave by the Respondent's HR department, usually Mr. Barron. In the Applicant's case, four separate applications for leave were made to the leave allocators in the period 7 January 2023 to 19 February 2023 for the two periods of leave referred to in paragraph [8] above.

The Applicant's Annual Leave

[18] The Applicant's evidence was that following the approval of her paid annual leave, she flew to Tashkent on 20 February 2023 with her sister Sadaf Zobair, to undertake a performance that she was contracted to complete. She said that her sister acts as her manager in relation to the work she does as a performer. The Applicant said that her original itinerary[6] had her returning from Tashkent to Sydney departing 1 March and arriving 2 March 2023.

[19] The Applicant said that on 27 February 2023 she was offered a further performance opportunity by a different production company to perform at a second event in Tashkent. The Applicant agreed to the second Tashkent performance and the production company that had organised the second event booked hotel rooms for the Applicant and her sister. The Applicant said this company also booked an amended return ticket to Sydney which was to depart Tashkent on 6 March and arrive in Sydney on 7 March 2023.[7]

[20] The Applicant said that prior to her revised return flight on 6 March she fell ill. She said she saw a local doctor, Dr. Dilorom, who provided her with a medical certificate.[8] The medical certificate was dated 5 March 2023 and provided (passport details omitted) as follows:

To Whom It May Concern;

I am writing to inform you that Ms. Tahmina Zobair, holding passport number xxxxx, an Australian citizen is under my treatment from 6 March to 10 March 2023.

She is unwell and unfit for travel. I highly recommend that Ms. Tahmina Zobair, must

complete her medical treatment before travelling.

Thank you for your attention in this matter.

Sincerely,
Dr. Fattahova Dilorom
ENT Specialist

[21] The medical certificate was not signed but bore a stamp and included a telephone number. The letterhead included the words "Fertility IVF" in English and other details in a language other than English, presumably Uzbek. The Applicant sent this certificate to Mr. Hughes from the Respondent on 7 March with a covering note that said:

"Hi Geoff,

Hope you're well.
I'm currently in Tashkent Uzbekistan and was meant to fly back on the 6th however due to my poor health I have not been able to.
I've seen a doctor and have been advised not to travel for the time being.
Please find below attached the medical certificate provided.

Regards
Tahmina"

[22] In cross-examination, the Applicant said that she did not fly back to Sydney from Tashkent but instead flew directly from Tashkent to Istanbul after she recovered from her illness at some time in the period from 6 to 12 March 2023.[9] She returned to Sydney after completing her second performance in Istanbul in the latter part of March 2023.

Events Post-Annual Leave

[23] The Applicant said that after she returned from annual leave, she was contacted by the Respondent's HR Manager, Mr. Barron, who requested further documentation regarding her travel and suggested that she could face disciplinary action for failing to produce what was requested. The Applicant then contacted the MUA. The Respondent cancelled the Applicant's next rostered shift, 4 April 2023, and directed her to attend a meeting with Mr. Barron on 6 April 2023. The letter, dated 4 April 2023, from Mr. Hughes to the Applicant requiring attendance at that meeting provided in part:

Re: Notice To Attend a Meeting

You are required to attend a formal meeting on Tuesday 6 April 2023 at 14:30 with Luke Barron (Manager – HR Operations) and myself to provide further information in regard to the correspondence sent by you on Tuesday 7 March, stating that you were overseas and unable to return to Australia due to 'poor health'.

Your work schedule around this period, as shown below, has created some uncertainty. We would like to meet with you to obtain further information.

• Monday 20 February – Sunday 5 March; Annual Leave.
• Monday 6 March – Sunday 12 March; Back On Roster (2 x Personal Leave Days Taken).
• Monday 13 March -Sunday 26 March; Annual Leave.

At this meeting you will be required to address the following allegations.

• It is alleged that you have used your personal leave entitlements inappropriately.
• We allege that you had no intention of returning to Australia on 6 March, as stated in your correspondence.

Please bring along with you any supporting evidence relating to your correspondence.

• Original Flight Itinerary.
• Any correspondence relating to any change or cancellation of flight or flights.
• Any supporting receipts or bank statements.

[24] On 6 April the Applicant attended a meeting with her MUA delegate Mr. Cakrun, Mr Barron and another manager from the Respondent, Mr. Vlahadamis. At the meeting the Applicant supplied the Respondent with two documents; first, a copy of the medical certificate from Dr. Diloram that had already been provided on 7 March and second, a document that the Applicant said reflected her *revised* travel arrangements to fly from Tashkent to Sydney on 6-7 March 2023 (TZ3).[10] The Applicant said that further supporting evidence of her travel itinerary was requested by Mr. Barron at the meeting and that a letter reiterating that request was sent to her on 11 April 2023. That letter provided in part:

Re: Request for Supporting Evidence

Further to our letter dated 4 April 2023 and our meeting on Tuesday 6 April 2023 at 14:30 with Tony Cakarun (MUA Delegate), John Vlahadamis (Manager – Landside Operations) and myself we write to confirm that we requested the following supporting evidence:

• Original Flight Itinerary.
• Any correspondence relating to any change or cancellation of flight or flights.
• Any supporting receipts or bank statements.

We acknowledge we have been provided with the following:

• Partial reservation issued Skylink Travels.
• Unsigned letter from Dr Fattahova Diloram (ENT Specialist).

Whilst we confirm the above documents have been provided, they are non-responsive to our request and we are not able to establish your original travel plans or verify your documents. Accordingly, we request:

> *• Original Flight Itinerary confirming departure and return flights from airline/Eticket.*
> *• Any correspondence relating to change or cancellation of flight or flights.*
> *• Signed medical certificate.*
> *• Any other supportive evidence you believe may be useful.*
>
> *Please email the above no later than 5:00pm, 13 April 2023. The supporting information provided by you, will be considered together with your responses at our meeting. Please note these are serious concerns and disciplinary action including termination of your employment is a possible outcome of this process, depending on your responses to the above allegations and management's consideration of same.*

[25] It appears that sometime shortly after the letter was sent by Mr Barron it came to the attention of Mr. Paul Keating, the Divisional Branch Secretary of the MUA's Sydney Branch. Mr. Keating gave evidence that the letter gave him cause for concern. Mr. Keating said that because the Applicant did not have any sick leave left to cover her absence on 9 and 10 March, she took unpaid leave for the two shifts in question. He said that because the Applicant had not sought payment for the period of leave, she was not required by the 2021 Agreement, by the National Employment Standards (NES), or by SICTL's own policy to provide the company with a medical certificate, let alone further documentation to establish that she was unfit to work those two shifts.[11] Mr. Keating said he was concerned at the request for a signed medical certificate even though no certificate was required and considered the request unreasonable. He said that he regarded the requests from the Respondent for flight information as intrusive. He instructed the MUAs' National Legal Officer, Mr. Bond, to respond to the letter.

[26] On 13 April 2023 Mr. Bond, wrote to Mr Hughes in the following terms:

> *I am in receipt of a letter dated 11 April 2023 in which you request further supporting evidence from Tahmina Zobair in relation to two days that she missed work due to illness. For the reasons set forth below, your request for further information is unreasonable and unfair and the MUA will not tolerate you going on a bullying fishing expedition to try to obtain evidence in support of your unfounded suggestion that Tahmina was dishonest when legitimately taking sick leave. Accordingly, please consider this message a formal grievance on Ms Zobair's behalf pursuant to Clause 22 of the Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021. Because this grievance is brought against you, SICTL's Human Resources Manager, it would be inappropriate and futile for Tahmina to raise it in the first instance with her manager. Therefore, pursuant to Clause 22.6 I am raising the grievance at step 2 of the Issue Resolution clause. In doing so, I am invoking the status quo provisions contained in the EA at Clause 14.8.*
>
> *The basis for this grievance is as follows. Tahmina fell ill whilst she was overseas and missed two rostered shifts. In line with a Memorandum dated 13 December 2022 from Harriet Mihalopoulos to all employees, Tahmina provided you with a medical certificate from Dr Fattahova Dilorom certifying that she was unfit to travel back to Australia from 6 March to 10 March 2023. Under Hutchison's sick leave policy, that is all that Tahmina was required to provide to you. For you to threaten her with*

'disciplinary action including termination of [her] employment' if she doesn't provide you with a plethora of further information to establish that she didn't fabricate an illness to extend hr holiday is nothing short of intimidation and harassment.

The MUA demands that you immediately withdraw your letter to Tahmina dated 11 April 2023 by the close of business today. Should you refuse to do so, I will immediately lodge a dispute in the Fair Work Commission. Along with a withdrawal of the dispute, it would be appropriate for you to apologise to Tahmina for the emotional distress that your actions have caused her.

[27] On 17 April Ms. Mihalopoulos, the Respondent's Head of Corporate Services & Industrial Relations, wrote to Mr. Bond in the following terms:

I am in receipt of your email to Mr Barron dated 13 April 2023. I confirm you can regard my response consistent with Clause 14, Issue Resolution – Step 2 – National Level discussion.

I have today reviewed the matters raised by you and the information currently available. My primary position is:

- *We reject the proposition that the request for further information is unreasonable and unfair or constitutes a bullying fishing expedition.*

- *The Company is entitled to require confirmation for the reason for an Employee's absence where an Employee is claiming personal/carer's leave. Furthermore, the Company may exercise this right where absence issues are of concern to the Company (Clause 28.19).*

- *We reject your characterisation that the Company is trying to obtain evidence in support of an unfounded suggestion that Ms Zobair was dishonest when legitimately taking sick leave. The Company has simply exercised their rights as recognised by the Parties at Clause 28.19.*

- *The Company at this time is not satisfied with correspondence from Dr Fattahova Dilorom on the basis that the document would not convince a reasonable person that the employee was genuinely entitled to the sick or carer's leave because the document is both unsigned and we have been unable to verify whether Dr Fattahova Dilorom is a registered medical practitioner.*

- *The Company maintains that Ms Zobair has failed to follow a reasonable directive to provide supporting evidence that is her* (sic) *possession to support her application for paid leave.*

- *The Company rejects that by exercising rights under the Enterprise Agreement, this would somehow constitute intimidation and harassment.*

As such, I confirm that the absence remains of concern and we press our rights under Clause 28.19 to require confirmation for the reason for the absence. On that basis, letter

dated 11 April 2023 is not withdrawn. I am prepared to extend a final opportunity to provide further supporting evince (sic) *no later than, 5:00pm on Tuesday, 18 April 2023. Accordingly, we require:*

- *Original Flight Itinerary confirming departure and return flights from airline/E-ticket.*
- *Any correspondence relating to change or cancellation of flight or flights.*
- *Signed medical certificate.*
- *Any other supportive evidence you believe may be useful.*

We consider this directive reasonable under the circumstances. The supporting information provided by Ms Zobair, will be considered together with her previous responses. Our concerns remain serious and disciplinary action including termination of employment is a possible outcome of this process.

The Dispute Application

[28] Mr. Keating's evidence was that this response from the Respondent prompted him to instruct Mr. Bond to file a dispute with the Commission pursuant to the dispute resolution clause of 2021 Enterprise Agreement. He said the purpose of filing a dispute was to invoke the 'status quo' provisions of the clause to stop the Respondent from disciplining the Applicant or perhaps terminating her employment. A dispute was filed on 20 April 2023.

[29] Mr. Bond also wrote to Ms. Mihalopoulos on 20 April in the following terms:

Dear Harriett,

I refer to your email in response to the grievance that I filed on behalf of MUA member, Tahmina Zobair. For the reasons set form below, your response is unacceptable. As such, the matte [sic] remains in dispute, and I have referred the matter to the Fair Work Commission for conciliation and, if the matter remains unresolved, arbitration.

In response to the matters raised in your email, you invoke Clause 28.19 as giving the company the right to seek evidence in additional to a medical certificate to establish that an employee is genuinely entitled to take sick or carer's leave. Your reliance on Clause 28.19 is misplaced. That clause provides as follows:

> *An Employee may be required to provide evidence supporting a claim* ***for payment of personal/carer's leave*** *as provided by the NES. The Parties recognise that the Company has rights under the NES to require confirmation of the reason for an Employee's absence where the Employee is claiming personal/carer's leave and that the Company may exercise this right where absence issues are of concern to it.*

Likewise, the NES provides that, if required by an employer, an employee must provide evidence of an illness only when the employee seeks to take 'paid personal/carer's leave' (see Fair Work Act s. 107). As explained by the Fair Work Ombudsman, 'an employee

who doesn't give their employer evidence when asked may not be entitled to be paid for their sick or carer's leave'.

As you are aware, Tahmina has no available sick leave and, thus, did not seek to get paid for the two rostered days that she was unable to attend work due to an illness. Accordingly, she was required by neither the EA nor the NES to provide Hutchison with a medical certificate, let alone flight information, correspondence relating to cancelled flights, or any other evidence to confirm that she missed work due to illness.

Because your HR Manager, Luke Barron, merely requested in his letter dated 11 April 2023 that Tahmina provide further information, or the reasons set forth above, Tahmina respectfully refuses that request. Where and when she flies when she is on holidays is none of the company's concern and she is unwilling to open her personal life to unwarranted scrutiny.

Because both your email and Mr Barron's letter suggest that the company will take disciplinary action, up to and including the termination of Tahmina's employment should she refuse to permit Hutchison management to scrutinise her private life, I have lodged an F-10 in the Fair Work Commission and have involved the status quo provision of the Issue Resolution clause. Should the company attempt to discipline Tahmina while this matter remains in dispute, the MUA will seek injunctive relief on her behalf. (original emphasis)

[30] On 21 April the Respondent, through Ms Mihalopoulos, replied as follows:

Dear Mr Bond

Your member Ms Tahmina Zobair (also known as Tahmina Arsalan) has been asked by her employer to answer questions that arise directly out of matters that she has represented to Hutchison Ports.

So that your member (and your union) is aware of our concerns please be advised:

> *1. our policies require our employees to adopt the highest standards of honesty and integrity in their dealings with us;*
>
> *2. all forms of paid and unpaid leave are discretionary and in the case of personal leave, these discretions are informed by the NES and/or the EBA; and*
>
> *3.all forms of unpaid leave are discretionary;*

It would appear that Tahmina made arrangements to depart Australia to further her artistic career.

In order to pursue this opportunity Tahmina understood that she would need a period of approved leave.

We relied upon Tahmina to be truthful as to the intended duration of the leave and initially approved the period 20 February 2023 to the 5 March 2023 on the basis that she would return to Australia and work her allocated shifts commencing on 9 March 2023.

Tahmina knowingly represented that she would work allocated shifts commencing 14:00 9 March 2023 and 14:00 10 March 2023.

As you will now be aware Tahmina did not return to Australia and did not work the allocated shifts. We now have reason to believe that Tahmina misled us in that she had no intention to return to Australia to work the allocated shifts. When pressed by Hutchison Ports on her attendance Tahmina further misled Hutchison Ports in that she asserted that she had made the necessary arrangements to return to Australia.

Again in response to her representation we sought to verify this information. It is now apparent to Hutchison Ports that Tahmina is either unwilling or unable to produce any record or document which supports her representation to us.

We appreciate that any allegation of potential dishonesty is a matter that requires procedural fairness in terms of an opportunity to be advised and respond. The purpose of this email is to provide both Tahmina and your union with the opportunity to respond to this serious allegation in circumstances where termination of employment is a potential outcome.

Dispute Application

Contrary to your email of 20 April 2023 this is not about attempts by management to 'scrutinise her private life '. To the contrary, your member made representations as to her 'private life ' to obtain leave that was discretionary.

As we have relied upon these representations as true, we equally have an interest in testing the truthfulness of these representations.

Your union has chosen to file in the FWC a Form F10. We will instruct our solicitors to file a notice of appearance and await any listing. We do not however understand how the 'status quo ' provisions can apply in circumstances where we are asking an employee to respond to what may be regarded as misconduct.

The EBA permits termination of employment for misconduct. We would therefore urge your member and your union to address the concerns of and respond in a meaningful way which can be verified. Our concerns can be addressed in part by the production of any record, booking (or re booking), email, airline communication that supports Tahmina's representation that she had made the necessary arrangements to return to Australia prior to her allocated shift commencing 14:00 9 March 2023.

If there are no such documents Hutchison Ports is entitled to infer that Tahmina has not been truthful.

[31] Mr. Bond replied on the same day as follows:

Harriet,

Your treatment of Tahmina in this matter is appalling. Let's recap:

> *• Tahmina provided the company with a medical certificate certifying that she was unwell and unable to attend her rostered shifts on 9 and 10 March.*
> *• Hutchison accepted the medical certificate and granted her unpaid leave for those shifts.*
> *• Upon her return from leave, Luke Barron requested that she provide documentation related to her travel during her holiday and suggested that she could face disciplinary action, including termination, if she failed to comply with his request.*
> *• Acting through me, she filed a grievance on the basis that her travel arrangements are unrelated to her employment, and she provided you with a medical certificate that established she was unwell and unable to attend work on 9 and 10 March.*
> *• You responded to the grievance and suggested (quite wrongly) that the EA and the NES permit you to require documentation related to unpaid leave.*
> *• I disagreed, lodged a dispute in the Commission, and invoked the status quo provision that is contained in the Issue Resolution Clause.*
> *• You wrote back and, for the first time, now accuse Tahmina of dishonesty and threaten to terminate her employment.*

While you purport to be providing Tahmina with procedural fairness, your email does not identify what it is that you believe she did that was dishonest. She can't respond to an allegation that was not put to her. You say:

We now have reason to believe that Tahmina misled us in that she had no intention to return to Australia to work the allocated shifts.

I can assure you that Tahmina did not mislead you and that she had every intention to return to Australia to work the allocated shifts. Unless you put to her the 'reason to believe that Tahmina misled' you, she can't provide a meaningful response. Therefore, please provide Tahmina, through me, the evidence that you have that leads you to believe that she has been anything but truthful with SICTL. Once you provide such evidence (that I'm fairly certain consists of nothing more than baseless assumptions), Tahmina will gladly respond and, if required, provide evidence to the contrary.

Finally, your assertion that the status quo provision does not apply to this situation is absurd. The dispute involves a determination of whether Hutchison is within its rights to require an employee who was granted unpaid leave to, in addition to a medical certificate, provide after the fact flight information, receipts and other information.

You are clearly attempting to undermine the Issue Resolution process by now alleging dishonesty, thereby attempting to force Tahmina to provide the documentation you seek to defend herself against your baseless allegations. As soon as the matter is allocated

to a Member (presumably DP Easton) I will ask him to set the matter down for an urgent conference to deal with the status quo issue.

In the meantime, I look forward to you providing Tahmina with procedural fairness by providing her with the evidence that leads you to believe that she has been untruthful.

[32] On 24 April the Respondent wrote to the MUA in the following terms:

Dear Kirk

There are obvious limits as to what the 'issue resolution' and 'grievance procedure' clauses in the EBA can be used for. You simply stating your intention to place any matter 'into dispute' does not automatically invoke what you describe as the 'status quo'.

From our perspective, the status quo is and remains that in the event of alleged misconduct, it is open for SICTL to terminate the employment of an employee without notice of termination.

In terms of procedural fairness we would, as a matter of practice, allow the employee to respond to any allegation of misconduct. This is an opportunity, not a requirement.

It would appear from your correspondence that your member is unwilling (perhaps on advice) to produce records which would support her narrative that she both intended to return to Australia and work the shifts that were allocated for 9 March 2023 and 10 March 2023.

We feel that, in the circumstances, you are not responding to the opportunity to provide relevant information as to the possible termination of the employment deliberately and perhaps on the basis that we can infer that no such records exist.

Grievance Procedure

You refer in your correspondence of 21 April 2023 to the 'Grievance Procedure'. Clause 22.1 of this clause states:

> *'Where an Employee is concerned that the Company has in some way acted unfairly towards them, the Employee may initiate a Grievance.'*

We assume that the 'unfair actions' of SICTL must be the requirement to produce records to support the narrative of Ms Zobair as put to SICTL.

In your email of 21 April 2023, you state:

> *'The dispute involves a determination of whether Hutchison is within its rights to require an employee who was granted unpaid leave to, in addition to a medical certificate, provide after the fact flight information, receipts and other information.'*

> *If the above reflets the position of the union, then perhaps you should in the circumstances amend your Form F10 to confirm that this is the question that needs to be determined by the Fair Work Commission.*
>
> *We, however, take a different view as to the characterisation of the current circumstances. Our position is as set out in our email of Friday, 21 April 2023. Your member has been made aware of our concerns that she may have engaged in misconduct. Your member has an opportunity to respond to this allegation.*
>
> *Whilst it is not for SICTL to determine how your member is to respond, it is apparent to SICTL that if her narrative as put to SICTL was truthful, there would be documents in existence such as flight bookings and/or documents supporting changes to flight bookings which would assist SICTL in determining whether or not misconduct has occurred. This is now the third occasion that we have requested that this documentation be produced. This is not a question of privacy. If there are any legitimate privacy issues, they can be dealt with by way of undertaking.*
>
> *If it is the position of the union that the Fair Work Commission determines the above question, then it will be our position at the Fair Work Commission on Wednesday that an order be issued by the Commission for your member to produce the documents to the Commission.*
>
> *A copy of this correspondence will be sent to the Fair Work Commission as part of our response. It would be our preference to avoid seeking an order from the Commission as to the production of documents and we would encourage your union to seek instructions from your member and produce the documents as a matter of urgency.*

[33] On 26 April, the Respondent, through its lawyers, made an application to the Commission for an order for production of documents in the MUA dispute application matter. The documents sought were set out in the schedule to a draft order sent with the application. The documents were as follows:

> *Any document in the possession of Tahmina Zobair, including any email, text message, proof of payment, bank record, which evidences any booking, change of booking, cancellation fee and/or invoice with respect to any proposed or actual airline travel by Tahmina Zobair departing from Australia and/or returning to Australia in the period 18 February 2023 to 27 March 2023.*[12]

[34] On 27 April 2023 the MUA discontinued the dispute application in the Commission. No order for production was made.

[35] On 28 April 2023 Ms. Mihalopoulos wrote to the MUA noting the discontinuance of the dispute application but pressing for the production of the documents set out in the draft order by 1 May 2023. That correspondence included the following:

> *I will leave it to you to discuss with Kirk, but at the Fair Work Commission earlier this week, SICTL was accepting of the fact that it cannot require or demand that the*

documents be produced. We can, however, draw an inference from the non-production of the documents.

[36] On 1 May 2023 the Applicant was stood down on full pay until 5pm on 2 May to allow her to "focus on the collection of documents and any submission" that she might want to make about her ongoing employment.[13]

Meeting of 2 May 2023 – MUA and Respondent

[37] On 2 May 2023 a meeting occurred between Mr. Keating and Mr. Smith, Deputy National Secretary of the MUA, Ms. Mihalopoulos, Mr. Hughes and Mr. Barron at the Respondent's premises at Port Botany.

[38] According to Mr. Keating, who was not cross-examined, Mr. Smith showed Ms. Mihalopoulos two documents. The first was a document purporting to be the original itinerary for the Applicant's trip to Tashkent which had the Applicant returning to Sydney on 2 March 2023. This document was annexed to both Mr. Keating's statement (as PK11) and the Applicant's statement (as TZ2). The second document was the revised itinerary which had the Applicant returning to Sydney on 7 March 2023 (TZ3). The Respondent had already been provided with the second document at the meeting with the Applicant on 6 April. It was not in issue that the Respondent was not provided with copies of either of these documents on 2 May 2023.

[39] According to Mr. Hughes, Mr. Smith showed the Respondent's representatives a document that now appears as TZ2 on the screen of his laptop computer. Mr. Hughes' evidence in chief about the conversation was as follows:

> Mr Smith:
> *"We understand your concerns. Tahmina intended to return to work for her shifts. There is no doubt about that. "*
>
> Ms Mihalopoulos:
>
> *"Well that's fantastic because for us there is doubt about what she represented to us and what she intended versus what happened. "*
>
> Mr Smith [starts referring to a document on his screen and turns his laptop around so Ms. Mihalopoulos, Mr Barron and I could see it]:
>
> *"Here is a booking confirmation that Tahmina and her sister were flying out of Sydney on 20 February. They were departing Uzbekistan on 28 February, arriving in Sydney on 2 March. "*
>
> Mr Barron:
>
> *"Hang on, that makes no sense. So was she arriving back in Sydney on 2nd March or 6th of March? The documents that she has provided us show that she was booked on a flight that was departing on 6 March arriving 7 March. "*

Me: *"This doesn't explain anything, in fact it makes everything more confusing. "*

Ms Mihalopoulos:

"I feel the same, and again these are not e tickets, they are simply documents produced by travel agents. "

Mr Smith:

"The reason she is having trouble providing documents is because she is a performer, her travel is booked by the entertainment company. She picked up an extra gig and that's why it's all over the place. "

Ms Mihalopoulos:

"That doesn't really explain anything. When I travel for Hutchison, my travel is booked through a corporate travel agent, but the e ticket is issued to me in my name. Where is that? "

Mr Barron:

"I can see there are airline links to this booking confirmation, do you mind if we click there? "

Mr Smith:

"You can't, this is a PDF I have created from what Tahmina provided me. "

Mr Barron:

"Can we have a copy of this, or see the original? "

Mr Keating:

"No, you can't! She doesn't trust you it is all you're getting. And it's more than she needs to provide to you! "

Ms Mihalopoulos:

"We are well aware of that. We have said repeatedly that we cannot compel Tahmina to provide us anything, however we can provide her with an opportunity to give us any supporting evidence that will contradict our concerns. "

Mr Smith:

"But you have it. What I have shown you clearly shows she was returning to Sydney well ahead of her shifts. She got sick she can't help that. You have a certificate. "

Ms Mihalopoulos:

"The certificate is problematic in that it's predominantly in a language we cannot read nor understand, it also states it's from an ENT but the letterhead is from an IVF clinic. "

Mr Keating:

"She does not need to provide a medical certificate, she has no paid sick leave left. "

Ms Mihalopoulos:

"Essentially this is not the issue. The issue is that she made certain representations about going on leave and we need to be satisfied that she was being honest and candid when she applied for the leave.

[40] Mr Hughes made a number of points about the document TZ2 shown to him and others by Mr. Smith. He said he accepted it was the same document as the Annexure TZ2 to the Applicant's statement which he had seen by the time he made his statement. He said despite a request that a copy be provided, no copy was provided on 2 May. He said he could only view the document briefly and did not see the entirety of its contents. He said it "raised more questions than it answered" because it referred to a return date of 2 March as opposed to the 6 March return date that the Applicant had advised of in her email of 7 March.

[41] Having been provided with a copy of TZ2 by the time Mr. Hughes prepared his statement of evidence in chief, Mr. Hughes continued to take issue with the document as not supporting the "Applicant's narrative regarding the date she originally intended to return to Australia in light of the surrounding circumstances, other documents provided and other representations made by the Applicant."[14] In particular, Mr. Hughes said:

(i) Mr Smith's Document appeared to be a booking confirmation from a company "TravelPerk" whereas the Partial Reservation provided by the Applicant on 6 April 2023 (see paragraph 20 above and Annexure GH10) was provided by a company "Skylink Travels"; and

(ii) Mr Smith's Document appears to confirm a flight from Islam Karimov Tashkent International Airport on 28 February 2023 arriving at Seoul Incheon International Airport on 1 March 2023 flying Uzbekistan Airways whereas the Partial Reservation appears to confirm a flight from Islam Karimov Tashkent International Airport on 6 March 2023 arriving at Seoul Incheon International Airport on 6 March 2023 flying FLYDUBAI; and

(iii) Mr Smith's Document appears to confirm a flight from Seoul Incheon International Airport on 1 March 2023 arriving in Sydney on 2 March 2023 flying Asiana Airlines whereas the Partial Reservation appears to confirm a flight from Seoul Incheon International Airport on 6 March 2023 arriving in Sydney on 7 March 2023 flying Emirates.[15]

[42] On 3 May the Respondent wrote to the Applicant in the following terms:

As you are aware, we have now had a number of meetings and discussions with representatives of your union. We have also had the benefit of the assistance of the Fair Work Commission with the dispute that has been discontinued. We continue to press for the production of documents which may support your narrative which has been questioned by SICTL. You will also be aware that the allegation made against you is serious and may result in the termination of your employment.

In the context of a meeting with Mr Smith yesterday, he showed me documents on his laptop. Whilst Mr Smith did not provide me with copies of documents shown on the screen, I was not convinced that the documents shown to me were supportive of your narrative. The documents did not address our concerns.

It is noted that you did not attend the meeting yesterday. We are obviously now considering your ongoing employment. We wanted to provide you with a final opportunity to meet or discuss your situation. I have set a meeting for Friday, 5 May 2023 at 10am. As you have been stood down on full pay, this meeting will not be extended beyond this date. Please confirm whether you and/or your support person will attend. If you would prefer to have the meeting by telephone, I will facilitate a telephone meeting. Finally, if there are any other documents that you believe may assist you, this is your final opportunity to produce those documents. At the conclusion of Friday's meeting, a decision will be made with respect to your ongoing employment.

Please confirm your attendance by return email."

[43] Mr. Bond responded on 4 May as follows:

I refer to the message that you sent to Tahmina on 3 May 2023. Tahmina will attend the meeting that you have scheduled for tomorrow at 10:00 am along with her chosen MUA Official.

The fact that you are threating to terminate Tahmina' s employment over your gut feeling that she did not intend to return to Australia to work her two scheduled shift would be laughable if not for the immense consequences that Tahmina will suffer if you carry through with your threat. You can only lawfully summarily dismiss an employee if they have engaged in serious misconduct. In cases of serious misconduct, the principle established in Briginshaw v Briginshaw [1938] HCA 34 is applicable:

> *The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction I attained' and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' or 'by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion.*

In my email to you dated 21 April 2023 I wrote the following:

> *I can assure you that Tahmina did not mislead you and that she had every intention to return to Australia to work the allocated shifts. Unless you put to her the "reason to believe that Tahmina misled" you, she can't provide a meaningful response. Therefore, please provide Tahmina, through me, the evidence that you have that leads you to believe that she has been anything but truthful with SICTL. Once you provide such evidence 1(that I'm fairly certain consists of nothing more than baseless assumptions), Tahmina will gladly respond and, if required, provide evidence to the contrary.*

To date, you have not provided one scintilla of evidence that would support your assertion that Tahmina did not intend to return to Australia to work her two rostered shifts in March. What I gather from what your lawyer told DP Easton at a conciliation conference, you merely infer that Tahmina did not intend to return because you can't fathom that someone would return to Australia from overseas, work a couple of shifts, then fly overseas again. If, in fact, that's all you've got, then good luck convincing the Fair Work Commission that you have grounds to terminate Tahmina' s employment.

Moreover, accusing Tahmina of dishonesty without proof is inexcusable. You have caused her an extraordinary amount of stress and anxiety by threatening to sack her when you have no evidence that she has done anything wrong. And, you have no evidence that she has done anything wrong because she hasn't done anything wrong.

You now say that you have no reason to question the legitimacy of her medical certificate. That should be the end of the inquiry. Speculating whether, before she got sick, she intended to return is irrelevant. Even if she didn't intend to return when she was first booked to fly overseas, so what? It's not misconduct for an employee to have no intention to show up at a rostered shift. I could decide on a Friday that, rather than attending work on Super Bowl Monday, I am going to chuck a sickie. But if I change my mind and decide to attend work on Monday, I haven't engaged in misconduct. Likewise, if I catch Covid on the weekend and am unable to attend work on the Monday, I haven't engaged in misconduct because my reason for missing work is illness, not my original intention to engage in Super Bowl celebrations.

While I maintain that Tahmina is not required to provide you with proof that she has not been dishonest when you have no proof that she has been, to save her the distress of getting unfairly sacked and having to fight to get her job back, I asked Warren to show you documents that conclusively establish that Tahmina had every intention of returning to Australia. He showed you the following:

> *• Her original booking showing that a company that booked her to do a show overseas paid for a return plane ticket (as well as hotel accommodations) for Tahmina and her sister with them booked to return to Australia on 1 March (returning on 2 March)*
>
> .
>
> *• Tahmina was contracted to perform another gig by a different company, so she extended her stay and performed on 1 March. That company purchased tickets for her sister and her to return to Sydney on 6 March (arriving 7 March). You were provided with that booking as well.*

Even though you have sighted two different return flights to Australia that were booked for Tahmina and her sister, you stubbornly maintain that the documents shown to you do not support an intention to return to Australia. What else could she possibly provide to you, Harriett, to show that she intended to return to Australia? The fact that you're continuing to harass Tahmina about this matter demonstrates that you have an agenda beyond what you've informed us.

In short, you have no grounds to discipline Tahmina in any way, let alone sack her. Should you carry through with your threat, once again we'll meet in the Commission or in Federal Court. Rest assured that, in any such proceedings, whether in an Adverse Action claim or an Unfair Dismissal Application, we will also raise instances of disparate treatment involving cases in which Luke Barron was well aware of sickies taken by employees in circumstances where he knew full well that they were not, if fact, sick. The fact that he condoned the misuse of sickies for certain employees while accusing Tahmina of engaging in serious misconduct for allegedly doing the same is alarming and, perhaps, illegal.

In sum, I urge you to do the right thing and drop this matter entirely.

[44] The Respondent replied to that email the following day, taking issue with the MUA's perception of the conciliation conference before the Commission, noting that documents were shown by Mr. Smith to the Respondent's representatives but that the documents did not meet the Respondent's concerns and offering a final opportunity for the Applicant to respond to those concerns. The Applicant was copied into the correspondence. Mr. Bond replied on the same day arguing that no specific concerns had been put to the Applicant to which she could respond, that the process lacked procedural and substantive fairness and that the Respondent had presumed the Applicant guilty of an undisclosed transgression and indicated an intention to terminate her employment if she could not prove her innocence.

Meeting on 5 May 2023 – Applicant, MUA and Respondent

[45] The Applicant and Mr Keating met with Ms. Mihalopoulos and Messrs Hughes and Barron on 5 May. The meeting was brief. Mr Keating did most of the talking. According to Mr. Keating, he said that the Applicant had proven to the company that she fully intended to return to work her rostered shifts, that the Applicant had provided all the documentation she had to demonstrate her intention to return and that the Applicant was a model employee.

[46] Mr. Hughes and Mr. Barron gave similar accounts of the meeting as each other.[16] They said Mr. Keating referred to the medical certificate that had been provided and confirmed the Applicant's intention to return for work on 9 and 10 March. They said Mr. Keating said that the information requested had been provided or shown. They said the Applicant and the MUA were asked to comment on the impact of termination of employment and Mr. Keating strongly opposed this outcome. Mr. Hughes disputed that Mr. Keating made comments about the Applicant's record as an employee. The Applicant was asked to offer any additional comments but agreed that Mr. Keating had said what she had wanted to be said. None of the Respondent's representatives said anything in response to Mr. Keatings representations on the Applicant's behalf. No further documents were produced or provided at the meeting.

[47] Further correspondence followed this meeting. On 17 May the Applicant's employment was terminated. The letter of termination is set out below.

> ***Re: Termination of Employment***
>
> *I have had regard to the matters raised on your behalf with respect to our concerns relating to your conduct.*
>
> *I believe that you have had an adequate opportunity to respond to these concerns and the possibility of the termination of your employment.*
>
> *It is noted that there was a conciliation conference before the Fair Work Commission. We were prepared to work within the FWC processes, however, your union discontinued these proceedings.*
>
> *We have, for some time now, pressed for the provision by you or your union of documents that that would have supported your narrative. These attempts were resisted before the Fair Work Commission by your union.*
>
> *In our subsequent meeting with Mr Smith and with Mr Keating, we do not believe that any verifiable documents have been produced that support your claims.*
>
> *In the circumstances, we remain of the view that you have not been honest. In circumstances where we grant leave based upon the representations of our employees, it is important that employees are open and honest in their dealings with us. This has not occurred and, in the circumstances, we remain of the view that you have engaged in misconduct.*
>
> *We have elected to terminate your employment, effective today. Notwithstanding our finding of misconduct, I will, without any prejudice to the legal position of SICTL, arrange for a payment to be made in lieu of notice in accordance with the EBA. Please ensure that you have returned to SICTL any company property. Any personal effects that remain on company premises will be couriered to your home address.*

Orders for Production of Documents

[48] Shortly before the hearing of this matter, the Respondent applied to the Commission for an order for the production of documents by the Applicant. The documents sought included the following:

1. *Any document in the possession of Tahmina Zobair, including any email, text message, proof of payment, bank record, e-ticket, which evidences any booking, change of booking, cancellation, cancellation fee and/or invoice with respect to any proposed or actual airline travel by Tahmina Zobair departing from Australia and/or returning to Australia in the period 18 February 2023 to 27 March 2023.*

2. *Any communications (including emails / text) in the period 18 February 2023 to 27 March 2023 to or from any travel agent, travel booking, travel consultant, visa procurement organisation, embassy with respect to any actual or intended cancelled or airline travel by Tahmina Zobair.*

[49] The application was not opposed and an Order[17] was made for the production of the above material. Nothing was produced in response to the Order.

Company Policies

[50] The Respondent gave evidence about a Code of Conduct that applied to employees at the Port Botany site including the Applicant. That Code required all employees to observe the highest standards of ethical and professional conduct.[18]

[51] There was also in evidence a memorandum from Ms. Mihalopoulos to all employees dated 13 September 2022 setting out the Respondent's policy in relation to supporting evidence required for personal and carer's leave absences. The memorandum provided:

"Further to directives in September 2020, this Memorandum serves as a reminder to employees are to provide supporting evidence for all absences to take Personal (Sick) or Carers Leave.

When is Supporting Evidence be required?

The Company shall require an Employee to provide supporting documentation for all Personal (Sick) or Carers leave absences from work which are adjacent to public holidays, annual leave and ROW.

Supporting Evidence can be as follows:

- *An Employee can provide up to 2 statutory declarations in any 12-month period for any absences from work due to personal or carers leave. The statutory declarations must be signed and duly authorised/approved by a justice of the peace; or*
- *A medical certificate from a medical practitioner; or*
- *A certificate from an ancillary medical provider such as a dentist, Nurse Practitioner, clinical psychologist.*

Please note that the Company does not accept evidence obtained from online platforms or certificates from a pharmacist to support any Personal (Sick) or Carers leave application.

Employees are also reminded that when absent they must contact the Absence Hotline prior to the shift start otherwise the absence may be treated as an FTR (Failure to Report) and provide the following details:

- *Full name;*
- *Allocated shift you are unfit to attend; and*
- *Reason for not attending eg. sick, carers leave ect.*

Note that should an Employee not provide a reason for their absence then the Employee will not be paid for that absence. As such providing a reason such as "not available", "won't be in" or "not coming in" will be unpaid.

The above is consistent with the Company's Leave Policy and the EBA and may not apply to Employees on an Absence Management Plan.

If you have any questions, please contact your manager".

Submissions – "Valid Reason"

[52] The Applicant submitted that there was no valid reason for the termination of her employment. The Applicant said this was so because the decision to terminate was capricious, fanciful and spiteful, because the company produced no evidence of misconduct and that even if the misconduct were proven, it did not justify termination. The Applicant said under the terms of the 2021 Agreement and the Respondent's own policy she was not required to provide evidence for her personal leave absences because the leave was unpaid. She said that under the Respondent's policy the consequence for not providing such evidence was non-payment for the period of leave. The Applicant said that in any event she had provided a medical certificate for the absence and ultimately the Respondent did not challenge the certificate as evidence of an inability to attend work due to illness.

[53] The Applicant said the provision of the medical certificate should have been the end of the matter but instead the Respondent took the extraordinary step of putting the burden of proof on her to satisfy the company that, before she became ill, she intended to return to perform the two rostered shifts. The Applicant submitted that ultimately it was simply assumptions and conjecture on the part of the Respondent - namely that no-one would fly back from Uzbekistan to work two shifts before flying to Türkiye for a second period of leave - that lead to her dismissal and that under the *Briginshaw* standard, such assumptions could not properly found a summary dismissal.

[54] The Applicant pointed to the fact that the Respondent accepted it had no right to demand the documentation it sought but relied solely on the negative inference that it drew from the failure to provide those documents. The Applicant said that notwithstanding the fact that the Respondent had no right to the documents, flight information was provided in an attempt to resolve the matter and that information showed that two separate bookings had been made for return flights before the rostered shifts. The Applicant said the Respondent did not ever explain why the documents provided were considered to be insufficient. The Applicant submitted that even if it were accepted that the Applicant did not intend to return for the shifts, this would warrant no more than a written warning, not termination.

[55] The Respondent submitted that the Applicant did not intend to present for work on 9 and 10 March 2023 and lied to the Respondent as to her intentions. They said that the Applicant's narrative about being unexpectedly prevented from returning to Sydney was false. In support of this contention, they invited the Commission to draw adverse inferences against the Respondent from the available evidence, including the lack of documents produced by the Applicant. Reliance was placed on the decision of the Full Bench in *DesignInc (Sydney) Pty*

Ltd v. M Xu[19] where the principles relating to the drawing of inferences was discussed. The Respondent submitted that the failure to produce documents permitted the Respondent to assume no such documents existed and that the Applicant had not been honest in her dealings with the Respondent. The Respondent said applying ordinary human experience to the Applicant's evidence as to her travel plans and their amendment, the claim as to the non-existence and non-production of documents appeared to be inherently unlikely.

Consideration

[56] In its consideration of predecessor provisions to s.387(a), the former Industrial Relations Court of Australia confirmed that the expression "valid reason" means a reason that is sound, defensible or well founded.[20] It was there said that a reason that it capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE of the former *Workplace Relations Act* 1996.[21] Although the wording of the present provisions differ, the approach continues to apply to the issue of "valid reason" under s.387(a).[22]

[57] When considering whether there is a valid reason relating to the conduct of an employee, the Commission must decide whether, on the balance of probabilities, the conduct said to have been engaged in by the employee actually occurred.[23] The test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct.[24]

[58] As to the question of onus or burden of proof in matters of this kind, a Full Bench of the Commission observed in the matter of *Newton v Toll Transport Pty Ltd*:[25]

> [81] Contrary to the Appellant's contention, the extent to which the legal concept of onus or burden of proof applies to matters before an administrative tribunal such as the Commission is somewhat vexed. As observed by the Full Bench in *Advanced Health Invest Pty Ltd T/A Mastery Dental Clinic v Mei Chan*:[26]
>
> > *'As to the issue of onus agitated by the Respondent, it must be said that the extent to which the legal concept of onus or burden of proof arises in relation to matters considered by an administrative tribunal such as the Commission is a difficult one. However, in the context of the question whether a dismissal is unfair, to the extent that there is a legal onus or something analogous to it, the onus rests on the applicant in the sense that it is the applicant who bears the risk of failure if the satisfaction required by s.385 including s.385(c) is not reached. As to evidentiary onus, plainly a party seeking to establish a fact bears onus of adducing evidence necessary to establish that fact. In a practical sense, in most cases the question of where an evidentiary onus resides will be answered by asking: in relation to each matter about which the Commission must be satisfied, which party will fail if no evidence or no further evidence about the matter were given?*

[59] In order to be satisfied that there was a valid reason for the dismissal here I must conclude that the Applicant had no intention of returning to work her allocated shifts when she applied for annual leave and that in that event, she was dishonest and mislead her employer into believing that she did intend to return to work. The Applicant asserted that at all times it was

her intention to return to Australia to work on her allocated shifts. The conclusion for which the Respondent contended was based largely on adverse inferences that they maintained should be drawn from the Applicant's failure to produce documents. Mr. Hughes accepted in cross-examination that the Respondent did not provide the Applicant with any evidence that she had mislead the Respondent but that the Respondent simply stated to the Applicant that they believed that she did not intend to return.[27] The Respondent's case was that the Commission could nonetheless be satisfied that the conduct occurred because the surrounding agreed or proven facts were of a kind that that allowed the Commission to draw an inference, as the Respondent had done, as to the Applicant's real intention at the time the leave was requested.

[60] In *DesignInc (Sydney) Pty Ltd v. Xu*[28] a Full Bench of the Commission restated the relevant principles relating to the drawing of inferences as follows:

(i) an inference is assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts;
(ii) the drawing of an inference is part of the process of fact finding;
(iii) an inference can be drawn if it is reasonably open on the basis of agreed or proved facts;
(iv) the question whether a particular inference can be drawn from the facts found or agreed is a question of law;
(v) where direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference;
(vi) the circumstances must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture;
(vii) matters to be taken into account in drawing an inference include circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed;
(viii) generally it is not lawful to take into account moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations;
(ix) the degree of probability required to found the necessary inference will depend on the nature of the proceeding:
(x) in a criminal case the facts must be such as to exclude reasonable hypotheses consistent with innocence;
(xi) in a civil case you need only circumstances raising a more probable inference in favour of what is alleged;
(xii) a party's failure to give evidence on some issue in cases where it is within that party's power to provide or give evidence, may result in more ready acceptance of the evidence for the other party or the more ready drawing of an inference that is open on that evidence.

[61] It is apparent from the submissions that the Respondent relied upon, primarily, the failure of the Applicant to produce travel and related documentation to support the drawing of the necessary inference against the Applicant. There was also some evidence from the Respondent relating to the way in which the Applicant applied for annual leave. Although it was not stressed in submissions, that evidence was that the Applicant made a series of applications for leave for two discrete periods and that had she made an application for a single

period of leave of four weeks or more, this would have required more senior levels of managerial approval. Mr Hughes also gave evidence that the Applicant went to some lengths to avoid being rostered on for work on 8 March 2023.[29] To the extent that this evidence is relied upon to support the view that the Applicant always intended to be absent for the entire period and applied in the way she did to avoid an approval process, a point not put to the Applicant in cross-examination, I reject that contention. The Applicant gave evidence that she had two (and later three) different performances booked for different dates in two different countries for different production companies. There was no evidence about the sequence in which these engagements became available to and were accepted by the Applicant. However, I can just as readily infer that the leave was requested and booked as and when it was necessary to meet those separate commitments. I draw no adverse inference against the Applicant from this evidence.

Documents Provided

[62] The Applicant did provide documents to the Respondent about her travel arrangements. On 7 March, in advance of her absence from work, she provided notice of her pending absence on 9 and 10 March and a medical certificate to the Respondent that covered the period of that absence. At various points, the Respondent questioned the validity of the certificate. On 11 April they requested a signed copy of the certificate. On 17 April they asserted a right to require confirmation of the *reason* for the Applicant's absence and relied on clause 28.19 of the 2021 Agreement to do so. The Respondent said that the certificate would not satisfy a reasonable person because it was unsigned and they were unable to verify the person who had provided it was a registered medical practitioner.[30] They also asserted that the Applicant had failed to follow a reasonable directive to provide supporting evidence to support an application for paid leave.[31]

[63] On 28 April, after the Commission proceedings before Deputy President Easton, the Respondent no longer asserted any right to demand documents. Ms. Mihalopoulos wrote *"..at the Fair Work Commission earlier this week, SICTL was accepting of the fact that it cannot require or demand that the documents be produced. We can, however, draw an inference from the non-production of documents."*[32] From this point until the termination of the Applicant's employment, the Respondent did not reassert a right to receive any of the documents it was asking for, including a signed medical certificate. Nor did they take issue with the validity of the certificate itself or assert that the Applicant had failed to follow a reasonable direction to provide evidence as to her taking of leave. However, Mr. Hughes' evidence at the hearing was that employees were obliged to provide supporting evidence for any absences adjacent to public holidays, annual leave and rostered off weeks according to the company policy dated 13 September 2022.[33] He said the fact that the Applicant had exhausted her paid personal leave did not relieve her of the obligation to provide supporting evidence for her absences.[34] He accepted in cross-examination that the company was not entitled to obtain travel and banking documents.[35]

[64] It is unclear what accounted for these changing positions by the Respondent. In any event, as to the medical certificate, given that the Applicant had never sought paid personal leave, the MUA was, in my view, correct to assert as it did[36], that clause 28.19 of the 2021 Agreement, including any rights the clause confers on the Respondent pursuant to the NES,[37] did not oblige the Applicant to provide a medical certificate or any other documentation relating

to her absence on 9 and 10 March. Clauses 28.18 and 28.19 both refer to medical certificates or other evidence to support a "claim for payment". The second sentence of clause 28.19 simply references the rights the company has under the NES. Section 107 of the FW Act requires an employer to give their employer notice of the taking of personal leave and, where that notice is given and if the employer requires it, to provide evidence as to the reason for the leave where the leave is paid personal leave.[38]

[65] I also do not accept that the company's policy set out in the memorandum of 13 September 2022 obliged the Applicant to do any more than she did. Even accepting for a moment that the terms of the memorandum required something beyond what the 2021 Agreement provided for, and that employees were obliged to provide a reason and supporting material in cases of unpaid personal leave absences, the Applicant met this obligation by providing the medical certificate. The reason for the absence was illness, evidenced by the certificate.

[66] In any event, it was not the failure to produce documents or comply with company policy that the Respondent claimed grounded the termination, but dishonesty at the point of applying for annual leave. It seems to me that on this argument, there are two possibilities insofar as the provision of a medical certificate is concerned. Either the Respondent contends that the Applicant did not intend to return to work but was nonetheless ultimately prevented from doing so because of genuine illness, or that the Applicant did not intend to return and the dishonest intention later manifested itself in a feigned claim of illness and the provision of a bogus medical certificate or a medical certificate obtained in bad faith.

[67] I do not accept that there is any issue with the medical certificate itself. The medical certificate is valid on its face and there is no basis to go behind that certificate. Contrary to one of the original allegations by the Respondent that the Applicant had used personal leave entitlements inappropriately,[39] the Applicant was entitled to rely on that certificate to access unpaid personal leave. I note that Mr. Hughes' evidence was that the medical certificate did not have anything to do with the reasons for termination.[40] Nevertheless, the Respondent said in final submissions that the unsigned medical certificate and the Applicant's attendance history gave the Respondent good reason to question the Applicant's narrative. The certificate is cogent evidence of the Applicant's state of health at the time. To the extent that I am invited by the Respondent to draw an adverse inference from the surrounding circumstances that there was some feigned illness on the Applicant's part I decline to do so. Ultimately, I conclude that the Applicant did not return to Australia to work her allocated shifts because illness prevented her from doing so. I do not accept that the Applicant's medical certificate was a manifestation of a dishonest intention and draw no adverse inference against the Applicant because she obtained and provided the certificate. It follows that there should be no adverse inference drawn against the Applicant because of the absence from work on 9 and 10 March because of her illness.

[68] On 6 April 2023, the Applicant also provided to the Respondent a copy of a document setting out the details of a return flight for the Applicant and her sister from Tashkent to Sydney on 6 March 2023 (TZ3). The Respondent's witnesses described this as a "partial reservation". They disputed that the document was evidence of purchased tickets. Despite being provided with the document early in the "investigation" process, the Respondent continued to assert that this was insufficient to support the Applicant's narrative. The document includes two e-ticket receipt numbers. I accept the document as evidence of at least a reservation having been made

for a return flight to Sydney for the Applicant on 6 March, prior to that date. Such a reservation is consistent with the Applicant's narrative as to both obtaining a second performance in Tashkent after her arrival there and an intention to return to Sydney prior to her rostered shifts.

[69] The Applicant also relied on document TZ2, which was said to evidence her original itinerary for the trip from Sydney to Tashkent, including accommodation in Tashkent from 21 to 28 February and a return flight arriving in Sydney on 2 March 2023. The document appears to be an email dated 13 February 2023. It includes a booking confirmation number in the subject line. At least some part of the document was shown to the Respondent's representatives by Mr Smith at the meeting on 2 May. It was not provided to the Respondent until the Applicant's witness statement was filed in these proceedings. The origin of the document is unclear. The Applicant appeared to accept it came from her but was unsure when she provided it to the MUA.[41] Mr. Hughes said that Mr. Smith described the document as *"a PDF that I have created from what Tahmina provided me."*[42]

[70] In cross-examination Mr. Hughes' evidence was that he saw the first page only of the document on Mr. Smith's computer.[43] However, it was also his evidence[44] in chief that the following exchange occurred at the meeting on 2 May:

> Mr Smith [starts referring to a document on his screen and turns his laptop around so Ms. Mihalopoulos, Mr Barron and I could see it]:
>
> *"Here is a booking confirmation that Tahmina and her sister were flying out of Sydney on 20 February. They were departing Uzbekistan on 28 February, arriving in Sydney on 2 March. "*
>
> Mr Barron:
>
> *"Hang on, that makes no sense. So was she arriving back in Sydney on 2nd March or 6th of March? The documents that she has provided us show that she was booked on a flight that was departing on 6 March arriving 7 March. "*
>
> Hughes:
>
> *"This doesn't explain anything, in fact it makes everything more confusing. "*
>
> Ms Mihalopoulos:
>
> *"I feel the same, and again these are not e tickets, they are simply documents produced by travel agents. "*

[71] The discrepancy described in the statement of Mr. Barron above can be explained by the Applicant's evidence[45] about the second Tashkent performance of which the Respondent was, at that stage, apparently unaware. Nonetheless, the Respondent continued to attack the document as not credible and not satisfactory evidence of a purchased return ticket. The Respondent said the failure to provide it demonstrated evasiveness on the part of the Applicant. Having been supplied with the document by the time of the proceedings, Mr. Hughes

maintained that it did not support the Applicant's narrative regarding the date she intended to return.[46]

[72] In my view the document does provide some support for the Applicant's narrative. The dates of the document are consistent with the Applicant's version of events and the fact that some form of travel arrangement was made prior to the Applicant's departure which included a return date of 2 March 2023. It is consistent with an intention to return to Sydney before 9 March. The fact that it refers to a different travel company, different flights and different return dates to TZ3 is understandable given the Applicant's evidence, which I accept, that the bookings were made by the different production companies for the two separate events.

[73] It was accepted by the Applicant that a copy of TZ2 was not provided to the Respondent prior to her termination. The Respondent was shown some part of the document at the meeting on 2 May but was not given the document until the filing of the Applicant's witness statement in these proceedings. However, the Respondent was made aware prior to the termination that the Applicant had engaged in two different performances in Tashkent which necessitated a change of flight arrangements. Mr. Bond's correspondence[47] to the Respondent of 4 May referred to this and Mr. Hughes accepted the point in cross-examination:

> *.....So, before you terminated Tahmina, Mr Hughes, you knew that two separate flights had been booked for Tahmina, and to return to Sydney well in advance of her next rostered day off work, and you knew the reason that two separate flights had been booked, right?---We were given reasons, yes.*
>
> *So the reasons were, she booked the original flight; I informed Harriet that there is a second booking, because she got a second gig; therefore a change of flights; that's why we have the two separate bookings, right?---Right.*
>
> *And you were aware of that fact prior to the time that you terminated her employment; correct?---Yes.*[48]

[74] Aside from documents TZ2 and TZ3 no other travel documentation was produced to the Respondent before the termination, or to the Commission pursuant to the order for production. The Applicant said that her sister was her manager and managed her travel, invoicing, bookings and financial arrangements. She lived with her sister and accepted she had a good relationship with her and that if any travel documents existed, they would likely be held by her sister.[49] The Applicant said at various points in cross-examination that she did not recall discussing the Respondent's request for travel documents with her sister.[50]

[75] The Applicant said that she did not pay for her flights. She said that flight bookings are made by a booking agent and that the costs are met by the producer who retains her services.[51] She said she did not incur any expenditure for purchasing or changing tickets[52] and that the company that she is performing for pays for those items, as well as "extra hotel stays".[53] Mr. Barron gave evidence that the Applicant told him as early as 6 April that all of her travel arrangements were made by a third party and that was the reason she had no proof of purchase or correspondence from any airline.[54] I accept that the Respondent was told this by the Applicant. Those are matters that clearly have implications for any documents that the Applicant might be expected to have in her possession relating to travel arrangements. For

example, given flights were not paid for by the Applicant, it would be unsurprising in the circumstances if the Applicant had nothing to produce in response to Mr. Barron's request for bank records, albeit a request qualified by reference to records relating only to proof of purchase of flights.[55]

[76] The involvement of booking agents and production companies also reduces the likelihood that the Applicant would have at least some of the travel documentation sought by the Respondent. Mr. Hughes accepted in cross-examination that the Respondent was aware that third parties were involved in the travel arrangements before the decision was made to terminate the Applicant's employment:

> *The companies who booked her to perform are the companies that provided her with those reservations, they purchased the flights, correct?---Yes.*
>
> *And you were aware of that at the time that you terminated her employment, weren't you?---Yes.*
>
> *Because Warren Smith told you that, at that meeting, didn't he?---He did, yes.*
>
> *Yet she couldn't provide those documents because she is not the one who did the booking, yet you assume that she should have had them and because she didn't you terminated her employment, how fair is that?---As I said, if Ms Zobair did not have that correspondence in her possession I believe the company making the bookings should have had that correspondence in their possession.*[56]

[77] Mr. Hughes accepted in cross-examination that the Respondent had no evidence of misleading conduct other than the assumptions made by the Respondent as to the Applicant's conduct.[57] As to the evidence provided to the Applicant that she had engaged in misleading conduct he said:

> *To this very day you never provided her with any evidence that she mislead you, right?---We did not provide evidence, no, we simply stated that we believed she was misleading us in telling us that her intention was to return to Australia for those two shifts.*[58]

[78] There are parts of the Applicant's **"**narrative" that remain at least partially unexplained. For example, there was very little evidence as to the flight that the Applicant said she had originally intended to take from Sydney to Istanbul after she had returned from Tashkent. There were no travel documents relating to this flight and the Applicant could not recall what date it was that she was scheduled to fly, or the airline. The evidence as to the return flight from Istanbul to Sydney was unsatisfactory. Again, there was no documentation and the Applicant said the flight may have been on 23 or 24 March but could not recall whether the flight that she ultimately returned on was the same as the one that had been originally booked.[59] The absence of documentary evidence on these issues does not assist the Applicant.

[79] The adverse inferences that the Respondent submits should be drawn go not to, for example, the occurrence or non-occurrence of a particular event, but to the existence of a dishonest intention on the part of the Applicant at a particular point in time. Given the all the evidence here, including the documents that were provided and the evidence of the Applicant

as to her intention, and having regard to the principles enunciated in *DesignInc*, I am not satisfied that the absence of some evidence of this kind in combination with other evidence supporting the Respondent's case, allows me to draw adverse inferences to the point where I can be satisfied that the Applicant held a dishonest intention and thereby engaged in misconduct.

[80] Having regard to all the evidence in this case I am unable to conclude that the conduct said by the Respondent to have been engaged in by the Applicant, occurred. I therefore conclude that there was no valid reason for the dismissal relating to the Applicant's capacity or conduct. This weighs in favour of a conclusion that the termination was unfair.

Section 387(b) and (c) - notice of reason for dismissal and opportunity to respond

[81] The Applicant was given notice of the reason for her dismissal and an opportunity to respond. The matter that is required to be taken into account under s.387(b) of the Act is whether the Appellant "was notified of that reason". Contextually the reference to "that reason" is the valid reason found to exist under s.387(a).[60] Since I have found that there was no valid reason in this case, there is nothing to weigh under this heading. The same view has been adopted in relation to s.387(c)[61] and the same approach applies.

Section 387(d) - any unreasonable refusal to allow a support person to assist in discussions relating to the dismissal

[82] There is no evidence of any refusal to allow a support person to participate in discussions relating to the dismissal. This is a neutral consideration in this case.

Section 387(e) – unsatisfactory performance - warnings

[83] The dismissal did not relate to unsatisfactory performance, but rather alleged misconduct on the part of the Applicant. This factor is not relevant to the present circumstances.

Section 387(f) and (g) - size of the employer's business and absence of dedicated human resources management specialists or expertise

[84] The nature of the Respondent's operations, the 2021 Agreement, which covers its Sydney and Brisbane operations and the evidence that there was in the order of 250 employees[62], indicates that it is an employer of significant size. The Respondent was plainly aware of the need to afford an opportunity to the Applicant to obtain advice, representation and time to provide a response to the allegations that were put to her. I do not regard the size of the Respondent's enterprise as having a material impact on the procedures followed in effecting the dismissal in this case. The Respondent had dedicated human resource management specialists, Mr. Barron and Ms. Mihalopoulos, directly involved in the termination process. There was no absence of such specialists and this is a neutral consideration here.

Section 387(h) - other relevant matters

[85] The Applicant has approximately eight years' service with the Respondent. There was some evidence as to her employment history. There was one instance in 2020 where the

Applicant was sent a letter[63] about a failure to report for a shift. According to the letter, the Applicant provided an explanation, expressed regret and indicated the situation would not recur. The letter was in the nature of a warning and no further disciplinary action followed.

[86] There was also evidence that the Respondent had sent a letter dated 3 December 2021 addressed “Dear Employee” and titled "Absence Management Plan” which referred to the fact that more than 13 days of personal leave had been taken over the last twelve months. The Applicant accepted that she had received the letter but said it had been sent to most if not all employees and was withdrawn following a complaint by the MUA. She said it did not result in her being placed on an absence management plan.[64] The Applicant submitted that a level of absenteeism during the pandemic was not remarkable. The Respondent said that the Applicant and approximately 75 other employees had been sent the letter, that it was not withdrawn and that it placed the Applicant on an absence management plan for a period of time which had expired by the time the events involving the Applicant arose[65].

[87] Even accepting the Respondent’s evidence as to the absence management plan in 2021, I still consider that the Applicant has a satisfactory work history over an extended period. Dismissal in circumstances where she had notified her employer in advance of her absence and provided a medical certificate to explain the absence worked harshly against the Applicant. These are factors that weigh in favour of a conclusion that the dismissal was unfair.

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

Remedy

[89] 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[66] and on ensuring that a “fair go all round” is accorded to both the employer and employee concerned.[67]

Is reinstatement of the Applicant inappropriate?

[90] The Applicant seeks reinstatement to her previous position and the recovery of lost wages. The Respondent opposed reinstatement. Mr. Hughes gave evidence about the deliberate misconduct of the Applicant and his resultant loss of trust and confidence in her. He said reinstatement would “send the wrong message” to employees. Having regard to my conclusions in relation to “valid reason”, this evidence is not persuasive on the issue of reinstatement. I am satisfied that the employment relationship can and should be restored.

[91] I consider that reinstatement is the appropriate remedy. I am satisfied that I should make an order reappointing the Applicant to the position in which she was 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.

[92] I also propose to make an order to maintain the continuity of the employment and the period of continuous service of the Applicant with the employer pursuant to s.391(2).

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

[93] 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.

[94] 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.*

[95] 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.[68]

[96] 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). I note that it was put in the Applicant's final written submissions that since the hearing, the Applicant had taken steps to mitigate any loss.

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

DEPUTY PRESIDENT

Appearances:

Mr Kirk Bond for the Applicant.
Mr Paul Brown for the Respondent.

Hearing details:

In-person on Thursday, 10 August 2023.

Final written submissions:

Applicant Final Submissions – 4 September 2023.
Respondent Final Submissions – 13 September 2023.
Applicant Final Submissions in Reply – 25 September 2023.

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[1] Section 391(2).

[2] Section 391(3).

[3] s 394(2).

[4] Statement of Tahmina Zobair Annexure TZ3, Court Book page 44.

[5] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[6] Statement of Tahmina Zobair paragraph 5 and Annexure TZ2, Court Book page 37.

[7] Ibid, paragraph 6 and Annexure TZ3, Court Book page 44.

[8] Ibid, Annexure TZ4 Court Book page 45.

[9] Transcript PN345.

[10] Exhibit A1 Statement of Tahmina Zobair Annexure TZ3. Exhibit R2 Statement of Luke Barron paragraph 17.

[11] Exhibit A3 Statement of Paul Keating paragraph 10.

[12] Exhibit R1, Annexure GH17.

[13] Ibid, Annexure GH21.

[14] Exhibit R1 paragraph 42(e).

[15] Ibid.

[16] Exhibit R2 Barron Statement says the meeting concluded at 10.50am. Mr Hughes said the meeting concluded at 10.30am.

[17] PR764958.

[18] Statement of Geoff Hughes Annexure GH3, Court Book page 266.

[19] [2012] FWAFB 2740 (‘*DesignInc*’).

[20] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at p. 373.

[21] Ibid.

[22] *BlueScope Steel (AIS) Pty Ltd v Agas* [2014] FWCFB 5993at [63].

[23] *Edwards v Giudice* [1999] FCA 1836 (23 December 1999) at paras 6–7.

[24] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at para. 24. See also *Yew v. ACI Glass Packaging Pty Ltd* [1996] 71 IR 201 at 205-206 per Wilcox J.

[25] [2021] FWCFB 3457. More recently see *NSW Trains t/as NSW Trainlink v. Wael Al-Buseri* [2023] FWCFB 165 (21 September 2023).

[26] [2019] FWCFB 5104.

[27] Transcript PN 1096.

[28] *DesignInc* (n 19).

[29] Transcript PN1208.

[30] See also Barron Statement at para 36(d).

[31] Statement of Paul Keating Annexure PK4.

[32] Statement of Paul Keating Annexure PK10.

[33] Statement of Geoff Hughes, para 67(a).

[34] Ibid

[35] Transcript PN1079 and PN 1100.

[36] See MUA correspondence 20 April 2023 Exhibit R1 Statement of Hughes paragraph 27.

[37] See s.107(3)(a) FW Act.

[38] Section 107(3)(a).

[39] Exhibit R1 Statement of Hughes paragraph 16.

[40] Transcript PN842-843.

[41] Transcript PN244.

[42] Hughes Statement paragraph 40.

[43] PN 1014-1015.

[44] Statement paragraph 40.

[45] Exhibit A1 Statement Zobair paragraph 6.

[46] Statement para 42(e).

[47] Exhibit A3 Keating Statement Annexure PK14.

[48] Transcript PN1170- 1172.

[49] Transcript PN233 and PN374.

[50] For example, transcript PN270 and 375.

[51] Statement para 8 and transcript PN371.

[52] Transcript PN717.

[53] Transcript PN716.

[54] Exhibit R2 Barron, paragraph 18.

[55] Transcript PN461 and following.

[56] Transcript PN1112-1115.

[57] Transcript PN919.

[58] Transcript PN1096

[59] Transcript PN363-364.

[60] See *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Reseigh v. Stegbar Pty Ltd* [2020] FWCFB 533 at [55].

[61] *Read v Gordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[62] Transcript PN865.

[63] Exhibit R1 Hughes Statement Annexure GH30.

[64] Exhibit A2 Zobair Statement paragraph 6.

[65] Transcript PN961.

[66] s 381(1)(c).

[67] *BlueScope Steel Limited v Sirijovski* [2014] FWCFB 2593 at [73].

[68] *Aurora Energy Pty Ltd v Davison* PR902108 (AIRCFB, Watson SDP, Williams SDP, Holmes C, 8 March 2001), [25].