[2023] FWC 2906[Note: An appeal pursuant to s.604 (C2023/7273) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Steven Lee
v
Origin Energy
(U2023/4315)

COMMISSIONER PERICA MELBOURNE, 3 NOVEMBER 2023

Application for an unfair dismissal remedy - independent medical examinations - lawful and reasonable directions - application dismissed

[1] On 24 May 2023, Mr. Steven Lee (the Applicant) made an application to the Fair Work Commission under s 394 of the *Fair Work Act 2009* (Cth.) (the Act) for a remedy, alleging he had been unfairly dismissed from his employment with Origin Energy (the Respondent). The Applicant seeks reinstatement.

[2] The matter was heard in-person on 14 August 2023 with the Applicant attending by video through Microsoft Teams. The Applicant represented himself, while the Respondent was represented by Ms Levine of counsel.

[3] For the reasons expressed below I am not satisfied the Applicant was unfairly dismissed within the meaning of s 385 of the Act. The application is therefore dismissed.

When can the Commission order a remedy for unfair dismissal?

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

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

(b) the Applicant has been unfairly dismissed.

[5] Both limbs of this section must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[6] Section 382 of the Act provides that a person is protected from unfair dismissal, at a time if, at that time:

(c) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(d) one or more of the following apply:
- (i) a modern award covers the person;
- (ii) an enterprise agreement applies to the person in relation to the employment;
- (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[7] The Applicant was employed by the Respondent for over two years which exceeds the minimum employment period. The Respondent accepted that the *Origin Energy (Melbourne Customer Contract and Retail X) Enterprise Agreement 2020* applied to the Applicant's employment. It was not in issue that the Applicant was protected from unfair dismissal at the time of being dismissed.

When has a person been unfairly dismissed?

[8] Section 385 of the 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.

[9] The Applicant was dismissed on 17 May 2023 and lodged his application for relief on 24 May 2023 within the requisite time period.

[10] The matters referred to at points (a), (c) and (d) above were not in issue. No jurisdictional issues arise with the application. Accordingly, 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 turning to consider whether the Applicant has been unfairly dismissed, it is convenient to set out some of the factual background relevant to the proceedings.

BACKGROUND

[11] The Applicant began his employment with the Respondent on 22 February 2021 as a sales consultant which involved selling energy plans over the phone and dealing with customer enquiries.

[12] The Applicant alleges he was subject to bullying by a coworker over the course of the next two months involving a series of incidents which he described in his evidence.

[13] On 6 April 2021, the Applicant ceased attending work on personal leave where he stated that he had no capacity to work.

[14] On 20 April 2021, the Applicant requested to be placed on serious illness leave because of a "serious medical condition [preventing him] from being at work for a significant amount of time".

[15] On 22 April 2021 the Applicant lodged a workers compensation claim. It claimed the alleged bullying by the coworker had exacerbated pre-existing anxiety and depression. From that date until the termination of his employment the Applicant was absent from work in receipt of workers compensation payments without any capacity for work.

Correspondence on the bullying allegation

[16] Also on 22 April 2021, Mr. Joshua Adams, a People and Culture Senior Consultant for the Respondent, sent an e-mail to the Applicant[1] to the effect the Respondent wished to investigate the alleged bullying incident "making sure that you are capable of meeting with us". That e-mail attached a letter. The letter was addressed to "Steven" but had the name "Janine" crossed out in tracked changes. The letter was dated 30 March 2021 and addressed to his "Treating Practitioner" in the form of a questionnaire. The letter stated the reason for the questions was to "understand his condition, prognosis, and fitness to participate in the investigative process" and "any appropriate adjustments that need to be applied to support Steven to participate in the investigative process". [2]

[17] On 27 April 2022, the Applicant sent an e-mail to Ms. Nerida Rodgers of the Respondent asking for "a copy of the report/documentation of the findings of the investigation into my workplace bullying allegations".[3]

[18] On 30 April 2022, the coworker who alleged to have "intimidated and bullied" the Applicant resigned from their employment with the Respondent.

[19] On 10 May 2022, the Applicant made a further request to Mr. Adams for "a copy of the internal investigation of the workplace bullying incident".[4]

[20] On 13 May 2021, the Applicant wrote to Mr. Adams requesting a copy of the "report/documentation of the findings of the investigation into my workplace bullying allegations".[5]

On 17 May 2022, Mr. Adams sent another e-mail to the Applicant that read:

> "Thanks for catching up with me yesterday. As mentioned, I was going to send out the letter for your treating practitioner to complete. I've attached it to the e-mail for your use.
>
> If you could arrange for your treating doctor to complete the form and return it to me, we will be in a position to proceed with the investigation with the assurance that we won't aggravate any mental health concerns."[6]

6 January request

[21] On or around 6 January 2023, Ms. Fiona Roufail, a consultant responsible for injury management contacted the Applicant by telephone. The Applicant provided her "with an overview of his current condition and associated treatment". She followed up with an e-mail requesting completion of a fitness for work questionnaire to his treating practitioner, Dr. George Dade, to assist the Respondent in ascertaining a timeframe for the Applicant's return to work (the "6 January request").[78]

The 31 March Direction

[22] On 31 March 2023, Mr. Alexander Small, employed by the Respondent as a Customer Operations Leader in "Retail X", sent a letter to the Applicant by e-mail which directed the Applicant to attend an independent medical examination (IME) at 2:00 PM on 24 April 2023. The letter warned that a failure to attend or to provide the required notice of non-attendance would possibly result in disciplinary action being taken, including termination of employment (the "31 March Direction"). [9]

[23] On 12 April 2023, Ms. Roufail, sent an e-mail to the Applicant confirming receipt of a medical certificate and noting "given you have not returned my calls, can I please ask you to confirm by e-mail your attendance at the telehealth appointment scheduled by Origin on 24 April with Dr. Kneebone".[10]

[24] At 5:17 PM on the afternoon of 24 April 2023, after the scheduled IME, the Applicant sent from his e-mail address, a medical certificate headed "Medical Certificate of Incapacity" which certified "Steven Lee is receiving treatment for a medical condition and for the period Monday 24 April 2023 to Monday 24 April 2023 inclusive he will be UNFIT to continue his usual duties".[11]

The 11 May Direction

[25] On 11 May 2023, Mr. Small sent the Applicant an e-mail[12] (the "11 May Direction") which noted that the Applicant had not attended the IME and as a result the Respondent had "incurred the cost of a late cancellation fee". It went on:

> "It has now been 2 years since you attended work. Origin has not been able to obtain any detail from you regarding your prognosis or likely return date during this time.
>
> In these circumstances Origin needs certainty as to whether and, if so, when you will be able to return to work."

[26] The 11 May Direction also directed the Applicant to confirm by no later than midday on 15 May 2023 whether he was prepared to attend an IME with a practitioner of the Respondent's choosing in the next two months and any dates he was not available to attend [an IME] via telehealth in the next two months. It also contained the following paragraph:

> "Failure to comply with the above direction or any reasonable attempts by Origin to arrange an [IME] for you may result in disciplinary action being taken against you, which may include termination of employment."

[27] On that same day the Applicant received a lump sum superannuation payment for $4898.92.

The Show Cause letter

[28] On 16 May 2023, Mr. Small sent the Applicant by e-mail a show cause letter (the "Show Cause letter")[13] as to why he had not complied with the "lawful and reasonable direction" to attend an IME at 2:00 PM on 24 April 2023 and the "lawful and reasonable direction" to respond to the request made on 11 May that he indicate whether he was prepared to attend an IME in the next two months, and if so his availability to attend. [14] The next steps identified in that letter included:

> "You are required to attend a meeting to discuss your ongoing employment with Origin. At the meeting, you will be required to show cause as to why your employment with Origin should not be terminated."

[29] The meeting was to be conducted by Microsoft teams at 3:30PM on Wednesday 17 May 2023. It went on:

> "If you fail to attend the meeting, we will proceed with making a decision in relation to your ongoing employment based on the information currently available to us."

[30] On 17 May 2023 at 2:59PM, the Applicant received an e-mail from EML, who is the Respondent's workers compensation insurer,[15] ("the EML e-mail") indicating there would be a change in the payer from the Respondent to EML. The e-mail was subsequently recalled by the sender.[16]

Termination of employment

[31] On 17 May 2023, Mr. Small sent a termination of employment letter by e-mail to the Applicant ("the termination letter").[17] It noted the Respondent had "decided to terminate your employment effective immediately" and that the Respondent would pay "two weeks in lieu of your notice period".

[32] The reasons given for the termination were that the Respondent had formed a view from available medical evidence that the Applicant was unable to fulfil the inherent requirements of his role at the time and that it would remain the case for the foreseeable future. The other specified reason was he had failed to comply with multiple "lawful and reasonable directions" in breach of his employment obligations.

CASE FOR THE APPLICANT

[33] The Applicant himself gave evidence over Microsoft teams. His evidence can be summarised as follows.

Reported bullying incident was the reason he was terminated

[34] The Applicant claimed, "the termination was retaliation for the bullying incident".[18] He elaborated this point in cross examination when it was put to him that the bullying incident was not the reason for his termination.

> "I believe that's the exact reason I was terminated. I believe as a retaliation for me reporting the bullying incident and they've basically just been looking for a loophole or some kind of excuse or reason to terminate me…"

The decision of the Respondent to terminate the Applicant's employment was predetermined

[35] The matters the Applicant used to support his claim the Respondent had reached a predetermined position to terminate him because of the bullying compliant included the following.

Superannuation payment made 11 May 2023

[36] He argues that the lump sum payment made on 11 May 2023 supports this argument. He claims the amount of $4,898.92 paid is similar to his superannuation entitlements on the date of termination, $4,892.22 according to his calculations.[19] The Applicant argues that this similarity, in addition to the payment being made six days before his show-cause meeting and subsequent termination of employment, are evidence of his hypothesis that it showed a pre-emptive decision to terminate his employment. He elaborated in cross examination:

> "It is actually clear and irrefutable evidence that there was an intention to terminate my employment. For example, why would they all of a sudden make a decision to update my superannuation just before I am terminated? Why would the amount equate to exactly within my calculations? I think I did my calculations from the start of the financial year 22 to the termination about 20 – in 23, which was 17 May. The amount that is paid in my super is exactly the amount within the last six dollars and seven cents to my calculations. How could that be – how could that be a coincidence?"[20]

EML e-mail

[37] The Applicant argues that an e-mail he received shortly before his termination letter, which notified him of a change in the payer of his workers compensation payments, supports an argument that there was a predetermined decision to terminate his employment. In his outline of arguments, he states:

"EML's retraction of the e-mail is further evidence that Origin had already made up its mind to terminate myself and that in haste the e-mail was forwarded to myself as was the lump sum super payment."[21]

[38] He elaborated on this argument in his evidence:

"Yes, there was a letter from my case manager, Shanika Jaya-Sikha, I believe. She's my case manager to e-mail. She sent an e-mail to me from EML on the day – literally a day on – on the day of the termination. I have the exact details here. The e-mail termination letter was sent on 17/05/03(sic), at exactly 2.59 pm. Sorry, the e-mail letter was sent on 17/05, 2.59 pm. But the Origin termination letter was sent on the same day at exactly 3.40 pm. So, there was exactly a 41-minute gap, if you like, between the two being sent. How is that – is that just a coincidence? Or how could they – how could EML have known about a termination prior to Origin sending it, or within such a short period of time. And then, shortly after that, I think 20 minutes after, they quickly retracted it. Why would they do that if there was no plans for – if there was no predetermined termination."[22]

Locked out of accessing e-mails and other systems

[39] The Applicant raised that he was "locked out of e-mail and logins to systems a year prior to termination" which he alleges demonstrates "isolation and alienation" as part of a predetermined plan to terminate him.[23]

Work culture

[40] The Applicant made several allegations of being exposed to a toxic work culture. He received "snarky letters and e-mails" including his termination e-mail containing the subject "It's Done".[24]

[41] The Applicant also requested that he not be contacted by anyone other than 'the necessary people'. This excluded Mr. Small, who attempted to call the Applicant in regard to the 11 May Direction, which the Applicant viewed as an "an attempt to either gain information to intimidate or bully" him.[25] It was Mr. Small's evidence that he was not aware of this request.[26]

The Applicant's evidence on his failure to respond to 31 March and 11 May Directions and the Show Cause letter

General explanation for his failure to respond

[42] The Applicant gave the following general explanation about his failure to respond:

> "I was in a very, very dark period and I was – I was in no position and – to basically do anything, let alone respond to e-mails and answer phone calls. That's why I specifically asked PNC for no managers or anyone to contact me. And at the time my wife was monitoring my e-mails and answering my phone, things like, that and she was looking after me. She's the one that suggested that, you know, 'You should go see a doctor', because she's worried about my health and that's why I attended. But the whole problem with Origin from the beginning was that I felt like that was I set up to fail and I wasn't given any support and any kind of – even for my back injury."[27]

The 31 March Direction

[43] When cross examined about his failure to respond to the 31 March Direction, the Applicant said:

> "My wife notified me of an e-mail, just briefly, that they sent like this, and she wasn't sure what to do and what I wanted to do, and at the time, as I said, I was in no state to make any logical or rational decision or any kind of - I guess, yes, basically to do anything in that regard. So yes, I just felt that it was just too overwhelming at the time for me to deal with everything that was going on. So, I just felt that, yes, it was just something that we needed to deal with at the right time, when I was feeling better, or I was able to address it properly, so."[28]

[44] In cross examination he also explained his reluctance to attend an IME:

> "Unlike IME or an independent medical examination, where I believe it's a doctor that's chosen by the company or towards the company, and they ask you a lot of - from what I understand, it's a lot of probing questions and it's quite - obviously, it's basically like a, from what I understand, interrogation. So it's not something that I felt that I was in the right frame of mind or emotional state to, sort of, address. Especially the way my health was, being so fragile."[29]

[45] He also noted the 31 March Direction was not sent from one of the 'necessary people' with whom he requested exclusive correspondence. He explained his lack of any response as a decision to wait for when he "was feeling better" or able to address the e-mail "properly".[30]

11 May Direction

[46] When asked in cross examination about the 11 May Direction he responded:

> "I can see the e-mail that was sent; however, I didn't actually refuse to attend the appointment. I just, as I said, I was not given enough time or patience to respond and to give my side of the story and also, even to recover. If I was given the opportunity I would have – I would have – I would have very – I would have very welcomely attended an IME appointment once I was recovered, but at the time I was in no shape to do it. That is what I am saying. So, I don't understand why it feels like it is almost forced upon me. Yes. In terms of, 'You have to go to this or we're going to terminate you'. That is – that is what it felt like to me."[31]

Show Cause letter and meeting

[47] When asked in cross examination the Applicant confirmed he "did not attend that meeting" and when it was put to him that he "did not communicate anything", he explained:

> "Yes, probably what I should have done was I should have asked my wife to at least give a response rather than sort of you know, I guess, sort of leaving – leaving it to – to, I guess, just sort of hang around. That is probably what I should have done in hindsight and then at least Origin would have had some kind of response as to my – my current state. And things like that. And that is probably what, in hindsight we should have done. That is – that is – yes, I do – I do agree we should have probably done that, even if I couldn't have done it myself, my wife should have probably given some kind of notice, that is probably what we should have – what we should have done."[32]

THE CASE FOR THE RESPONDENT

[48] The Respondent called two witnesses, Mr. Alexander Small and Ms. Rachel Field.

Evidence of Alexander Small

[49] Mr. Alexander Small is employed with the Respondent as a Customer Operations Leader in "Retail X". He was the Applicant's team leader from around May 2021 until the termination of his employment. His witness statement which Mr. Small affirmed under oath[33]

attached the Applicant's original contract of employment which contained the following terms:

> 11(e) You agree to exercise such powers and perform such duties as required, and comply with reasonable requests and directions given by us.
> …
>
> 17.2 You are responsible for informing us of any medical event or condition that has the capacity to affect your ability to perform your role in a safe and responsible manner.
>
> 17.3 During the course of your employment, you must comply with any request by us for you to undergo a medical examination to determine or confirm fitness for work. In those circumstances we will pay for the examination, and you agree that the doctor(s) who conduct such medical examination will provide a report on your fitness for work to us.[34]

[50] Mr. Small noted on 28 December 2022, a letter was sent to the Applicant confirming a change to his title and report line, as well as coverage under a new enterprise agreement, and revised contract terms which also included the terms quoted above.[35] The Applicant did not dispute either the original terms or the revised terms.

[51] Mr. Small gave evidence on events leading to the 2023 enquiries concerning the Applicant's fitness for work. He stated "the business was planning for the 2023/2024 financial year. As part of that planning, it was necessary to better understand when Steven may be able to return to work". Mr. Small then gave an account of the various directions and correspondence sent to the Applicant over the course of 2023:

> "In early January 2023, I asked Fiona Roufail, People & Culture Consultant (Injury Management) to contact Steven and request that he provide his treating practitioner with a questionnaire about his fitness for work. On 6 January 2023, Fiona sent Steven an e-mail attaching a questionnaire for his treating practitioner about his fitness for work. Fiona told me that she also called Steven regarding this issue on the same day. About a week later, in or about mid-January 2023, Fiona informed me that Steven did not respond to her e-mail.
>
> On 31 March 2023, I sent a letter to Steven requiring him to attend a medical assessment on 24 April2023 to assess his fitness for work. Steven was required to provide notice by 14 April 2023 if he was unable to attend. The letter stated that the requirement to attend the medical assessment was a reasonable request and failure to attend or to give notice of being unable to attend may result in disciplinary action against him, including termination of his employment. Steven did not respond to my letter of 31 March 2023 as required, or at all.
>
> I asked Fiona to call Steven to confirm whether he would attend the medical assessment on 24 April 2023, however, Fiona informed me that Steven did not respond to her call. As a result, Origin incurred the fee for the medical assessment that had been booked for him.

On 24 April 2023, several hours after the time for the medical assessment, Steven sent a medical certificate to Fiona stating he was unfit for work. for work in the future.

On 11 May 2023, I sent an e-mail to Steven again requiring him to attend a medical assessment to assess his fitness for work. I required Steven to inform me by 15 May 2023 whether he would attend. I restated that a failure to follow this direction may result in disciplinary action against him, including termination of his employment. Steven did not respond to my e-mail of 11 May 2023 by 15 May 2023 as required and did not respond. When I tried to call him on the phone about my letter.

On 16 May 2023, I sent a letter to Steven informing him that Origin proposed to terminate his employment due to his failure to follow the directions given to him on 31 March and 11 May. Steven was invited to provide his response in writing or at a meeting scheduled on 17 May 2023 via Microsoft Teams Steven did not respond to my letter or attend the meeting on 17 May 2023, and did not respond to my efforts to call him on the phone about these matters.

It appeared to me from the circumstances that Steven did not consider that he was required to comply with any lawful and reasonable directions given to him by the company about his fitness for work. Steven had been given the opportunity to explain his conduct in the meeting scheduled for 17 May2023, and in my phone calls to him, and had not done so. I decided that it was appropriate to terminate Steven's employment due to his failure to follow the lawful and reasonable directions given to him without explanation.

On 17 May 2023, I sent Steven a letter terminating his employment due to his failure to follow lawful and reasonable direction."[36]

Evidence of Rachel Field

[52] The Respondent called Ms. Rachel Field, who is a People and Culture Consultant (Employee Relations) at the Respondent. She had filed a filed a witness statement in the proceeding which she adopted under oath.[37] Ms. Field has worked in that role since July 2022. She gave evidence about the sequence of events from March 2023 relating to the requests and directions for the Applicant to attend an IME up to the termination of his employment. She also gave evidence responsive to the arguments made in the Applicant's outline of arguments as follows:

Reason for dismissal was the bullying complaint

> "Steven says that his dismissal was because of his "reporting initial bullying incident". The only bullying incident raised by Steven was in April 2021. The person Steven complained about then resigned in April 2021 before an investigation could be completed into Steven's allegations. Steven's termination on 17 May 2023 was because of his refusal to follow lawful and reasonable directions given to him."[38]

Superannuation payment

> "Steven alleges that a lump sum payment of superannuation to him showed a decision to terminate employment on 11 May 2023. The payment of superannuation to Steven was unrelated to the termination of Steven's employment and I was not aware of this payment until it was raised by Steven after his dismissal. I have since spoken to Beti Kouloumendas, Payroll Operations Lead, who confirmed that these payments were made in error in respect of prior superannuation guarantee periods. EML, Origin's workers compensation insurer, also paid the applicable superannuation guarantee contributions on behalf of Steven for those prior superannuation guarantee periods. Accordingly, this an overpayment of superannuation to Steven."[39]

EML e-mail

> "Steven says that he received an e-mail on 17 May 2023 indicating that the payment of his workers 'compensation payments would be made by EML, Origin's workers compensation insurer, in the future, which EML then sought to retract. This e-mail was sent to Steven in error, which was why EML sought to retract it. EML was notified prior to the meeting on 17 May 2023 that Steven was required to attend a show cause meeting that day, and that Origin was considering the termination of his employment. Origin is required to notify EML of any proposed changes in the employment status of a recipient of workers compensation payments. EML misunderstood that Steven's employment had already been terminated, and then sought to retract the e-mail when it was explained that this was not the case. This misunderstanding by EML is not related to Steven's dismissal or the reason for it."[40]

Was there a valid reason for the termination?

Applicable test

[53] For there to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[41] and should not be "capricious, spiteful of prejudiced"[42]. However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[43]

[54] Where a dismissal related to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[44] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings.

Was the reason for the dismissal retaliation for the Applicant making a bullying complaint?

[55] The Applicant argues there was no valid reason for the termination. He claims the decision to dismiss him was retaliation by the management of the Respondent for him making the bullying complaint in 2021.

Evidence

[56] He provided no direct evidence to support this claim but argued there was evidence that supported an inference the bullying allegation was the reason for his dismissal.

The "failure" to investigate the bullying complaint.

[57] In his outline of arguments, he stated "Investigation report into bullying not done despite numerous requests as well as numerous current and former employees to testify against Manager and Origin".[45]

[58] The evidence establishes the alleged perpetrator left the employment of the Respondent in April 2022.[46] On 22 April 2022, Mr. Adams sent an e-mail which attached a questionnaire addressed to his treating General Practitioner (GP) requesting information regarding his capacity to attend meetings concerning the bullying incident.[47]

[59] The Applicant then, on several occasions requested the "investigation report" but did not respond to repeated requests for the capacity to attend questionnaire to be filled out. The reason the Applicant gave for his failure to respond to the request that his doctor fill in the questionnaire was as follows:

> "If you see that letter and was contained in it, that if you can see, on page 31, 32, he's asking a lot of very personal and intrusive questions. Stuff that I am not willing to share with my personal health or my – my condition, with Origin.
>
> It's not that I wasn't willing to cooperate, or willing to cooperate to - with the report or investigation; I just didn't want them to have access to deeply personal and sensitive information that I didn't want them to - I didn't want them to reveal, basically, as you can appreciate."[48]

[60] The Applicant had suffered a compensable psychological injury around the time of the alleged bullying. The Respondent took the step, consistent with its duty of care, to seek a

medical clearance for the capacity of the Applicant to participate in meetings relating to the allegations.

11 May 2023 Superannuation payment

[61] The Applicant claims this payment establishes a premeditated decision of the Respondent to terminate his employment. He claims the amount of $4,898.92, paid close to the date of his termination, was suspiciously close to his superannuation entitlements on the date of termination, $4,892.22 according to his calculations.

[62] The Applicant argues the close correspondence between the two payments (that is $4898.92 and 4892.22, some $6.70 apart) is beyond coincidence, particularly when the payment was made six days before his show-cause meeting and subsequent termination of employment. He argues this is evidence the decision to terminate his employment was made prior to the show cause meeting.

[63] The circumstances of the payment of this superannuation contribution were explained in the evidence of Rachel Field:

> "The payment of superannuation to Steven was unrelated to the termination of Steven's employment and I was not aware of this payment until it was raised by Steven after his dismissal. I have since spoken to Beti Kouloumendas, Payroll Operations Lead, who confirmed that these payments were made in error in respect of prior superannuation guarantee periods. EML, Origin's workers compensation insurer, also paid the applicable superannuation guarantee contributions on behalf of Steven for those prior superannuation guarantee periods. Accordingly, this is an overpayment of superannuation to Steven."[49]

The EML e-mail

[64] The Applicant argued the receipt of an e-mail (which was subsequently recalled) which advised of a change in the payer of his workers compensation payments, just before he received his termination letter, inferred a premeditated decision to terminate him:

> "Yes, there was a letter from my case manager, Shanika Jaya-Sikha, I believe. She's my case manager to e-mail. She sent an e-mail to me from EML on the day – literally a day on – on the day of the termination. I have the exact details here. The e-mail termination letter was sent on 17/05/03(sic), at exactly 2.59 pm. Sorry, the e-mail letter was sent on 17/05, 2.59 pm. But the Origin termination letter was sent on the same day at exactly 3.40 pm. So, there was exactly a 41-minute gap, if you like, between the two being sent. How is that – is that just a coincidence? Or how could they – how could EML have known about a termination prior to Origin sending it, or within such a short period of time. And then, shortly after that, I think 20 minutes after, they quickly retracted it. Why would they do that if there was no plans for – if there was no predetermined termination."[50]

[65] Ms. Field explained this in her witness statement as follows:

> "Steven says that he received an e-mail on 17 May 2023 indicating that the payment of his workers compensation payments would be made by EML, Origin's workers compensation insurer, in the future, which EML then sought to retract. This e-mail was sent to Steven in error, which was why EML sought to retract it. EML was notified prior to the meeting on 17 May 2023 that Steven was required to attend a show cause meeting that day, and that Origin was considering the termination of his employment. Origin is required to notify EML of any proposed changes in the employment status of a recipient of workers compensation payments. EML misunderstood that Steven's employment had already been terminated, and then sought to retract the e-mail when it was explained that this was not the case. This misunderstanding by EML is not related to Steven's dismissal or the reason for it."[51]

Locked out of accessing e-mails and other systems

[66] The Applicant did not explain why the cutting off from the e-mail system a year prior to his termination made his dismissal unfair other than it showed "further isolation and alienation".[52] He did refer to that issue in evidence.

> "About a year prior to the termination. I believe the reason they had them all of a sudden was because I mentioned to Josh that I had certain abusive e-mails and evidence of misconduct from Kat, that I could send to him as evidence, to show that – the bullying."[53]

Findings on the bullying complaint as a reason for termination

[67] At best, the Applicant is seeking to rely on inferences from events and documents to support his argument that the bullying complaint is the reason for the dismissal.

[68] The Applicant argues one of these circumstances is the alleged "failure" of the Respondent to investigate his bullying complaint. This "failure" can be explained by the resignation of the person alleged to have bullied him shortly after the incident, and the Applicant's refusal to participate in a process whereby the Respondent could be assured that he was medically capable of participating in an investigation.

[69] The Applicant insists the investigation could still have occurred without his direct involvement or the involvement of the person who he alleged bullied him. He seemed to suggest the investigation could have taken place based on a screenshot he had forwarded and other witnesses. I accept the explanation given by Ms. Field on this issue:

> "Origin would always be to speak to the complainant and take their version of events and their concerns. It's not really fair, I guess, on a respondent to put allegations to them when we haven't actually understood the full scope of the allegations from the complainant, and we also wouldn't go speaking to other witnesses before we'd spoken to the complainant and got their full version of events either. Obviously, workplace investigations can be stressful for all involved. So we'd never commence that process until we knew exactly what we were investigating and whether an investigation was required. So that's why we'd never commence one unless we'd spoken with the complainant and get their sort of statement and versions of events as a first step."[54]

[70] I accept the evidence of the Respondent which explained the circumstances in which the superannuation payment e-mail was sent to him. I also the accept the explanation in the Respondents evidence in relation to the recalled EMT e-mail.

[71] The proximity of the superannuation payment and the EML e-mail to his termination cannot support the argument he contends. As for the removal of his access to e-mails and other systems a year out from his termination, no explanation was provided by the Respondent in its evidence, however, there is simply no evidence to support the inference the Applicant seeks to draw.

[72] Therefore, I find there is no credible evidence to support his claim that that he was terminated for making the bullying allegation.

Was the dismissal of the Applicant for a "failure to comply with lawful and reasonable directions" a valid reason?

Relevant contract terms

[73] There was no dispute the Applicant's contract of employment contained a term to "comply with reasonable requests given by the Respondent". It also contained a specific term during the course of his employment; the Applicant "must comply with any request by us for you to undergo a medical examination to determine your fitness for work".

[74] It follows it was clearly lawful for the Respondent to direct the Applicant: to attend an IME; to provide a date at which we could attend an IME in the next two months and to attend a show cause meeting. Were those directions "reasonable"?

Were the directions reasonable?

[75] Mr. Small gave evidence that the business was planning for the 2023/24 financial year, and it was at therefore necessary to understand when the Applicant could return to work.

[76] The 6 January 2023 request asked the Applicant to forward a questionnaire to his treating GP to complete concerning his fitness for work. The Applicant in cross examination did not remember receiving this e-mail but conceded it was sent to his e-mail address, and that his wife was monitoring his e-mails at the time. No response to the e-mail was forthcoming.

[77] Almost three months later, on 31 March 2023, Mr. Small sent the 31 March Direction that the Applicant attend an IME at 2:00 PM on 24 April 2023. This gave the Applicant 24 days' notice of the appointment. That letter gave the following explanation as to why an IME was necessary:

> "You have been absent from your workplace and unable to perform your role since 6 April 2023. However, Origin does not currently have any medical information about your prognosis beyond this date, how it relates to your capacity to perform the inherent requirements of your position and the anticipated time frame in which you may be fit to return. Of concern is the fact that your work capacity has not improved since you originally ceased attending work on 6 April 2021."

[78] That letter noted that cancellation fees applied. It also required the Applicant to notify Mr. Small by midday on Friday 14 April 2023 with reasons why he could not attend. It "reminded" him that his employment contract obliged him to comply with IME requests. It also noted:

> "This is considered a reasonable request and your failure to attend or failure to provide the required notice as set out above, may result in disciplinary action being taken against you, which may include termination of employment."

[79] Despite his wife monitoring his e-mails, no response was forthcoming, and no reasons were provided as to why the Applicant could not attend the IME. He did not attend the IME and the Respondent incurred a cancellation fee.

[80] Three hours after the time scheduled for the IME the Applicant caused an e-mail to be sent from his e-mail address which attached a medical certificate of incapacity which certified that the Applicant was "unfit for his usual duties". The Applicant's evidence was that his wife "took a copy of that report and sent it on my behalf". He went on: "She does quite a bit of administration and things like that on my behalf, not just this kind of stuff".[55]

[81] The e-mail of the evening of 24 April which sent the medical certificate is an important piece of evidence. It demonstrates the Applicant, or at least his support network, could have responded, but no response was provided as the situation escalated. The Applicant conceded his "situation" should have been communicated by a "third party":

> "Yes, as I said at the time, I was *no position to do that and in hindsight, I probably should have got a third party, even my wife or somebody else just to communicate better my – my situation*. But I was in that state and it is probably not the best time to – to go through that kind of thing and if it could be delayed or pushed back, maybe a few weeks or a few months or something like – just until I am in a better position mentally and emotionally, then I think that probably would have been better, but yes, that is probably what we should have done." (Emphasis added)

[82] In the 11 May Direction, Mr. Small explained:

> "It has now been over 2 years since you attended work. Origin has also not been able to obtain any detail from you regarding your prognosis or likely return date during this time. Your medical certificates have consistently stated you have no current work capacity and your capacity has not changed or improved in any way during this time."

[83] The 11 May Direction then directed the Applicant to indicate by 15 May 2023:

> "Whether you are prepared to attend an independent medical examination with a practitioner of Origin's choosing in the next two months; and
>
> Any dates you are not available any dates you are not available to attend an IME via telehealth in the next two months."

[84] The 11 May Direction also warned the Applicant that a failure to comply with this direction "may result in disciplinary action being taken against you, which may include

termination of employment" and drew his attention to his contractual term requiring him to "comply with requests to undergo an IME".

[85] The 11 May Direction simply required the Applicant to indicate whether he could attend an IME by telehealth in the next two months. This required nothing intrusive or personal. No response was forthcoming.

[86] The Applicant asserted, throughout the proceeding, that he was medically incapable of attending an IME or responding to the e-mails of the Respondent. There is no medical evidence before me to support that claim. The Applicant gave evidence that he was "in a dark place", he was "bed ridden" and had had problems adjusting to different medication. He had suffered a compensable psychological injury and "he was in no state to make any logical or rational decision of any kind'. This claimed incapacity was never conveyed to the Respondent either by himself, by his wife, or his treating doctor.

[87] The Show Cause letter was an invitation to attend a show cause meeting. The letter rehearsed the background facts and the inherent requirements of the position of the Applicant. It stated the following on the "information available":

> "You have remained unfit for work for over two years with no change or improvement in you capacity at during this time, The capacity and prognosis on the medical certificates provided have remained unchanged since April 2021.
>
> You have not attended any independent medical examinations scheduled for you by the insured so we have no other information to hand regarding whether, and if so, when you may return to work."

[88] It summarised the events of the 31 March Direction to attend the IME and the 11 May Direction to respond with a date in the next two months he could attend an IME. It noted the "breaches" of the lawful and reasonable term and the IME compliance term in his contract.

[89] Under the heading "next steps", it "required him to attend a meeting" scheduled for 3:30 PM on Wednesday 17 May 2023 by Microsoft Teams "to discuss his ongoing employment and stated: "At the meeting you will be required to show cause why your employment should not be terminated" for the reasons elaborated in the letter. The letter then warned "if you fail to attend the meeting, we will proceed with making a decision in relation to your ongoing employment based on the information currently available to him".

[90] The Applicant did not attend the show cause meeting nor correspond with the Respondent in any way.

[91] On 17 May 2023, the Respondent caused a letter to be sent by e-mail and registered post that terminated his employment based on the medical evidence that he currently cannot fulfil the inherent requirements of his role at Origin, that "this will remain the case in the foreseeable future" and he failed to comply with multiple lawful and reasonable directions of his employer in breach of his employment obligations.

Relevant authorities

[92] There are authorities dealing with the question of whether a direction by an employer for an employee to attend an IME or to provide medical information can be lawful and reasonable directions.

[93] The Full Federal Court in *Blackadder v Ramsey Butchering Services Pty Ltd*[56] found that an employer also has a right to request an employee to attend an IME if there is genuine indication of a need for it and it is reasonable for your employer to make such a request. In his decision, Madjwick J made the following observations:

> [68] It is, in my opinion, essential for compliance with the [Occupational Health and Safety Law] duties, that an employer be able, where necessary, to require an employee to furnish particulars and/or medical evidence affirming the employee's continuing fitness to undertake duties. Likewise, an employer should, where there is a genuine indication of a need for it, also be able to require an employee, on reasonable terms, to attend a medical examination to confirm his or her fitness. …
>
> [69] The question whether it is reasonable for an employer to request an employee to attend a medical examination will always be a question of fact as will the question of what are reasonable terms for the undertaking of the medical examination. The matters will generally require a sensitive approach including, as far as possible, respect for privacy.

[94] In *Thompson v. IGT,*[57] Goldberg J noted it was well established that it was reasonable to direct an employee to attend a medical examination to determine whether the employee is fit to perform duties and whether they can do so safely. These duties were underpinned by occupational health and safety legislation.

[95] In *Fard v. Royal Melbourne Institute of Technology,*[58] the Applicant's employment was terminated effective immediately as a result of "disciplinary action for serious misconduct". The termination followed a failure to comply with directions to attend an IME on three occasions.

[96] Cirkovic C found there was no evidence to suggest the Applicant was given insufficient notice to attend the IMEs. On the contrary, she found there was a series of communications between the Applicant and the Respondent during which the Respondent made repeated requests for the Applicant to attend an IME to gather appropriate information as to the Applicant medical status and ability to return to work. On each occasion the Applicant did not make contact and did not attend.

[97] Cirkovic C found the IME directions were both lawful and reasonable and the Applicant's failure to attend was a sound and defensible reason for the termination of the Applicant's employment. She therefore found this was a valid reason for the termination.

Findings

[98] There are at least three lawful directions given by the Respondent to the Applicant:

(a) The 31 March direction to attend the IME on 24 April 2023;

(b) The 11 May direction to provide dates in the next two months where he could attend an IME; and
(c) The direction to attend the show cause meeting.

The directions were reasonable

[99] For the following reasons I find those directions are not only lawful but reasonable.

[100] The Applicant had been absent from work for over two years. The capacity and prognosis on the medical certificates remained unchanged since April 2021.

[101] It was legitimate for the Respondent as part of its planning for the 2023/4 financial year to enquire as to the prognosis and fitness for work of the Applicant.

[102] In January 2023, he was asked to request his treating GP to complete a questionnaire on his medical condition. The Applicant in his evidence expressed privacy concerns relating to some of the questions. Given his views about IMEs being "intrusive" and "an interrogation", it was open for him to discuss with his own doctor the preparation of a medical report for the Respondent that did not offend his privacy issues.

[103] The Applicant's failure to respond to this request meant the directions to provide evidence of his medical condition escalated beyond a request from his treating GP. Three months later, on 31 March 2023, the Applicant was directed to attend the IME.

[104] After the time scheduled for IME appointment, at 5:27 PM that evening the Applicant provided a medical certificate that he was "incapacitated for work". I find that this was an attempt to explain his failure to attend the IME. It demonstrates some capacity to respond.

[105] The 11 May Direction was to indicate whether he was prepared to attend an IME in the next two months or any date he was not available to attend an IME by telehealth. He did not respond to that letter.

[106] Finally, the Show Cause letter was issued which required him to attend a show cause meeting. He did not attend or respond to the Show Cause letter in any way.

[107] As I understand, the argument of the Applicant is that he was not in a "fit state to respond to e-mails", that he did not appreciate receiving "snarky" e-mails from the Respondent and he had "requested not to be contacted by management" outside of the "necessary people", and that these e-mails "disregarded his request".

[108] There is no medical evidence before me of any incapacity of the Applicant to respond to e-mails or to attend to an IME. His failure to respond was in circumstances where the employer was requesting information regarding his medical condition and his prognosis from January to May 2023.

[109] The Applicant's position appears to have been the Respondent would be notified at some indeterminate point when he was able to respond about his prognosis and that he could dictate

which management employees from the Respondent he would talk to and when he would talk to them.

[110] In all the circumstances this position was unreasonable and not consistent with his obligations as an employee to comply with lawful and reasonable directions and to comply with IME requests.

Finding on valid reason

[111] In the circumstances of this case and relying on the decisions relevant to lawful directions to provide medical information or to attend IMEs, I find the dismissal by reason of the Applicant's failure to comply with the lawful and reasonable directions was sound, defensible and well founded. I am therefore satisfied that there was a valid reason for his dismissal.

Was the Applicant notified of the valid reason?

[112] Proper construction of s 378(b) requires a finding to be made as to whether the Applicant was “notified of the reason”. In the context of the section, the reference to “that reason” is the valid reason found to exist in s 378(a).[59]

[113] Notification of the valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment and in explicit and clear terms.[60]

[114] The 16 May show cause letter specified the lawful directions given on 31 March and 11 May, referred to the alleged breaches of the terms of his contract.

[115] The termination letter dated 17 May 2023 stated:

> “On 16 May 2023, we sent you a letter via email requiring you to show cause as to why your employment with Origin should not be terminated in circumstances where:
>
> 1. the medical evidence available to us suggests you are currently unable to fulfil the inherent requirements of your role at Origin and that this will remain the case for the foreseeable future; and
>
> 2. you have failed to comply with multiple lawful and reasonable directions of your employer in breach of your employment obligations.
>
> You were invited to provide a response to the show cause letter both in writing as well as in a meeting at 3.30pm today, 17 May 2023. You did not provide a written response or attend the meeting. You also did not tell us that you would not be attending the meeting.
>
> For the reasons outlined above and in the show cause letter, Origin has decided to terminate your employment effective immediately. You will receive a payment in lieu of your 2 week notice period.”

[116] The text of the termination letter clearly articulated the reasons for the termination. In all the circumstances, I find the Applicant was notified of the valid reason for his termination.

Was the Applicant given an opportunity to respond to any valid reason?

[117] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee’s employment.[61]

[118] The opportunity to respond does not require formality and the factor is to be applied in a common-sense way to ensure the employee is treated fairly. Where the employee is aware of the precise nature of the employer’s concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[62]

[119] The 31 March Direction to attend the IME made it clear to the Applicant that his failure to respond to the various directions "is considered a reasonable request and your failure to attend, or failure to provide the required notice as set out above may result in disciplinary action being taken against you which may include termination of employment".

[120] The 11 May Direction required the Applicant to "confirm whether he was prepared to attend an IME in the next two months" and specify the dates he was not available. In that correspondence he was expressly warned: "Failure to comply with the above direction or with any reasonable attempts by Origin to arrange an IME for you may result in disciplinary action being taken against you, which may include termination of your employment".

[121] The Show Cause letter set out, in a precise and pellucid way, the concerns the Respondent had with his capacity to meet the inherent requirements of his position, the lack of information they had concerning his medical condition or prognosis and the circumstances of the directions he was given on 31 March and 11 May.

[122] It provided the Applicant a full opportunity to respond to the view "that his ongoing employment is untenable and is considering the termination of his employment on the basis that he would not be capable of returning to work for the foreseeable future" and that he had "repeatedly failed to comply with … lawful and reasonable directions." The Applicant was directed to attend a Microsoft Teams meeting on 17 May 2023 to address the matters contained in the Show Cause letter. The Applicant did not avail himself of this opportunity and neither attended nor responded.

[123] In all the circumstances, I find the Applicant was given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

Unreasonable refusal by the employer to allow a support person

[124] I am satisfied that there was no refusal by the Respondent to allow the Applicant to have a support person present to assist at any discussions relating to his dismissal. The Show Cause letter dated 16 May 2023 contained the following paragraph:

> "You are welcome to bring a support person, such as a friend or family member to the meeting you will to do so. Please let us know prior to the meeting if you intend to bring a support person."

Was the Applicant warned about unsatisfactory performance before the dismissal?

[125] The reason for this dismissal does not relate to unsatisfactory performance.

Size of the enterprise and absence of dedicated human resources management specialists or expertise in the enterprise likely to impact on procedures followed

[126] The Respondent is a large employer with dedicated human resource specialists. This is a neutral factor in this case.

Other matters which the Commission considers relevant

The Applicant's medical condition

[127] Another matter relevant to the issue of whether the dismissal was harsh is his medical condition. I accept the Applicant suffers from a debilitating psychological injury which renders him unfit for work and for which he is in receipt of workers compensation payments.

[128] In the proceeding he claimed that his condition incapacitates him from responding to e-mails or attending IMEs. In his evidence he stated: "If I was given the opportunity I would have – I would have – I would have very – I would have very welcomely attended an IME appointment once I was recovered, but at the time I was in no shape to do it".

[129] The Applicant led no medical evidence to support the claim that he was incapacitated from responding to e-mails or attending IMEs. However, there is some evidence to suggest otherwise.

- The Applicant was periodically attending medical appointments with his own treating GP in person and by telehealth which demonstrates some capacity to attend medical appointments; and

- His wife was monitoring his e-mails. The e-mail that was sent on Monday 24 April 2023 attached a medical certificate that the Applicant was incapacitated for work on that day. It appears this is responsive to the direction to attend the IME. This demonstrates some capacity on the part of the Applicant to at least cause a response to be sent to his employer on his behalf.

[130] If he was incapacitated to answer e-mails or attend an IME from the five-month period from the enquiries made by Ms. Roufail on 6 January 2023, through to the Show Cause letter on 16 May, this incapacity was never communicated to his employer.

[131] Following 6 January 2023, no communication was made by him, or on his behalf, to inform the Respondent of his medical condition or his prognosis. This is in circumstances of his absence from work on workers compensation payments for two years.

[132] The Applicant himself in evidence conceded:

> "Yes, probably what I should have done was I should have asked my wife to at least give a response rather than sort of you know, I guess, sort of leaving – leaving it to – to, I guess, just sort of hang around".

[133] In all the circumstances, despite his medical condition, the failure to respond at all was not reasonable and breached an express term in his contract. This counts against a finding that his dismissal was unfair.

Conclusion

[134] I have considered the material before me and found there was a valid reason for the termination. I am satisfied the Applicant was afforded procedural fairness. I am also satisfied

the dismissal was not disproportionate to the gravity of his conduct, nor harsh in any other sense.

[135] I am satisfied the Applicant was notified of the reason for his dismissal and he was given ample opportunity to respond to the allegations concerning his failure to comply with lawful and reasonable directions. The Respondent offered the Applicant an opportunity to have a support person present at the show cause meeting which he did not attend. I have considered the evidence of his medical condition in the proceeding (such as it is) and found it did not make the dismissal harsh. I have also considered all other factors in s 387 to be neutral. I am therefore satisfied that the dismissal was neither harsh, unjust or unreasonable.

[136] It follows that I am not satisfied that the Applicant was unfairly dismissed within the meaning of s 385 of the Fair Work Act 2009. The Application is dismissed.

COMMISSIONER

Appearances:

Mr. Steven Lee, the Applicant, for himself
Ms. Eugenia Levine, of counsel, for the Respondent

Hearing details:

14 August 2023
Melbourne and Microsoft Teams

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[1] Attached to Exhibit A1 (Digital Court Book (DCB) pp. 36-37).

[2] Exhibit A2 (DCB pp. 15-18).

[3] Ibid (DCB p. 27).

[4] Ibid (DCB p. 29).

[5] Ibid (DCB at p. 21).

[6] Ibid (DCB at p. 29).

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[7] Exhibit R1 (DCB at p. 86).

[8] Attached to Exhibit R1 (DCB at pp. 71 to 75).

[9] Ibid (DCB at pp. 76-7).

[10] Ibid (DCB at p. 86).

[11] Ibid (DCB at p. 91).

[12] Ibid (DCB at p. 93-4).

[13] Ibid (DCB pp. 96-99).

[14] Ibid (DCB at pp. 96-99).

[15] Transcript at PN258.

[16] Exhibit A1 (DCB at p. 8).

[17] Attached to Exhibit R2 (DCB at pp. 101 to 103).

[18] PN229.

[19] Exhibit A2 (DCB at p. 19).

[20] PN373.

[21] Exhibit A2 (DCB at p. 20).

[22] PN258.

[23] Exhibit A1 (DCB at p. 3).

[24] Ibid.

[25] PN378.

[26] Ibid.

[27] PN131.

[28] PN312.

[29] PN312.

[30] PN313.

[31] PN358.

[32] PN357.

[33] Exhibit R1 (DCB at pp. 50-51).

[34] Ibid (DCB at p. 61).

[35] Ibid (DCB at pp. 67-8).

[36] Exhibit R1 (DCB pp. 50-51)

[37] Exhibit R2.

[38] Ibid (at DCB p. 53).

[39] Ibid.

[40] Ibid.

[41] Selvachandran v. Peterton Plastices Pty Ltd (1995) 371 at 373.

[42] Ibid.

[43] Watson v. Mermaid Dry Cleaners Pty Lrd (1996) 142 ALR 681 at 685

[44] Edwards v. Justice Giudice [1999] FCA 1836.

[45] Exhibit A1 (DCB at p. 3).

[46] Exhibit R2 (DCB at p. 53).

[47] Exhibit A2 (DCB pp. 15-18).

[48] PN385.

[49] Exhibit R2 (DCB at p. 53).

[50] PN258.

[51] Exhibit R2 (DCB p. 53).

[52] Exhibit A1 (DCB at p. 3).

[53] PN252.

[54] PN189.

[55] PN308.

[56] [2002] FCA 603. Upheld on appeal by the High Court.

[57] 173 IR 395.

[58] [2022] FWC 1375. Upheld by a Full Bench in [2022] FWCFB 143.

[59] Bartlett v. Ingleburn Bus Services Pty Ltd [2020] FWCFB 6429.

[60] Previsic v. Australian Quarantine Inspection Services Print Q3730.

[61] Crozier v. Palazzo Corporation Print S5897 (AIRCFB, Ross VP, Action SDP and Cribb, 11 May 2000), [75].

[62] Gibson v. Bosmac Pty. Ltd (1995) 60 IR 1, 7.