



# DECISION

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

**Susana Henderson**

**v**

**Northern NSW Helicopter Rescue Service Limited**  
(U2022/5722)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 7 FEBRUARY 2023

*Application for relief from unfair dismissal – valid reason for dismissal – dismissal harsh and unreasonable – applicant reinstated without backpay.*

## Introduction

[1] Ms Susana Henderson was employed by Northern NSW Helicopter Rescue Service Limited (**Respondent**) as a Line Pilot for a period of 6 months and 26 days before her dismissal on 6 May 2022. Prior to working for the Respondent, Ms Henderson had extensive experience in flying helicopters, including during her service as a helicopter pilot in the Australian army for 17 years. But Ms Henderson did not have any experience in flying the type of helicopters used by the Respondent (AW139) to conduct its rescue and other services in northern New South Wales. The Respondent was aware that it would have to train Ms Henderson to operate an AW139 aircraft. Training was provided by the Respondent to Ms Henderson. The training took longer than had been anticipated, for a range of reasons to which I shall return. On 22 March 2022, Ms Henderson arrived at work excited to complete her scheduled final summative assessment, the line check, only to be told that a decision had been made on the previous day that she should not proceed to line check because she had not met company standards in all areas of her training. A show cause process then took place and the Respondent made a decision to dismiss Ms Henderson as a result of “a narrow area of concern”<sup>1</sup> relating to Ms Henderson’s ability to accurately position the AW139 aircraft during precision handling and then to maintain a stable hover on a consistent basis. Ms Henderson received a payment in lieu of notice on her dismissal. She contends that her dismissal was harsh, unjust and unreasonable. The Respondent denies those allegations.

[2] I heard Ms Henderson’s unfair dismissal case against the Respondent on 7 and 8 November 2022. Ms Henderson gave evidence in support of her case. She also adduced evidence from Mr Glenn Miller, Deputy Head of Flight Operations and Flight Examiner at a HEMS operator, Mr Richard Maas, Line Trainer and Crash Response Helicopter Pilot for Toll Aviation, and Mr Michael de Winton, Pilot employed by the Respondent. The Respondent adduced evidence from Mr Darryl Humphreys, Head of Training and Checking with the Respondent (resigned effective 16 October 2022), Mr Mark Overton, Training and Checking

Pilot with the Respondent, Ms Debbie O’Grady, Human Resources Business Partner with the Respondent, and Mr Robert Fisher, Head of Flight Operations with the Respondent.

[3] From 1 January 2000 until 23 January 2022 Mr de Winton was employed by the Respondent in the roles of Line Pilot, Head of Training and Checking, and Head of Flight Operations (Chief Pilot). On 23 January 2022, Mr de Winton was displaced from the position of Head of Flight Operations by the Operations Manager, Mr Robert Jenkins. Mr Michael O’Grady took over from Mr de Winton as the Head of Flight Operations but Mr de Winton remained employed by the Respondent.<sup>2</sup> Later, in April 2022, Mr Fisher was promoted from the position of Head of Training and Checking to the position of Head of Flight Operations.

### **Initial matters to be considered**

[4] Section 396 of the *Fair Work Act 2009* (Cth) (*Act*) sets out four matters which I am required to decide before I consider the merits of the application.

[5] There is no dispute between the parties and I am satisfied on the evidence that:

- (a) Ms Henderson’s application for unfair dismissal was made within the period required in s 394(2) of the Act;
- (b) Ms Henderson was a person protected from unfair dismissal;
- (c) the Small Business Fair Dismissal Code did not apply to Ms Henderson’s dismissal; and
- (d) Ms Henderson’s dismissal was not a genuine redundancy.

### **Relevant facts**

[6] The Respondent provides 24/7 emergency aeromedical services to 1.5 million people in the communities across northern New South Wales. The Respondent operates four AW139 helicopters from three bases at Belmont, Lismore and Tamworth.

[7] The AW139 type of helicopter is a modern glass cockpit aircraft with an advanced autopilot and flight management system.

[8] The Respondent provides its emergency aeromedical services to the communities across northern New South Wales pursuant to a contract with New South Wales Ambulance. This contract requires the Respondent to provide aircraft, maintenance support and aviation crews to support Emergency Medical Services (*EMS*) operations during the day and night, including the ability for a single flight crew at the Lismore base to be capable of safely accessing patients on boats up to 100 nautical miles from shore, either by landing or by winching.

[9] The Respondent is required to comply with the *Work Health and Safety Act 2011* (NSW) and regulations as well as the *Civil Aviation Safety Regulations 1998* (Cth). In addition, the

Respondent has developed its own safety and operational requirements under its integrated safety management system.

**[10]** The types of emergency missions conducted by the Respondent's operational crews include:

- (a) primary missions in response to triple 0 emergency calls to assist patients with trauma or those that are injured in hard to access locations by ground-based emergency services;
- (b) inter-hospital transfers for critically ill or injured patients that require specialist care and timely transfer from a regional hospital to a specialist tertiary facility; and
- (c) land and marine based search and rescue operations in all types of conditions, including the extraction of people from remote and hard to access locations and vessels.

**[11]** The Respondent conducted 1,479 missions across northern New South Wales during the financial year ending on 30 June 2021.

**[12]** A Line Pilot employed by the Respondent is a safety critical position and the key requirements of the position include:

- (a) conducting helicopter aeromedical and search and rescue operations and responding to mission tasks in accordance with the Respondent's procedures;
- (b) avoiding variations from standard procedures unless warranted by mission requirements, and then only if justifiable through a crew member risk assessment process;
- (c) maintaining high situational awareness of the weather and potential hazards throughout the duty shift, and submitting flight plans when appropriate;
- (d) demonstrating and upholding exceptional safety standards in accordance with the requirements of the Civil Aviation Safety Authority (*CASA*), the Respondent's contract with New South Wales Ambulance and SafeWork NSW;
- (e) maintaining all currencies and competencies as required by CASA and the Respondent's requirements; and
- (f) upholding safety standards in accordance with the Respondent's procedures.

**[13]** The crew configuration used by the Respondent on its AW139 aircraft is a single pilot, supported by an Aircrew Officer (*ACO*), a New South Wales Ambulance Critical Care Paramedic/Winchman and a specialist doctor.

**[14]** During winching operations the ACO leaves the cockpit and operates the winch from the rear cabin of the aircraft. When hovering close to obstacles the Line Pilot establishes an accurate and steady hover on a reference and any movement of the aircraft is cleared by the

ACO, who looks and moves around the aircraft to facilitate this. It requires effective teamwork and clear and concise communication.

[15] Establishing an accurate and stable hover is the platform for ensuring the safe delivery and extraction of the medical team and patients. Winch rescues can be conducted at over 200 feet and any instability or harsh movement of the aircraft through the Line Pilot's controls can quickly be transferred into the winch, which acts as a pendulum and resultant spins and swings can be hazardous to anybody on the wire. In addition, any undesired movement when close to obstructions such as trees or a cliff can place the aircraft in danger of striking the obstruction.

[16] Because there is no co-pilot to provide a constant overview of actions on the Respondent's AW139 aircraft, its single-pilot operations are regarded as more challenging than multi-pilot operations and the competency standards required of the Respondent's Line Pilots in terms of captaincy, aircraft handling and proficiency is higher.

[17] The Respondent's operations often occur under intense and challenging conditions, including operating in different weather environments, at night utilising night vision goggles (*NVG*), in cloud, and winching over land and water.

[18] Ms Henderson holds an air transport licence (helicopter), a multi engine helicopter instrument rating, a flight instructor grade 2 rating, and a class 1 aviation medical certificate. She has a Bachelor of Science and an advanced diploma of aviation studies.

[19] Ms Henderson is a graduate of the Australian Defence Force Academy and the Royal Military College Duntroon.

[20] Ms Henderson served as a helicopter pilot in the Australian army for 17 years flying Bell 206 Kiowa's at 161<sup>st</sup> Reconnaissance Squadron, serving two tours in East Timor and one tour in Afghanistan flying Chinook CH-47D helicopters.

[21] Prior to her employment with the Respondent, Ms Henderson flew as a Helicopter Emergency Medical Services (*HEMS*) pilot in the Torres Strait for about two years.

[22] Ms Henderson's prior helicopter flying experience includes search and rescue, emergency medical services, surveillance, peace keeping, combat operations, slung loads, winching, low level flight, instrument flight, night vision imaging system (*NVIS*) flights and remote operations in diverse and complex operating environments. She is also an army reservist with command and senior management experience having previously served as a communication, leadership, management, operations and tactics instructor, as well as commanding joint task units during Operation Bush Fire Assist, Operation Covid-19, Operation NSW Flood Assist 2021, and Operation Flood Assist 2022.

[23] In August 2021, Mr Fisher, who at that time was the Respondent's Head of Training and Checking, was asked to provide an overview of the candidates for the recently advertised Line Pilot position based in Lismore. The candidates included Ms Henderson and an experienced AW139 helicopter pilot with 10 years' EMS experience.

[24] At the time, the Respondent had just commenced operating an additional aircraft, added to the fleet to support the New South Wales Ambulance Covid-19 response effort. This change required the Respondent to recruit and train an additional two temporary Line Pilots and three temporary ACOs. Mr Fisher was aware that this recruitment would result in significant additional work for the Respondent because its training team was resourced to support its existing operation.

[25] In late August or early September 2021, Mr Fisher received feedback from the Respondent's recruitment team for the Line Pilot position in Lismore, of which Mr Fisher was not a member, that Ms Henderson had performed well at her interview. The recruitment team consisted of Mr de Winton, Ms O'Grady, Mr Todd Mulville, Chief ACO, and Captain Nathan Scard, Lismore Base Manager.

[26] I accept Mr de Winton's unchallenged evidence that Mr Fisher spoke to him about the selection of Ms Henderson and made it clear that he (Mr Fisher) felt the recruitment team would have been better selecting one of the other candidates for the position because they were already trained and qualified to operate an AW139 aircraft.<sup>3</sup> This accords with Mr Fisher's opinion that there were significant advantages to the Respondent in recruiting a Line Pilot with experience in an AW139 aircraft, who would be quicker and cheaper to train.<sup>4</sup>

[27] I also accept Mr de Winton's evidence that the AW139 is initially a challenging aircraft to operate on NVIS due to the poor visuals, but once a pilot gains experience on the aircraft and learns the nuances of the AW139 they become more confident and competent.

[28] Ms Henderson was asked to complete a pre-employment flight simulator check conducted by Lismore Base Trainer, Captain Martin Shepherd, prior to being offered a position with the Respondent. The simulator report showed that throughout the ground training and simulator check process Ms Henderson was a strong candidate with the ability to adapt to operating a complex aircraft such as the AW139. Mr Shepherd gave the following summary at the conclusion of his simulator assessment report:

"It is my assessment that Ms Henderson will have little difficulty assimilating the AW139 Type Rating. She will be capable of completing the company HEMS Conversion and Line Training but is likely to require additional line training to fully consolidate her transition [to] the AW139 and NNHRS HEMS environment. I see her having no issue operating and integrating as a PIC as part of a high performing team and as a result will be able to operate a complex multi-engine aircraft in VMC and IMC."

[29] Post Ms Henderson's selection as the preferred candidate by the recruitment team (including Mr de Winton) and her successful simulator assessment, Mr Fisher sent correspondence to Mr de Winton and Ms O'Grady detailing the expected cost and time impacts of employing Ms Henderson, as compared to a helicopter pilot who was already trained and qualified to fly a AW139 helicopter. Mr Fisher assessed the cost difference to be comprised of the following components:

	Type Rating	Sim	Flying Training	Total Cost
Ms Henderson	\$64,900	\$23,400	\$22,500	\$110,800 <sup>5</sup>

Qualified and trained AW139 pilot	\$0	\$19,500	\$22,500	\$42,000
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[30] Type rating training is training in how to operate the AW139 aircraft, which is a modern glass cockpit aircraft different to the analogue aircrafts Ms Henderson had previously operated.

[31] Mr Fisher then provided the following summary of his analysis:

**“Summary**

- The cost difference for training Ms Henderson vice an experienced HEMS operator is assessed as being \$78,800 (\$64,900 AW139 Course is budgeted)
- The difference in TCP training commitment is two weeks.
- The difference in time to line is assessed as being in the vicinity of 8 weeks 10 – 15 Jan 2022 vice 22 – 27 Nov 2021.
- Clearly a competent aviator it is assessed that Ms Henderson will assimilate the AW139 Type Rating little difficulty.
- Capable of completing the HEMS Conversion course.
- Likely to require additional line training to consolidate her transition to the glass AW139 and NNHRS HEMS environment (+2weeks).
- It is assessed that Ms Henderson will have no issue at operating and integrating as a PIC in NNHRS operations.”

[32] Notwithstanding the cost differential and the uncertainty as to how long it would take to train Ms Henderson to fly a AW139 helicopter, the Respondent made the decision to employ Ms Henderson, rather than a pilot who was already qualified and experience to operate a AW139 aircraft.

[33] Ms Henderson commenced her employment with the Respondent as a Line Pilot at the Lismore base on 11 October 2021. The Respondent has just one helicopter that operates from its base in Lismore. Ms Henderson was classified under the Northern NSW Helicopter Rescue Service Ltd Pilots and Aircrew Officer Enterprise Agreement No 6 (*Enterprise Agreement*) as a second year Pilot.

[34] On the commencement of her employment, Ms Henderson was issued a comprehensive conversion course training plan outlining how her training competencies would be tracked and setting out the formative and summative assessment plans for her.

[35] There were three stages to Ms Henderson’s training plan. These had to be completed sequentially, prior to her commencing operational duties for the Respondent undertaking missions as a Line Pilot. The first stage was type rating training, the object of which was to enable Ms Henderson to learn how to operate the AW139 aircraft. The second stage was conversion training, which involved teaching Ms Henderson how to operate the AW139 aircraft in accordance with the Respondent’s standard operating procedures. The third stage was line training, which allows the newly converted pilot to conduct live operational training exercises under the supervision of a Training and Checking Pilot. For a helicopter pilot such as Ms Henderson with limited HEMS experience and no experience in a AW139 helicopter, the

Respondent expected that the total time to train Ms Henderson would be in the vicinity of 12-14 weeks.<sup>6</sup>

[36] During the period from 18 October 2021 to 12 November 2021, Ms Henderson successfully completed a AW139 multi-pilot type rating course conducted by Toll Helicopters in a full motion simulator based at Bankstown. It was later discovered, on 24 November 2021, that Ms Henderson had been given the wrong training by Toll Helicopters. She should have been given the single-pilot training course, but was instead given the multi-pilot training course. The single-pilot training course was the correct course because the Respondent's Line Pilots operate the AW139 aircraft on their own; they do not have a co-pilot on board with them during normal operations. That Ms Henderson was given the wrong training course caused delays and loss of continuity in her training.

[37] On 26 November 2021, Ms Henderson passed her Instrument Proficiency Check (*IPC*). However, Ms Henderson's Operator Proficiency Check (*OPC*) was deferred because the Respondent wanted Ms Henderson to first complete the single-pilot type rating course which had not been completed due to the wrong training course being provided to Ms Henderson by Toll Helicopters.

[38] On 29 November 2021, Ms Henderson completed an observational training flight in which Mr Shepherd was the pilot conducting low level, emergency handling and winch operations. Ms Henderson sat in the left-hand seat and observed Mr Shepherd. Later on 29 November 2021, Ms Henderson conducted her first training flight in which she was the pilot of an AW139 aircraft. Ms Henderson was tasked with a challenging winching scenario in difficult terrain on a hillside. Mr Shepherd treated the training exercise as if it were a 'primary mission'. Ms Henderson felt time pressured and was expected to conduct the exercise at high speeds. Ms Henderson found this off putting because she believed it was supposed to be an entry level learning exercise. Ms Henderson described the initial training exercise in the following way during her oral evidence:<sup>7</sup>

"... It was the first flight in the aircraft and it was a complex winching scenario. I haven't even flown a circuit in the helicopter yet. We went straight out to winching [on a] complex slope on the side of the hill. And, yes, I had seen him do it before but it was a pretty big ask when I haven't flown the aircraft before.

... I thought I was going to be trained to fly the aircraft day winching but I received no training. I was just expected to go out and demonstrate it straight away."

[39] I prefer the direct evidence given by Ms Henderson about what happened during the training flight with Mr Shepherd on 29 November 2021 over the hearsay accounts of Mr Shepherd and Mr Kross, ACO, neither of whom were called to give evidence.

[40] Mr de Winton gave evidence that in the past Line Pilots who were not qualified or experienced in an AW139 aircraft were given a 'free flight' in the aircraft to adapt to the aircraft post simulator training and prior to commencing aircraft training. In response, Mr Fisher stated that he was aware of three ex-army pilots of similar pedigree to Ms Henderson and without AW139 experience who did not receive a 'free flight' before commencing training exercises involving winching and the like. Mr de Winton gave evidence in reply that the three pilots to

whom Mr Fisher referred are very experienced ex-military pilots, each with instructor qualifications and more recent flying experience. As a result, Mr de Winton does not believe that this represents a 'level playing field' against which to compare Ms Henderson. Mr de Winton went on to state that the Respondent had provided a 'free flight' to the majority of pilots converting to the AW139 helicopter type; this was not an unusual process, with exceptions generally for instructors and highly experienced pilots. I prefer Mr de Winton's evidence over that given by Mr Fisher in relation to this issue. Mr de Winton has been employed by the Respondent for a much longer period than Mr Fisher and is correct in his statement that Ms Henderson had not operated as an instructor and had not undertaken many flight hours in the six months prior to her employment with the Respondent.<sup>8</sup>

[41] After the initial training exercise, Ms Henderson attended a debrief with Mr Shepherd, during which he provided some negative feedback but gave an overall assessment on the check form as "competent". I accept the Respondent's submission that limited weight should be placed on the 'Overall Assessment' box, as 'competent' or 'not yet competent', on the check forms completed during Ms Henderson's training because the training flights are not check flights and the purpose of the check forms is to record the feedback given to the pilot during their training flight. Mr Shepherd's comments at the end of the check form completed by him on 29 November 2021 were as follows:<sup>9</sup>

"This was an introductory flight to company winch procedures by day. It was the first flight in the aircraft and was conducted following a 1.1 hr demonstration flight which included an ACO SAR Check. Aircraft handling improved throughout the flight with hovering close to company standard. Profiles flown during CA operations are not constant and decelerating in nature. DATUM positions are much too high. Awareness of company procedures, checklists and work-flows is poor and requires more effective pre-reading. Aircraft start checks are not yet able to be recalled. Overall you are operating near saturation. Only increased knowledge and familiarity will increase capacity and establish robust situational awareness."

[42] During the debrief Mr Shepherd made some inappropriate comments to Ms Henderson, including that he was keeping a 'paper trail' for the purposes of her dismissal. Ms Henderson was shocked by Mr Shepherd's comments. She later raised concerns with the Respondent about Mr Shepherd's conduct. Mr Fisher accepted that it would be highly inappropriate for a trainer in Mr Shepherd's position to tell Ms Henderson, after her first training flight, that he was keeping a 'paper trail' for the purposes of her dismissal.<sup>10</sup>

[43] Later, in March 2022, Mr Humphreys sent an email to Ms Henderson in which he made the following statement in relation to way in which Mr Shepherd interacted with Ms Henderson in an unprofessional manner during the initial training exercise on 29 November 2021:

"I would like to apologise as a trainer for the way your program has progressed. It's an embarrassing example of how not to get the best in people."

[44] Mr Shepherd told Mr Fisher that Ms Henderson's performance during the training flight was very worrying and that she had significant weaknesses in aircraft handling.<sup>11</sup> Mr Shepherd sent an email to Mr Fisher in which he was critical of Ms Henderson's performance during the initial training sortie and suggested to Mr Fisher that he no longer instruct Ms Henderson.<sup>12</sup> Mr



Fisher agreed that Mr Shepherd should no longer instruct Ms Henderson. Mr Fisher made this decision without speaking to Ms Henderson to hear her side of the story.<sup>13</sup>

[45] Mr de Winton was then tasked to fly with Ms Henderson to review her progress. Mr de Winton's initial assessment was that Ms Henderson was lacking in confidence due to the comments made by Mr Shepherd. This is an important observation by Mr de Winton, particularly in light of the following evidence given by Mr Fisher about the significance of confidence to the performance of a helicopter pilot during training:<sup>14</sup>

“... primarily, flying training is very much a[bout] confidence - it's very much about confidence, about personal confidence and belief in your own abilities, and it's very easy - it's very easy for an instructor to load up a student or to create an environment in which it's not conducive to learning...”

[46] Mr de Winton flew two training exercises with Ms Henderson on 2 and 3 December 2021. Mr de Winton told Ms Henderson that he was disappointed with the way in which Mr Shepherd had conducted the first training flight. Mr de Winton also told Ms Henderson that normally a pilot's first flight is an easy and relaxed sortie, and that Mr Shepherd should not have taken her on such an intense first flight winching.

[47] Mr de Winton's initial training exercise with Ms Henderson was to get an idea of her progress and the second was to expand into exercises involving winching and confined areas. On a couple of occasions during these training exercises, Mr de Winton demonstrated some of the required profiles and saw a steady improvement when Ms Henderson replicated them. Ms Henderson completed these training exercises. I accept Mr de Winton's evidence that following these two training exercises with Ms Henderson he “came away with no concerns about her performance”.<sup>15</sup> Mr de Winton's overall assessment of Ms Henderson on the check form was ‘competent’. Mr de Winton included in his notes areas in which Ms Henderson could improve and concluded his comments in relation to the 3 December 2021 sortie by stating: “Overall improvement throughout the sortie which is good to see. Keep it up.”<sup>16</sup>

[48] To the extent that ACOs who were in the aircraft when Ms Henderson conducted the training exercises with Mr de Winton on 2 and 3 December 2021 made comments to Mr Fisher which were critical of Ms Henderson's performance and inconsistent with Mr de Winton's assessment that he had “no concerns” with Ms Henderson's performance, I prefer the evidence given by Mr de Winton. No ACOs were called to give evidence in the proceedings. Further, they are not qualified helicopter pilot instructors or trainers. As a general observation, I prefer the evidence given by the pilot instructors and trainers in these proceedings over the hearsay accounts given by ACOs who were not called to give evidence and could not be cross examined by Ms Henderson's representatives.

[49] From early December 2021, Ms Henderson no longer received training according to the original training plan. Her training became ad hoc and was scheduled on short notice. The training sessions were regularly cancelled due to weather events, or because the aircraft had been taken off-line. This caused further delays to Ms Henderson's training and uncertainty as to how and when she would be trained. I accept Ms Henderson's evidence that the loss of continuity in training made it difficult for her to establish a flow.

[50] On 8 December 2021, Ms Henderson returned to the Toll simulator facility and completed the correct single-pilot type training. On 9 December 2021, Ms Henderson completed and passed the AW139 single-pilot type rating flight test.

[51] On 10 December 2021, Ms Henderson conducted an additional operational development sortie with Mr Fisher, who told Ms Henderson that her captaincy and crew resource management were of a good standard and that he was pleased. The sortie took place in a simulator and was Mr Fisher's first exposure to instructing Ms Henderson. Mr Fisher considered that Ms Henderson's performance in the simulator was sound, although he notes that a simulator does not provide the opportunity to judge low level flight skills.

[52] Mr Fisher prepared a memorandum dated 13 December 2021 in relation to Ms Henderson's performance during training and the options available to the Respondent moving forward.<sup>17</sup> Mr Fisher's assessment of Ms Henderson's training to date was as follows:<sup>18</sup>

- "Initial concerns regarding standards and amount of preparation appear to have been addressed.
- Sana possesses average handling skills and has found conversion to a new glass cockpit type challenging. There appears to be a steadying, but not quick rate of progression requiring further consolidation.
- Captaincy skills are assessed as sound but lack of depth of HEMS experience is clear."

[53] Mr Fisher made reference in his memorandum dated 13 December 2021 to Ms Henderson's performance during the initial winching training exercise with Mr Shepherd and then her additional training with Mr de Winton. Mr Fisher then set out his "overall assessment" as follows:

"Overall Assessment. Our initial training plan was formulated on the basis that Sana would quickly assimilate the aircraft handling skills post TR and possessed sufficient depth of HEMS experience that would require an extended period of Line Training, but which would ultimately suffice for Lime Operations at Lismore. Having now completed 2 months of training with the company it is clear that:

- Sana will require additional sorties to meet the aircraft handling standard.
- Day winching proficiency will require an additional sortie.
- Whilst an experienced NVIS operator, with the already highlighted issues it is likely that additional NVIS training will be required.
- Sana will require additional Line Training (on roster)."

[54] Mr Fisher went on in his memorandum dated 13 December 2021 to present four options for Ms Henderson.<sup>19</sup> The first option was to provide no additional training to Ms Henderson. The second option was to cease training Ms Henderson and recruit an experienced AW139 pilot, at a cost of \$42,000. The third option was to provide additional training to enable Ms Henderson to meet the required standard and then commence in Lismore as a Line Pilot. The fourth option was to provide the additional training plus transfer Ms Henderson to Belmont for a period to consolidate her HEMS and flight experience at a high tasking rate base. This fourth option was expected to cost \$20,000 plus the cost of travel, accommodation and the like at Belmont. Mr Fisher concluded that: "Whilst it is possible for both Options 3 & 4 to ultimately

end up as Option 2, my assessment is that Sana is trainable subject to the provision of the resource listed. In my view the only options that provide a high probability of success are 2 & 4.”<sup>20</sup>

[55] On 15 December 2021, a meeting took place between Mr de Winton, Mr Fisher, Mr John Candy, Chief Financial Officer, Mr Rob Jenkins, Operations Manager, and Ms Fiona Williams, People Capability and Strategy Manager. It was agreed that Ms Henderson would receive additional training to consolidate her handling skills. Mr de Winton stated that he disagreed with the proposition for Ms Henderson to operate from the Belmont base, although no firm decision was reached in relation to this matter at the meeting.

[56] On 17 December 2021, Ms Henderson flew a conversion course NVIS flight with Mr de Winton. He assessed Ms Henderson as ‘competent’. Mr Fisher considered the feedback he received from Mr de Winton about this sortie to be encouraging.

[57] On 20 December 2021, Ms Henderson undertook a night training sortie with Mr Fisher, who assessed Ms Henderson’s “NVIS proficiency check overall assessment” as ‘competent’. Mr Fisher’s comments at the end of his report were as follows:

“Overall, your knowledge of company procedures, checks and SOPS is developing well. You communicate your intentions clearly and maintained a good standard of CRM throughout whilst making, on the whole, sensible Captaincy decisions. Your NVIS approaches were consistently shallow and labored with your precision work in the confined area not yet sufficiently accurate. During your next sortie, work on executing relatively steep approaches to the CA which will allow you to maintain visuals into it throughout – the CAT A Helipad picture is a good starting point. Ensure that you trim the aircraft in the CA and reacts smoothly and quickly to both visual and ACO cues - sure that you remain relaxed on the controls to avoid overcontrolling.”

[58] On 21 December 2001, Mr Fisher conducted another night training sortie with Ms Henderson. The initial aim of the sortie was to undertake Ms Henderson’s NVIS Proficiency Check (*NPC*), however it was assessed that Ms Henderson was not ready for NPC, so the sortie was a ‘back to basics’ sortie to address Ms Henderson’s approach and hover accuracy. During this sortie Mr Fisher’s opinion was that Ms Henderson was not able to fly a consistently accurate approach and her performance in the hover was still not accurate enough. Notwithstanding this, Mr Fisher assessed Ms Henderson’s “NVIS proficiency check overall assessment” as ‘competent’ and made the following comments at the end of his report:

“This was a very valuable sortie that allowed some consolidation of purely aircraft handling skills. Whilst your approaches are improving you are finding it challenging to visually fly a constant angle – sweat keeping the LS in the correct point in the screen, offset the aircraft to improve visuals, monitor aircraft deed and do not allow it to wash off and maintain an overview of rad alt height to aid maintaining the correct angle. Precision work is improving with good light placement - you must improve your accuracy, especially in the vertical - ensure that you collaborate with the ACO to establish a solid reference where you want it.”

**[59]** During Ms Henderson's NVIS training, the Respondent was under additional pressure due to running a fifth aircraft and significant periods where the Respondent was short on trainers due to COVID-19, in addition to ongoing flight checking and training commitments.<sup>21</sup>

**[60]** On 22 December 2021, Mr Fisher sent an email to Ms Henderson, Mr de Winton and others setting out a number of changes to the roster, travel and training requirements for Ms Henderson's training plan, including:<sup>22</sup>

- "27 Dec – Ride Along (LHS) shift with MdW
- 4-6 Jan - Complete Night Training with MarkO at Belmont Base (NPC likely 6 Jan potentially with HTC/HOFO)
- 10-11 Jan – Sim Day (likely at TOLL) with HOFO to complete OPC
- 12-14 Jan – Line Training at Lismore (HOFO)
- 19-21 Jan – Line Training at Lismore (Cook)
- 26-28 Jan – Line Training at Lismore (HOFO/HTC tbc)"

**[61]** This revised plan provided for a break in Ms Henderson's flying training over Christmas.

**[62]** On 26 December 2021, Mr de Winton flew with Ms Henderson situated in the left-hand seat to observe, so that she could view operations and understand the Respondent's processes, whilst gathering valuable knowledge of the area. Mr de Winton also flew a training sortie with Ms Henderson, which he regarded as being well handled by Ms Henderson and he did not identify any problems.

**[63]** During the period from 4 to 6 January 2022, Ms Henderson undertook three further NVIS development training flights at the Respondent's Belmont base with Mr Mark Overton, Training and Checking Pilot Trainer.

**[64]** The intention of the flight on 4 January 2022 was to revise the basics, including holding a steady hover and using hover references to pick up on any aircraft drift, to ensure that Ms Henderson was operating the aircraft correctly with regards to the use of the NVIS. Mr Overton formed the view that Ms Henderson's learning capacity was getting maxed out with the new aircraft type, techniques and systems and this meant that her basic skills were starting to drop off and she was reverting to older ways of flying helicopters, before there were glass cockpits and automation, as there is in the AW139 helicopters. As an example, Mr Overton explained that Ms Henderson was moving her head too much during NVG scanning, rather than just using her eyes. This was causing her to move her hands slightly, which caused the helicopter to drift.

**[65]** On 5 January 2022, Ms Henderson undertook a second night training sortie with Mr Overton. I accept Ms Henderson's evidence that there were poor weather conditions because of reduced visibility and a low cloud base. Mr Overton, who was not required for cross examination, gave evidence, which I accept, that it was safe to fly on the night of 5 January 2022 and "there was no moon illumination on the evening, the wind was 15 knots from the east, light showers, visibility beyond 9999m, cloud scattered at 1,500 ft, broken at 2000 ft and temperature at 25 degrees. I would not say that this night was extreme flying conditions, nor did they border on illegal."<sup>23</sup> Ms Henderson did not perform as well as she had hoped during the training sortie. She was unable to establish a good point of visual reference (which is

essential to achieve a steady hover) because she was facing out over the water with no contrast or visual horizon. On her first attempt, the ACO on board called to ‘go around’ because the aircraft was drifting too close to the cliff. Mr Overton says that Ms Henderson then pulled too much power on the aircraft in response to the ‘go around’ call and there was a transient over torque of the aircraft. Ms Henderson accepts that she pulled on the power on the aircraft in response to the ‘go around’ call but she did so for less than six seconds, which is within the transient limits for the helicopter.<sup>24</sup> I accept Ms Henderson’s evidence in this regard because, as she explained, if the helicopter had exceeded the allowable torque limits it would have been grounded or a safety report would have been lodged to say that something had occurred outside the aircraft’s limits, which did not happen.<sup>25</sup>

[66] On her second attempt, after the ‘go around’ call, a similar situation occurred with the aircraft drifting and the ACO told Ms Henderson to ‘go around’ again. I accept Mr Overton’s evidence that Ms Henderson either did not hear the call or thought she was getting it under control. Mr Overton then took over control of the aircraft to fly it out of the area because he did not believe that Ms Henderson was responding to the ‘go around’ call. I also accept Mr Overton’s evidence that it is very uncommon for a Training and Checking Pilot to take over control of an aircraft during a sortie flight. Mr Overton believes that Ms Henderson was getting task saturated in the new aircraft operating environment, rather than building up her skills from the previous sortie. By task saturation Ms Overton means that Ms Henderson was working at near maximum capacity operating the AW139 aircraft and it was impacting her ability to process new information and training regarding more complex operations and skills and causing reversion of some flying skills. Ms Henderson’s training flight on 5 January 2022 was the only flight during her conversion course where she received an overall assessment of ‘not yet competent’.

[67] In the post flight debrief on 5 January 2022, Ms Henderson told Mr Overton that she would not have accepted attempting to winch in those conditions with her level of experience in the AW139. Ms Henderson does not believe that the poor conditions on the night of 5 January 2022 were suitable for the early stages of NVIS training in a new aircraft type. Mr de Winton gave evidence in support of Ms Henderson’s contention that the weather conditions on 5 January 2022 were poor and this was a mitigating factor.<sup>26</sup>

[68] On 6 January 2022, Ms Henderson undertook a further night training sortie with Mr Overton. The training focused on hovering. Mr Overton observed that Ms Henderson was getting very low on her approach profiles and this needed to be revised during the sortie. Flying a low approach is a military tactic but it is not used by the Respondent’s Line Pilots.

[69] In his report dated 7 January 2022, Mr Overton made the following comments in relation to Ms Henderson’s knowledge, skills and attitude:

“**Knowledge.** Sana’s subject knowledge on NVIS operations appears to be sound. This would be tested thoroughly during the NPC ground based assessment.

**Skills.** The following points were noted regarding Sana’s Captaincy, CRM and NVIS general Handling skills;

- At present Sana is becoming saturated with learning a new aircraft type, using a glass cockpit interface, learning EMS techniques and operating under

NVIS. This is becoming evident as she is reverting back to previous “bad habits” whenever a new scenario is introduced. This results in having to review previously learnt subjects and reduce the tempo of learning which in turn increases the amount of time required for her to gain competence in particular operations.

- Upon review of basic techniques, Sana seems to cope well and can hold a reasonable hover when given multiple hover references. When introducing scenario based training at sites that are of low contrast and require sound planning and execution to complete the task, Sana seems to struggle to cope with the operational tempo at times resulting in unsafe situations requiring instructor intervention.
- As Sana progresses and she becomes more comfortable operating the AW139 under NVIS in a high operational tempo, she will free up capacity to deal with evolving mission scenarios and this in turn will allow her to recall new and correct techniques for operating in such an environment. This will take some further time and exposure.
- Of the three training sorties Sana was given, the third sortie had to be manipulated and scaled down due to repeated reversions to incorrect basic techniques during the second more complex sortie. This is a key indicator that more training is required to build capacity prior to any complex or low contrast NVIS operations.
- Sana’s Captaincy and CRM are sound. Her planning and briefing processes are at a standard that would be expected of someone of her experience. Sana communicates with other team members well.

**Attitude.** Sana’s attitude towards the entire learning process appears to be good. She has been well prepared for each sortie and relates to other members in a base operating context well. Sana receives debrief and constructive criticism well and is trying to apply lessons learnt to current operations.

**Conclusion.** Sana is coping with operating under NVIS in benign operating environments. When transitioning to more complex mission subsets in low illumination and challenging weather, Sana is becoming task saturated which has the ability to lead to undesired aircraft states. Sana will require further training focussed on missions that require higher fidelity in varying degrees of difficulty concerning terrain, weather and illumination. I suggest this occurs prior to her NPC so she has the best chance of achieving competence and continuing her progression towards being cleared to line.”

[70] Mr Overton gave evidence that, in his estimation, a new Line Pilot would, on average, be cleared to line (operational duties) within 1-2 months of commencing with the Respondent. Mr Overton accepted that there would be some level of variance with this.<sup>27</sup> That is plainly correct, because the extent to which a pilot has had HEMS experience and qualifications and experience in operating a AW139 aircraft will have a significant impact on the amount of time and training required for a particular pilot. So much is obvious from the Respondent’s own

documentation to which I have already referred, where it is recorded that Ms Henderson's training was expected to take 12-14 weeks.

[71] On 7 January 2022, Mr Fisher prepared a further training report in relation to the training provided to Ms Henderson. Mr Fisher assessed that Ms Henderson would require an additional 18 hours of training in an aircraft and 4 hours in a simulator, at a total cost of \$61,800, as follows:<sup>28</sup>

Training Phase	Hours Required	Remark
Conversion Training	4.5 hours 1.5 hours 4 hours (SIM)	Aircraft – Night Consolidation Night Proficiency Check OPC
Line Training	6 hours	
Operational Development	6 hours	
TOTAL	18 hours Aircraft 4 hours Sim	Total cost \$61,800

[72] Mr Fisher compared the cost of extra training (\$61,800) to the time and cost associated with training a new pilot with HEMS experience and experience flying a AW139 aircraft (\$43,000).<sup>29</sup> Mr Fisher expressed the following conclusion in his training report:

“15. It is clear that Sana is trainable, the issue revolves around how much resource we allocate. My concern, based on my own experience and report of the training team is the demonstrable low rate of progression from a pilot who, is on paper a fully qualified HEMS NVIS captain. Her core basic handling skills require continued instruction and in my judgement, completion of TCM training will at best provide a pilot who is not initially able to conduct NVIS winch operations and is likely to require an onerous level of oversight for routine night primary missions at a base which experiences very low levels of night tasking (continuity).

16. It is clear that the interests of safety and operational capability require us to seriously considered both options.”

[73] The original training plan provided for Ms Henderson to complete 1.5 hours of day training and 4.5 hours of night training in the aircraft. As at 7 January 2022, Ms Henderson had completed 6.9 day hours and 9.6 night hours of flight training, amounting to an additional 10.5 flight hours which equate to approximately \$30,500 of cost in aircraft time. Overall, including all training received, Ms Henderson had over 60 hours of training in the AW139 by 7 January 2022. In Mr Fisher's experience in conducting and delivering pilot training at the Respondent, this was significantly more training than he had previously delivered. As at 7 January 2022, Mr Fisher's judgement was that the evidence from the training team highlighted that Ms Henderson demonstrated a clear lack of ability to consistently meet the Respondent's standard for winching, hovering and low level operations of the aircraft.

[74] Mr Fisher also stated in his 7 January 2022 report that at least one night training sortie should be provided to Ms Henderson during each rostered shift period.<sup>30</sup> Ms Henderson says that she was not provided any of the additional night training referred to in Mr Fisher's report of 7 January 2022, either during her conversion course or line training. Notwithstanding this,

Ms Henderson passed her NPC and completed her line training with a recommendation by Mr Humphreys for a line check.<sup>31</sup> Further, Ms Henderson says that had an operational restriction for NVIS winching been instituted for six months, as suggested by Mr Humphreys, with a night consolidation training flight each month, the cost comparison for those six extra hours would have been \$18,000 versus \$43,000 to employ a new, experience AW139 pilot. Ms Henderson also says that she was not provided with the additional day winching training suggested in the 13 December 2021 training report or the additional training suggested by Mr Overton in his 7 January 2022 report.

[75] On 12 January 2022, a meeting was held to discuss Mr Fisher's training report. Mr de Winton suggested that they should continue with the next NVIS flight for Ms Henderson and then allow her to undertake the NPC; if she passed her NPC, then the Respondent would continue Ms Henderson's training. Mr Fisher was wanted to cease Ms Henderson's training and move to the termination of her employment, as he believed that she was not at, or going to achieve, required standard.<sup>32</sup> A decision was made for Mr de Winton and Ms O'Grady to meet with Ms Henderson to discuss and gather feedback from her.

[76] On 13 January 2022, Ms Henderson received an email invitation to attend a meeting with Mr de Winton and Ms O'Grady. The subject of the invitation was 'Check-in'. Mr de Winton told Ms Henderson when he contacted her to tell her about the meeting that the meeting was to discuss getting her NPC completed.<sup>33</sup> Unlike Ms O'Grady, Mr de Winton did not consider the meeting on 13 January 2022 with Ms Henderson to be a disciplinary meeting. It was instead focused on giving Ms Henderson an opportunity to review her training progress and discuss the next steps. Ms Henderson declined the opportunity afforded to her to take a support person to the meeting.

[77] During the meeting on 13 January 2022, Ms O'Grady commented that Ms Henderson's training was taking longer than expected. Mr de Winton had flown with Ms Henderson on a number of occasions and instructed her in some areas in which he believed she needed attention. Mr de Winton saw a steady improvement over the flights.<sup>34</sup> Mr de Winton was also conscious that Ms Henderson's training had been very disjointed. Mr de Winton said that the training had been mostly positive, that she was demonstrating good progression, and that this was reflected in the check forms. Mr de Winton also explained the concerns with various aspects of Ms Henderson's flying during the training to date. Mr de Winton told Ms Henderson that her progress had not been in line with what was expected and, as such, they needed a plan to identify next steps in her training.<sup>35</sup> Ms Henderson provided feedback in relation to the training she had received, including her concerns with the flight conducted on 5 January 2022, in particular that the poor weather conditions for that sortie. Ms Henderson was careful not to be too negative about the training she had received because she wanted to maintain a positive state of mind and not upset anyone. Ms Henderson made reference to her initial training exercise with Mr Shepherd and described the situation as "not ... ideal" and "an unfortunate side issue", but stated that she did not feel that the situation has had an impact on her performance.<sup>36</sup> During the meeting I accept Mr de Winton's evidence that he told Ms Henderson that if she failed the NPC it was possible that her employment would be terminated.<sup>37</sup> Ms Henderson realised that it would be essential for her to pass her NPC.

[78] On 14 January 2022, Mr Fisher sent an email to Mr de Winton, Mr Jenkins, Mr Humphreys, Mr Candy, Ms Williams and Ms O'Grady. In the email Mr Fisher explained how



he had formed his judgement that the Respondent should cease Ms Henderson's training. The email contained mostly critical comments in relation to Ms Henderson's performance during training. Mr Fisher's email of 14 January 2022 did not include many of the positive comments from the check reports about Ms Henderson's performance during her training to date, such as:<sup>38</sup>

- "Aircraft handling improved throughout the flight with hovering close to company standard."
- "Overall a satisfactory sortie ... Overall improvement throughout the sortie which was good to see. Keep it up."
- "Day winching sortie well-planned and flown ... Hover during winch very accurate ... Overall a well-constructed and flown sortie, progressing well. Keep it up."
- "Hovering accuracy is developing and you had a good opportunity this evening to experiment with hover references."
- "This was a very valuable sortie that allowed some consolidation of purely aircraft handling skills. Your approaches are improving. Precision work is improving with good light placement."
- "You had a better hover control tonight using multiple ... points. Overall a better scan technique. Consolidation of using hover references both through NVG and without external lights and unaided, also sound, good use of FMS to keep you oriented to the pad tonight. Better approaches to the datum. Good departures overall a better standard to the end of the training cycle."

**[79]** Mr de Winton believes that Mr Fisher's negative email of 14 January 2022 was aimed at predetermining the upcoming meeting at which Ms Henderson's future would be discussed.

**[80]** On 17 January 2022, Mr de Winton met with Mr Fisher, Mr Humphreys, Mr Candy, Mr Jenkins, Ms Williams and Ms O'Grady to discuss Ms Henderson's future. Mr Fisher recommended that the Respondent permanently suspend Ms Henderson's training. Mr de Winton disagreed. He was of the view that the question was not whether Ms Henderson would pass her assessments, but rather the process that should be followed to protect the Respondent and Ms Henderson. Mr de Winton proposed that Mr Cook conduct a simulator assessment of Ms Henderson and subject to successful completion of the assessment, Ms Henderson would continue to her NPC and into line training at the earliest opportunity. Ultimately it was determined that Mr Humphreys would conduct an assessment of Ms Henderson's performance, subject to which her NPC would be conducted, and if she passed her NPC and OPC she would undertake her line training and line check.<sup>39</sup> At that stage, Mr Humphreys had not flown with Ms Henderson, and it was considered that as a highly qualified AW139 instructor and examiner Mr Humphreys was qualified to make an independent assessment of Ms Henderson's competency.

**[81]** The night assessment flight to be conducted by Mr Humphreys with Ms Henderson could not be legally undertaken until Mr Humphreys had completed his training with the

Respondent, which took place during January 2022. To support Ms Henderson's preparation for the assessment flight and having regard to the fact that Ms Henderson had not flown for 21 days (because of several factors including Covid-19 leave requirements for various trainers), it was decided that she should complete a refreshment flight with Mr Fisher on 27 January 2022. The refreshment flight took place on 27 January 2022.

**[82]** At a meeting on 19 January 2022, Ms Henderson was told of the plan moving forward in relation to her training.

**[83]** On 28 January 2022, Ms Henderson participated in an assessment flight with Mr Humphreys that would determine if her knowledge, skills and abilities were sufficient to successfully pass a NPC. The areas chosen for the assessment flight were on the higher side of complexity for EMS operations due to their location, local relative terrain and wind direction for the night. The assessment involved a complex NVIS winching task in complex terrain,<sup>40</sup> and required precision handling.<sup>41</sup> Mr Humphreys observed some aircraft drift during the arrival and departure phase of the sequence to the quality training area. Overall, Mr Humphreys considered that Ms Henderson had demonstrated the skills and abilities to continue the training program with the Respondent. Mr Humphreys did not observe any major deficiencies during the training exercise. Mr Humphreys found that Ms Henderson was able to maintain a stable hover when there was a close reference point or very defined solid features in front of the aircraft. In light of his assessment that Ms Henderson demonstrated competency during the sortie, his opinion was that Ms Henderson should proceed to her NPC.

**[84]** On 4 February 2022, Ms Henderson conducted her NPC flight with Mr Humphreys. The flight involved a simulated primary NVIS winch task in complex terrain north of the Lismore base. Mr Humphrey's assessment was that Ms Henderson had demonstrated proficiency during the sortie by flying all required sequences to a safe line standard. Ms Henderson passed her NPC. After passing her NPC, Ms Henderson flew an NVIS paramedic live winch training sortie with minor debrief points.

**[85]** During the period from 9 to 11 February 2022, Ms Henderson returned to the Toll simulator in Sydney to undertake her OPC, which involves checking the proficiency of the pilot to deal with emergencies and the Respondent's emergency procedures. This check is a requirement of the Respondent, not a CASA requirement.

**[86]** On 10 and 11 February 2022, Mr Humphreys conducted two OPC training flights with Ms Henderson. Mr Humphreys considered that Ms Henderson flew well during these training flights and passed her OPC. These OPC flights involved operating the aircraft in a simulated environment in normal flight conditions and did not involve precision handling of the aircraft. Following Ms Henderson passing her OPC she had completed the conversion training course with the Respondent and could proceed to her line training, which is training in 'real-world' flight operations for the Respondent that are as close as possible to what a Line Pilot is employed to do. This means that the Line Pilot undertaking their line training is rostered to

work at the base as part of the normal operations of the aircraft conducting primary and secondary missions under the supervision and guidance of a Training and Checking Pilot.

[87] On 18 February 2022, Mr Humphreys conducted a short training flight with Ms Henderson. This flight did not involve any precision handling of the aircraft.

[88] On 21 February 2022, Ms Henderson participated in ‘doctor live winch training by day’ and NVIS.

[89] On 27 February 2022, Mr Humphreys conducted a line training flight with Ms Henderson. This mission involved an inter-hospital transfer between two hospitals. The weather conditions were poor during the flight, which did not involve any precision handling. After completing her training on 27 February 2022, Ms Henderson was not able to return home as rising flood waters had cut roads from the Lismore base causing the farm where Ms Henderson lives with her family outside Lismore to be isolated. For this reason, Ms Henderson elected to sleep at the Lismore base so that she would be in location for her subsequent night shift on 28 February 2022.

[90] Flooding in the Lismore region impacted operations at the Respondent’s base located in Lismore from 28 February 2022. The Lismore base was damaged by the flooding and a temporary base was established from Ballina Airport. On 28 February 2022, Ms Henderson conducted multiple flights transporting critical equipment and personnel from the Lismore base to the Lismore Hospital helipad in extremely challenging conditions.

[91] Ms Henderson is an Army Reservist and Commanding Officer of the local 41<sup>st</sup> Battalion which had been called forward on a Defence Assistance to the Civil Community, Level 1 emergency support request in relation to the flooding in the Lismore area. Ms Henderson led the Australian Defence Force response to the flood emergency, including overseeing the rescue and evacuation of hundreds of local residents by army helicopters and ground personnel. Ms Henderson remained on this task for the first six days of the flood event until Australian Defence Force reinforcements were able to reach the northern rivers area of New South Wales and Ms Henderson’s team could be relieved.

[92] After returning home for a day off on Sunday, 6 March 2022, Ms Henderson recommenced her line training with the Respondent. On 7 March 2022, Mr Humphreys conducted a further line training flight with Ms Henderson. This mission involved inter-hospital transfers and did not involve specific precision handling skills, although a debrief point was discussed with Ms Henderson about aircraft drift on departure from elevated helipads. This was raised to refocus attention to this area after another break from regular flying in the line training phase.

[93] On 9 March 2022, Ms Henderson undertook a line training flight from Grafton to the Gold Coast Hospital.

[94] On 14 March 2022, Ms Henderson flew a ‘doctor live winch training sortie by day’.

[95] On 15 March 2022, Mr Humphreys conducted a further line training flight with Ms Henderson. The first primary mission was the transport of a patient to a hospital. Following this

mission Ms Henderson undertook further winch hover training. This type of training is not directed at the pilot but is a proficiency check that is required to be completed by doctors and paramedics for their training currency. In between doctor/paramedic training sessions Ms Henderson conducted a high non-live winch scenario to a confined area in the vicinity. Mr Humphreys observed that Ms Henderson had difficulty maintaining a stable hover in the windy conditions of the day. On completion of this mission, Mr Humphreys told Ms Henderson that training missions had been undertaken and that the plan was for her to complete her line check on the next shift block with Mr de Winton. This was on the proviso that there be no problems with the programmed hi-line training sortie planned for a few days' time. Mr Humphreys informed Ms Henderson that there would likely be an operational restriction placed on her for NVIS winching with an ongoing proposed monthly training flight to focus on this area further and develop and refine this skill set.

[96] On about 15 March 2022, Mr Humphreys advised Mr Fisher that he recommended for Ms Henderson to proceed to line check with the understanding that Ms Henderson not be cleared for unrestricted operations until further NVIS winch training was conducted and a further assessment completed. Mr Fisher indicated that this would have to be approved by the client (New South Wales Ambulance) and would need to be discussed with Mr Jenkins. Mr Humphreys was not sure if that would be acceptable at a contract level.

[97] On 16 March 2022, Mr Humphreys conducted an NVIS training flight with Ms Henderson for her three-monthly winch proficiency training. This was the first night operations flight that Ms Henderson had conducted since her NPC on 4 February 2022. During the flight Mr Humphreys observed that Ms Henderson was having issues with maintaining the aircraft position in a stable hover where reference points were not ideally where Ms Henderson wanted them to be, being in front of the aircraft.

[98] As at 16 March 2022, Mr Humphreys' recommendation was that Ms Henderson would proceed to line check in her next training block, but this was still waiting on hi-line training. Mr Humphreys' view was that Ms Henderson was not yet performing at a standard where the Respondent could be confident that she could safely and consistently handle a winching scenario during operations where persons were being put on a winch. Mr Humphreys was satisfied at this point that the progress to line check was still achievable with the proposed NVIS winch restriction. However, it would have needed to be accepted by the client and that conversation was still being planned for. To Mr Humphreys' knowledge, nobody from the Respondent ever proposed to New South Wales Ambulance that an operational restriction be placed on Ms Henderson in relation to NVIS winching.<sup>42</sup>

[99] On 17 March 2022, Ms Henderson conducted her hi-line training with Mr Fisher. Hi-line training involves transferring people and equipment to a vessel at sea while the vessel is moving. This was the first time that Ms Henderson had undertaken any hi-line training or activity in her career. Mr Humphreys observed the flight from a rear cabin position and witnessed the normal range of pilot errors in circumstances where the pilot is conducting a hi-line for the first time.<sup>43</sup> Mr Humphreys considered that Ms Henderson initially had difficulty in maintaining a consistent aircraft height and heading on run into the vessel. Mr Fisher gave evidence that, initially, Ms Henderson struggled to maintain an accurate hover position over the moving vessel. As the sortie progressed Mr Humphreys observed that Ms Henderson's approaches to the vessel improved to the point where the last iteration completed a transfer at

the minimum required standard. The aircraft was low on fuel by this stage, so a further confirmatory transfer sequence was unable to be carried out. Although Ms Henderson achieved the objective of the hi-line training by successfully achieving a hi-line transfer, Mr Fisher told her during the debrief that she would not be signed off for hi-line because he wanted to ensure she could replicate the training, and that she would therefore be scheduled for a further sortie. Ms Henderson was assessed as ‘not yet competent’ for hi-line training. I consider that Mr Humphreys’ observations of Ms Henderson’s performance during the hi-line training on 17 March 2022 to be the most balanced and accurate assessment of her performance on that day. Mr Humphreys witnessed Ms Henderson make the normal range of pilot errors in circumstances where the pilot has not previously undertaken hi-line activities. Mr Humphreys observed Ms Henderson successfully complete a high-line transfer during the training sortie and a water winch iteration following the sortie, both of which required a level of precision handling.<sup>44</sup>

**[100]** Ms Henderson says that hi-line training is not a CASA requirement, nor a requirement of line training imposed by the Respondent. Ms Henderson says that pilots engaged by the Respondent are allowed to fly to line when they are not current for hi-line.<sup>45</sup> Mr Fisher says that the Respondent’s service requirements state that the Respondent’s crews must be able to safely conduct a winch transfer at 100nm offshore, if required by the mission. I prefer Mr Fisher’s evidence in relation to this issue. I consider that his position and experience with the Respondent puts him in a better position to understand the requirements of the role of a Line Pilot with the Respondent.

**[101]** Ms Henderson also says that hi-line is not comparable to the hovering required for NVIS winching. She says that hi-line is a different and specific skill set, and working with a vessel requires different visual cues. Three senior and experienced trainers engaged by the Respondent - Mr de Winton, Mr Mick O’Grady and Mr Humphreys, who are all ex-navy - told Ms Henderson that hi-line is not comparable to the hovering required for NVIS winching. Mr Fisher says that whilst the locations are different for hi-line and NVIS winching, the piloting skill is the same and it is necessary for a pilot to have the ability to visually interpret their surroundings and translate that into the physical movement to manoeuvre the aircraft. Mr de Winton says that hi-line is a complex evolution and has created a number of challenges for pilots over the years. Mr de Winton has taught hi-line in the British Navy and with the Respondent. He has observed a large number of pilots struggle with the task, including highly experienced pilots, as it is not a practice that is regularly conducted and is usually practiced only once a year.

**[102]** A training review meeting took place on 21 March 2022. In attendance were Mr Fisher, Mr Humphreys, Ms O’Grady, Mr Todd Mulville and Mr Sharman. At this time, Mr de Winton had been removed from the position of Head of Flight Operations. At the meeting Mr Fisher advocated for the cessation of training to Ms Henderson in light of his assessment that she was not able to consistently ensure a steady hover during operations. It was agreed that Ms Henderson’s training would be ceased by the Respondent. The training review report dated 21 March 2022 states that the following points were agreed by the persons who conducted the review:

“16. The following point were agreed:

- For winch qualified pilots with limited experience, it is acceptable for a HOFO approval limitation to be applied once they have been cleared for line operations.

This ensures appropriate oversight of winch tasking as a new pilot gains experience.

- It is not acceptable to place a pilot who is not cleared to winch in a line position. This limitation would not be contractually or practically appropriate.
- Sana is not ready to complete her Line Check. The Line Check confirms the individual has met the flying standards for all regimes required of a company pilot.
- This is due to an inability to maintain a consistently steady hover, especially when hover references are compromised or not in an ideal position.
- Despite all instructors attempts to address this issue, Sana's hover performance is not consistent and is not at the standard required of a company pilot to conduct winch operations.
- Instructors considered that the only possible avenue to remediating the precision handling issue was possibly an external training school. This could possibly take the form of Vertical Reference training. However, it was also not clear on whether this course of action would ultimately result in this skill being brought to the required level.
- Excessive movement during winch operations presents a potential danger to both the aircraft and to the winchman.
- The CACO and Lismore TCACO's input, based on consistent feedback from both line and training ACO's is that the group would not be comfortable to conduct live winch operations with Sana due to the amount of aircraft movement during hover operations.

17. As a result of these points and in the interests of future flight safety, the review group unanimously recommend that Sana Henderson's training is permanently suspended."

**[103]** On 22 March 2022, Ms Henderson arrived at work excited to finally complete her scheduled final summative assessment, the line check. The instructor, Mr de Winton, who was scheduled to assess Ms Henderson's line check, had flown from Newcastle to Ballina for the shift. Ms Henderson received a phone call from Mr Fisher on the morning of 22 March 2022 to inform her that the senior operations team had met the day prior and decided that she should not proceed to line check because she had not met company standards in all areas.

**[104]** Ms Henderson was shocked by what Mr Fisher said to her. She said she did not understand, as she had passed all proficiency checks and completed her line training. Mr Fisher said there were concerns raised with her NVIS training sortie on 16 March 2022 and that ACOs had come forward and said they did not feel safe to conduct winching with her.

**[105]** Ms Henderson was upset. Mr de Winton, who was nearby, asked what was wrong. Ms Henderson told him. Mr de Winton said that he was surprised, because he had flown up to conduct Ms Henderson's line check and had not been briefed otherwise.

**[106]** Ms Henderson spoke to Mr Jimmy Keogh about her phone call with Mr Fisher. Mr Keogh had been rostered as her ACO during line training and was to be rostered with Ms Henderson once she was checked to line. He had flown many hours with Ms Henderson including winching. Mr Keogh told Ms Henderson that he had not said anything to Mr Fisher about having any problems flying with Ms Henderson. Ms Henderson said that Mr Fisher had

mentioned the NVIS training sortie on 16 March 2022. Mr Keogh said words to the effect, “Yeah we did three winches, the first one had a good reference and you were rock solid, the second was more challenging and there was a bit of drift, but workable, and the third you were out of the wind without a hover reference and we couldn’t achieve a steady hover there, but all pilots have problems in that spot”.

**[107]** On 24 March 2022, Ms Henderson attended a meeting with Ms O’Grady and Mr Fisher. Mr Lachlan Hayes, a Lismore base Line Pilot, attended as Ms Henderson’s support person. Ms Henderson was told that the Respondent had concerns about her performance that could lead to her dismissal. Ms Henderson was assured that her captaincy and ability to make safe decisions were not in question, but there was a concern about Ms Henderson’s ability to hold a steady hover in particular situations. Ms Henderson read out a pre-written response she had prepared prior to the meeting. After reading her response, Ms O’Grady asked Ms Henderson how many remedial flights she thought she would need to resolve the deficiencies raised with her. Ms Henderson started to respond but Mr Fisher cut her off and said it had been unanimously agreed that the deficiencies in her flying were not remediable.<sup>46</sup> Ms Henderson was shocked by Mr Fisher’s comment, because, in her view, the assertion that a flying skill is not remediable is absurd. Ms Henderson formed the view that Mr Fisher had clearly made up his mind. Ms Henderson was told that she would be issued with a show cause letter. The meeting ended at 11:30am. A draft show cause letter was sent to the CEO of the Respondent at 12:11pm on 24 March 2022.

**[108]** Later on 24 March 2022, Ms Henderson received a show cause letter from the Respondent. Ms Henderson sought assistance from her union and they requested an extension of time to respond to the show cause letter. The Respondent permitted Ms Henderson additional time to respond to the show cause letter but refused to provide the documents sought by Ms Henderson.

**[109]** On 21 April 2022, Ms Henderson provided a comprehensive response to the show cause letter. As part of that response Ms Henderson made the point that she had passed all six formal checks on the first attempt during her employment with the Respondent. Ms Henderson suggested in her show cause response three alternative options which were available to mitigate the Respondent’s concerns prior to terminating her employment. The first option was to permit Ms Henderson to undertake her line check and gain further experience flying on the line. Hi-line training could be completed with an additional sortie as originally proposed and should a concern remain about Ms Henderson’s hovering during NVIS low contrast with a compromised reference, then an operational restriction could be put in place requiring an additional phone call and oversight prior to the conduct of any NVIS winch operation. An additional NVIS training sortie could be conducted each month for the first few months. The second option suggested by Ms Henderson was for the Respondent to provide remedial training and recheck the skill said to be causing concern. The third option suggested by Ms Henderson was for her to pay for a vertical reference training course, at *her own expense*, to improve her hovering without a reference.

**[110]** Ms Henderson also outlined a number of mitigating circumstances in her response to the show cause letter. They included the following:

“The training continuum has been disjointed in terms of timeliness, consistency of instruction and training locations. Substantial gaps in my Type Rating and subsequent Conversion/Line training occurred that were outside my control which made demonstrating consistency extremely difficult. This has resulted in large gaps between training flights, particularly in live aircraft.

Also, the continuous changing of instructors and subtle differences between instructional technique and inter-rater reliability meant there was some inconsistency in their expectations of flying techniques which made my consolidation extremely difficult. These significant breaks in training when converting on to a new type in addition to learning new company procedures, on a new contract and in new airspace represent a predictable obstacle to consistency.

Despite this I was able to pass all of my check flights on the first attempt and progress through to completion of my line training.

As a large amount of my training has involved assimilating new information (aircraft type and company procedures), the introduction of extended gaps in my training program together with receiving instruction from six different company Training and Checking Pilots added additional pressure on my performance.

Irrespective, only one skill has been identified and only under abnormal/ adverse conditions. Moreover, any documented evidence to support this concern in the Check Forms written after each flight is lacking.

During my meeting on 24 March 2022 and through the Show Cause letter and the subsequent supplementary letter of 4 April 2022 a picture has been painted that I have taken excessive time in training and been given significant additional training. There have been several factors not related to my flying performance that have impacted on my training program:

- My initial type rating at Toll was incorrectly run as a multi-crew type rating and not single pilot. Two weeks of flying the simulator were not conducted single pilot. This put me at a significant disadvantage at the commencement of my conversion training as I had not had the pre-conversion training at that additional single pilot level.

As a result, I could not complete my OPC as originally planned in my first week of sim training as I first had to return to Toll to complete a single pilot type rating but without the usual number of lead-in flights. That required an additional week to schedule the rating to be conducted in Sydney.

- My initial trainer during the first week of company sim training had concerns about my ability to conduct a single pilot IPC. At this time the company policy was that an IPC could not be conducted with the use of an ACO in the front left hand seat (LHS). As I had only been flying the aircraft multi-crew and on my previous type we were able to have a crewman present during the conduct of a single pilot IPC I was not used to this circumstance.



This delayed the conduct of my IPC. It should be noted that the following month in December the company changed the relevant policy to permit ACOs to act in their role in the front LHS to support the conduct of an IPC. Had this been afforded to me less than a month earlier I would have met my originally scheduled IPC timeline.

- My initial week of flights scheduled in the aircraft were delayed partially because of my performance on the first flight, but also due to the trainer's conduct during that first flight which I had cause to submit a report on, including at the direction of the company, from which an investigation has been, or is being, conducted. I have touched on that incident above and do not traverse it further in this form.

However, it cannot be denied as a significant event impacting on me in numerous ways. Needless to say, training had to be rescheduled and, for that in part, I must show cause as to why I ought not be dismissed.

- After completing my three NVIS sorties as per OPSMAN C4.3.2 para 3b it was decided to break for Christmas prior to conducting my NPC due to availability of trainers. Lead up training to that NPC would be provided due to the extended break over Christmas. This led to a plan of two NVIS flights with Mark Overton followed by an NPC to be conducted at Belmont.

Prior to my second flight with Mark I was advised that I would no longer be sitting my NPC the following night as there had been positive Covid cases at Lismore Base and the scheduled examiner was deemed a close contact and therefore could not conduct my NPC.

I was told that the positive of this was that I could now focus on purely developmental training for the subsequent two scheduled sorties and my NPC would be rescheduled once trainers were available.

- Upon returning from Belmont a Training Check-in was scheduled with Mike De Winton and Debbie O'Grady. A decision was made that I would conduct a company assessment to determine if I was ready to sit the NPC. The company decided to wait for the incoming HTC to be online to conduct my assessment check. I asked whether in the interim I could go to the sim to complete my OPC, commence line training or at least be able to ride along on missions to maintain my progression and increase my proficiency.

All of these requests were denied. Had these requests been met my training time overall would have been reduced significantly. Instead, I did not fly for three weeks at the behest of the company.

In summary the issue of being trained incorrectly as multi-crew during my type rating, having to conduct my IPC without an ACO, delaying my OPC as I did not yet have a single pilot type rating, repeating my type rating, breaking for Christmas, delaying my

NPC due to Covid close contacts and waiting for the incoming HTC to be on-line to conduct my independent assessment all contributed to delays in my training that were not related, nor attributable, to my performance. Additionally, many flights were cancelled due to weather or aircraft being on task.

I accept the report regarding hovering while NVIS winching with a compromised reference. However, no additional training to specifically address this has been provided, let alone offered, discussed or planned.

I have passed all of my proficiency checks at the first attempt, completed my conversion training and there has been no issues raised during the conduct of my line training so far that compromised my progression.”

[111] Ms Henderson responded as follows in her show cause response to the contention that she had not demonstrated a consistent hover performance despite over 90 hours of experience in the AW139:

“Whilst I have logged over 90 hours only 74.8 have been flown hands on from the right-hand seat. Many of these flying hours were not low-level nor involving winch training. The letter says that over 23 hours of flight training has been completed. However only 17.5 hours of aircraft flight training was completed during the conversion course.

The actual figures are as follows:

- Total hours hands on: 74.8
- Total Simulator hours: 38.6 and Total Aircraft hours: 36.2
- Type Rating Multi-Crew and Single Pilot Sim hours: 19.9
- Conversion Training (Simulator): Allocated hours were 12 hours (not 10 as stated in the letter). Actual Hours flown were 18.7 hrs. Seven of these hours were for IPC purposes (note the IPC is not allocated hours in the OPSMAN conversion course breakdown)
- Six hours were for my scheduled February OPC cyclic which was pre-allocated and not an additional resource bid for.
- Therefore, conversion training total resource for simulator was 5.7 hours.
- Conversion Training (Flight): 17.5 hours. 3.2 hours were for lead in flights post-Christmas and pre-NVIS checks due to long breaks in flying not otherwise required. This leaves 14.3 hours: 4.4 hours was Day training (3 sorties) and 9.9 was Night training (6 sorties). An additional 3.1 hours were flown for the company NVIS assessment and NPC.
- Line Training: 15.6 hours including 4.8 hours of live winching for paramedic and doctor training (a resource not allocated for my training specifically), 1.2 NVIS winch currency and 1.5 Hi-line training.

The hours and sorties numbers above are less than those outlined in the 4 April 2022 supplementary letter. These hours were utilised for the obtainment of several qualifications and skills including IPC, OPC, Multi-Crew Type Rating, Single-pilot Type Rating, NPC, Doctors and Paramedics Winch Currency, Hi-line training etc. To

suggest that a large proportion of these hours constitute ‘additional training’ specific to the purpose of addressing the alleged ‘inability’ is misleading.

### Industry Standard

It is noteworthy that Toll schedules the following minimum hours for newly inducted pilots who have not previously held a rating on type before they are cleared to fly the line and as agreed to by NSW Ambulance:

The total minimum hours on type prior to being checked to line at Toll are:

- a. Dual 22 hours (15 Sim, 7 aircraft);
- b. PIC 50 hours (40 Sim, 10 aircraft); and
- c. 2nd Pilot 15 hours (Sim).
- d. Total AW139 hours – 87 hours**

The Training hours resource originally scheduled for me by WRHS was significantly lower than that allocated by Toll for a similarly experienced pilot.”

[112] On 6 May 2022, Ms Henderson attended a meeting with Mr Jenkins, Ms Williams and Mr David Stephens, who was representing Ms Henderson from the Australian Federation of Air Pilots. Ms Henderson was told by Mr Jenkins that she had many amazing strengths and capabilities and was a great fit from a team perspective, but the skill gap identified was deemed too great a risk for the nature of the Respondent’s operations.<sup>47</sup> She received a letter of termination outlining the reasons for her dismissal. The termination letter sets out the following reasons for the termination of Ms Henderson’s employment:

“Clause 16.2.1(iii) of the Northern NSW Helicopter Rescue Service Limited Pilots and Aircrew Officer Enterprise Agreement No 6 states that an employee can be terminated for: *“Failure to attain and maintain necessary licences, qualifications and accreditations and the like necessary for the performance of the Employee’s duties.”*

The above statement includes the requirement to meet the training and checking standards of the organisation and receive the appropriate “accreditation” to carry out the duties of a Line Pilot. Based on the following factors you have not been successful in meeting the required standard and therefore are unable to fulfil the requirements of your Line Pilot role.

A review of your training and checking results since your commencement on the 11<sup>th</sup> October 2021 have indicated the following concerns in relation to your competency as a Line Pilot:

- The core issue relates to your inability to accurately position the aircraft during pre-arrival handling and to then maintain a stable hover. It is noted that this skill is key to safe aircraft winching operations.
- During challenging operational scenarios or in areas of low contrast, an unacceptable level of drift and movement is experienced.
- Hover performance has been inconsistent throughout your training and feedback has been provided by various members of the training and checking team, including through Company check forms. In January 2022 you met with Mike

de Winton, Chief Pilot and Deb O'Grady, HR Business Partner to discuss these concerns relating to your ability to meet our standards. The decision was made at that point in time to continue training. However, the issue again surfaced during your night training sortie on 16 March 2022 and hi line training sortie on 17 March 2022.

- You have been provided with additional training since your commencement, which was aimed at assisting you to meet the required standard. However, despite this training, you are yet to attain the company standard for hovering, especially during winching operations."

[113] At the end of the meeting at which she was informed of her dismissal Mr Jenkins said that Ms Henderson could contact the three subject matter experts who had independently reviewed Ms Henderson's response to the show cause letter and provided advice to the Respondent's Chief Executive Officer (*CEO*) before he made a decision about her dismissal. Those three persons were Mr O'Grady, Mr Humphreys and Mr Fisher. Ms Henderson contacted Mr O'Grady and Mr Humphreys, who both confirmed that they had recommended additional training rather than dismissal.<sup>48</sup>

[114] At the time of her dismissal, Ms Henderson was the only female HEMS Captain in Australia. In addition, the Respondent's operations team, apart from Ms Henderson, were all male. Ms Henderson's response to the show cause letter included a statement of concern by her that "certain person(s) involved in this process who are representing the company campaigned against my initial appointment/employment and continue to do so, including seeking to have my appointment reversed even before I commenced training, and then seeking my termination despite a completely unblemished check record". This was clearly a reference to Mr Fisher's conduct after Ms Henderson was identified as the preferred candidate in the selection process.

[115] Mr de Winton was the Respondent's Chief Pilot from June 2010 until January 2022. Prior to that he was in the British Navy for 20 years, including as an instructor and an instructor for all other instructors.<sup>49</sup> Mr de Winton is of the view that employing solid aircraft captains who make sound, carefully thought-out decisions is imperative for the safety of the mission and the crew. In Mr de Winton's opinion, Ms Henderson demonstrated these attributes throughout her training.

[116] Mr de Winton believes that Ms Henderson required a further period of training of about one week to get her to the standard required by the Respondent.<sup>50</sup> Mr de Winton recommended that the Respondent follow a remedial training package as laid down in the Respondent's Training and Check Manual (*TCM*), of a couple of sorties and a check flight.<sup>51</sup> Mr de Winton believes that Ms Henderson would have passed the Respondent's requirements if she had been given the proper remedial training package.<sup>52</sup>

[117] In response to a question I asked about what had gone wrong in this case, Mr de Winton said:<sup>53</sup>

"I believe that an initial breakdown in the instructor/student relationship at the very beginning created a confidence breakdown with Ms Henderson, which I identified in my first flight with her. I believe that we didn't – and I blame myself as much for this – instruct her properly. She did the wrong course at the beginning. She did a two-pilot

course, not a single-pilot course and the expectation was just going to do a quick check right – a quick – in the right-hand seat was a sufficient answer. I don't agree necessarily that was the right way and we didn't pick up on it. I didn't pick up on it either until it was too late when we were in the training system. I think we should have spent more time instructing. That is my personal view."

**[118]** Mr de Winton also expressed the following views in his re-examination:<sup>54</sup>

"I would believe that there were areas to improve on which would be gained by experience ... I think some of the areas that I was concerned about was that we hadn't spent the time training to ensure that [what] we were after was being achieved... I believed that Sana could actually achieve what she wanted to achieve. Her captaincy and her mannerisms and method around the place was exceptional. It was just a little bit rusty on the flying skills."

**[119]** Mr de Winton says that it had been standard practice in the Respondent's business to limit some pilot's operational capabilities when they first go to line while they gain confidence and experience in HEMS operations and NVIS operations in the AW139 aircraft. Mr de Winton says that the most common limitation is NVIS winching. Mr de Winton also says that this practice has been accepted by New South Wales Ambulance as a solid risk mitigator.<sup>55</sup>

**[120]** Mr de Winton gave evidence that when the Respondent converted to the AW139 aircraft in about 2016/17 all pilots, apart from the instructors, were limited on their night winching capability for a short period of time until they gained experience on the aircraft and night winching, and the Respondent did the same with new pilots joining the business. For example, Mr de Winton says that Mr Luke Frost was a new pilot employed to work at the Belmont base and he was limited from night winching for four months because of his experience.<sup>56</sup>

**[121]** Mr Humphreys was asked for his opinion in response to Ms Henderson's show cause response. He was of the view that Ms Henderson had the ability to be trained to overcome the deficiency in maintaining a consistent and stable hover in particular circumstances. However, this was not a deficiency that Mr Humphreys had seen before in his career for somebody with Ms Henderson's background and training. As a result, Mr Humphreys was cautious in estimating how long or at what cost additional training would be required for Ms Henderson to bring her to the required standard. His best estimate was that a two-week additional training program would be required (flying pretty much every day), and he was very hopeful that Ms Henderson could have got to the standard required after such additional training.<sup>57</sup> Mr Humphreys was not surprised that Ms Henderson passed her IPC, NPC, OPC and line check on her first attempt in her AW139 training with Toll Helicopters following the termination of her employment with the Respondent.<sup>58</sup>

**[122]** Mr Humphreys was of the view that Ms Henderson could complete her line check but there would be an operational restriction imposed for NVIS winching operations. Mr Humphreys advised the Respondent's management team that he was not sure how that would work under the Respondent's requirements and that it would need to be discussed and approved at contract level by either Mr Fisher or Mr Jenkins. Mr Humphreys considered that it was not a scenario that was common, but he was aware of similar limitations being employed in the southern contract with New South Wales Ambulance by Toll Helicopters; this was normally

utilised for new pilots who had limited NVIS experience prior to being checked to line. Mr Humphreys was of the view that the restriction would likely be imposed for 3-6 months and would require an ongoing monthly NVIS training flight to help continue to develop and refine Ms Henderson's NVIS winching skills. Mr Humphreys also made the point that the NVIS winching restriction he proposed for Ms Henderson may have been different from other similar arrangements he was aware of in light of the location of the Lismore base and the aircraft at that base being a primary aircraft.<sup>59</sup>

[123] Mr Humphreys also gave evidence, which I accept, that, ideally, in initial training when a pilot is new to an aircraft and company, there is a planned training continuum which involves the least amount of breaks between flying events so that the pilot can build on lessons from one flight and apply them to the next flight.<sup>60</sup> Mr Humphreys accepts that Ms Henderson's training continuum was less than ideal, but says that many factors impacting her training were outside the Respondent's control, such as flooding and the impact of COVID-19 on the availability of trainers and other staff. Mr Humphreys says that the Respondent was aware of these matters and took steps during Ms Henderson's training to ensure she was provided additional training resources.<sup>61</sup>

[124] Mr Overton believes that Ms Henderson was 'trainable' as a Line Pilot for the Respondent's service, but she required additional training.<sup>62</sup> Mr Overton also expressed the views that:

- "In my view it was a reasonable expectation for the Service for Ms Henderson to be a consistent standard after the number of training sorties in the aircraft and simulator she had. While there were some breaks in the training and it would ideally be better for the training to be more consolidated overall, I do not consider this to have had a significant impact on her hovering ability in the aircraft";<sup>63</sup> and
- "It was in everyone's best interest to try and get Ms Henderson through – she is a great person and would have been an excellent addition to that base. Unfortunately, the Service is a single-pilot operator and the requirements of the job can be really complex and dangerous. Safety is critical in this industry. If an incident occurred then the Service would be accountable to explain why Ms Henderson was cleared to the line when there were concerns raised in Ms Henderson's training".<sup>64</sup>

[125] At the time of Ms Henderson's dismissal, Mr Fisher did not believe that Ms Henderson could be trained within a reasonable timeframe to the standard required by the Respondent to consistently apply skills for precision handling of the AW139 aircraft. Mr Fisher says that the Respondent is not a pilot training school; it employs experienced pilots and converts them, if needed, to fly AW139 aircraft according to the Respondent's requirements. Mr Fisher also says that, at 6 May 2022, the Respondent had spent approximately \$169,000 on Ms Henderson's training, which was \$58,100 more than initially budgeted. The provision of further training for Ms Henderson would also have required, according to Mr Fisher, the allocation and rostering of Training and Checking Pilots and ACOs to facilitate training. This would have meant that those employees would not have been available to perform operational missions, which in turn would impact other Line Pilots/ACOs who were needed to fill the roster. Mr Fisher points out

that the operational roster at Lismore was without a pilot for over a year, which resulted in fatigue, travel and overtime costs for the Respondent's existing crews.

[126] Mr Fisher did not have confidence that Ms Henderson could operate as a single pilot consistently across the range of operational scenarios where the Respondent is required to respond. In forming these views, Mr Fisher was highly aware of his responsibility to the rest of the Respondent's operating crews and the potential serious consequence to them as a result of a safety incident. Mr Fisher is a highly experienced pilot, instructor and examiner.<sup>65</sup>

[127] Mr Fisher emphasised that the Respondent's most challenging flight profile is night winching utilizing NVG. This competency is subject to a three-monthly training currency, which typically results in the period between night winching sorties being between 6-8 weeks. To be considered proficient and safe, crews must be able to maintain competency in NVG winching and other essential flight skills with this intermittent exposure.

[128] Mr Fisher discussed with Mr Humphreys whether additional training would get Ms Henderson to the required standard. Mr Fisher struggled with that issue because of the inconsistency in Ms Henderson's ability to maintain a stable hover during her training with the Respondent. He gave the following evidence in relation to this issue:<sup>66</sup>

“... I think in two weeks, yes, we could have got Ms Henderson above the line potentially, but is it going to stay and that was the nub of the discussions that we were having, to try and establish that. If I had a very clear view in my head, yes, two weeks and Ms Henderson would be fine, then that would have been very different – that would have been a very different decision that we had to make as opposed to the decision that I had to make at the time where I didn't have that assurance in my own head.”

[129] Ms Henderson was recruited to the Respondent's Lismore base. At that location the Respondent's pilots experience an annual flying rate per pilot that approaches the minimum at which safe competency can be maintained by exposure to tasking alone. This low flight rate requires the Respondent's crews to be able to maintain their high flight standard with an irregular exposure to different flight types. Mr Fisher says that this is especially relevant to the interval to night winching serials, which is routinely 6-8 weeks.

[130] Mr Fisher says that as part of the review into Ms Henderson's training performance, the Respondent considered whether placing operation limitations on Ms Henderson during her initial period of line operations was an appropriate course of action. It was agreed during the review that historically the Respondent had placed a limitation on some pilots to contact the Head of Flight Operations for clearance to conduct winching operations. In this case Mr Fisher says that the pilot had completed all training and had been assessed at the Respondent's standard for winching. The limitation was in place to ensure the pre-mission captaincy considerations regarding the winch had been appropriately considered. Mr Fisher says that Ms Henderson's issue was not her captaincy but that she had not reached the Respondent's standard to safely winch. Mr Fisher further says that the requirements of the Respondent's EMS tasking and service requirements demand that all of the Respondent's Line Pilots are required to be winch capable. Furthermore, Mr Fisher says that the Respondent's TCM requires achievement of the service standard prior to commencing line operations.

[131] As to the example given by Mr Fisher in relation to a pilot who Mr Fisher says had captaincy-based limitations in relation to night winching, Mr de Winton says that the limitation was placed because the pilot had limited experience in the aircraft and on a NVIS winch.<sup>67</sup> The Respondent stopped this pilot from doing night winching, with the result that the pilot would turn down any mission which involved night winching. Mr de Winton says it was on the status report that the Respondent submitted in relation to their contract with New South Wales Ambulance that the aircraft was not night winch capable. If a situation arose which required night winching when that pilot was on duty, other aircraft would cover that mission.<sup>68</sup> I prefer Mr de Winton's evidence in relation to the question of whether the Respondent has in the past allowed new pilots to be checked to line with a limitation on NVIS winching. Mr de Winton has been employed by the Respondent in a senior role for a significant period of time. I consider that he is in the best position of the witnesses called to give evidence in this case to provide an accurate account of the historical practices of the Respondent in this regard.

[132] Following Ms Henderson's dismissal, the Respondent recruited two new Line Pilots, one of whom was the alternative, experienced AW139 pilot considered by the Respondent for recruitment at the time that Ms Henderson was employed.<sup>69</sup> The other was also an experienced AW139 pilot and he replaced Mr Shepherd, who left resigned in early June 2022.

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

[133] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Ms Henderson's dismissal was harsh, unjust and/or unreasonable. I will address each of these matters in turn below.

### **Valid reason (s 387(a))**

#### General principles

[134] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.<sup>70</sup> In order to be "valid", the reason for the dismissal should be "sound, defensible and well founded"<sup>71</sup> and should not be "capricious, fanciful, spiteful or prejudiced."<sup>72</sup>

[135] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>73</sup> The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).<sup>74</sup>

[136] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.<sup>75</sup> It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.<sup>76</sup>

[137] A reason will be 'related to the capacity' of the applicant where the reason is associated or connected with the ability of the employee to do his or her job.<sup>77</sup> The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.<sup>78</sup>



Summary of contentions on valid reason

[138] The Respondent contends that the capacity to safely winch and operate the AW139 aircraft on a consistent basis is an important part of the substantive position of a Line Pilot. The Respondent's competency standards for Line Pilots are higher than the minimum CASA standard. These competency standards include those with respect to low-level operations, operating in hilly and difficult terrain, winch operations and NVIS operations.

[139] The Respondent submits that the TCM is structured such that a new Line Pilot must not only have the requisite experience to perform the role, they must also complete prescribed training and checking (competency assessments) before they are cleared to work as a Line Pilot in an operational capacity. The Respondent contends that proficiency check flights (e.g. IPC, OPC, NPC), while critical, are only one part of the verification and monitoring process of the Respondent when assessing whether a Line Pilot has attained and maintained a competency required to carry out their responsibilities to the Respondent's standards.

[140] It is submitted by the Respondent that it had a sound, defensible and well-founded reason to dismiss Ms Henderson because she was not able to consistently perform one of the essential requirements of the position of a Line Pilot, namely maintain a stable hover of the AW139 aircraft, particularly during night winching operations.

[141] In summary, Ms Henderson contends that there was no valid reason for her dismissal because:

- (a) there were deficiencies in the wording of the termination letter;
- (b) Ms Henderson was entitled, and not permitted, to complete a line check;
- (c) Ms Henderson was entitled to, and not given, remedial training;
- (d) the Respondent could have checked Ms Henderson to line with an operational limitation on NVIS winching, as it had done in the past; and
- (e) Ms Henderson's performance in her new employment with Toll Helicopters, after the termination of her employment with the Respondent, demonstrates that she has the skills to operate as a HEMS pilot in a AW139 aircraft.

Consideration re valid reason

[142] The termination letter relevantly provides:

“Clause 16.2.1(iii) of the Northern NSW Helicopter Rescue Service Limited Pilots and Aircrew Officer Enterprise Agreement No 6 states that an employee can be terminated for: ‘Failure to attain and maintain necessary licences, qualifications and accreditations and the like necessary for the performance of the Employee's duties.’

The above statement includes the requirement to meet the training and checking standards of the organisation and receive the appropriate ‘accreditation’ to carry out the duties of a Line Pilot. Based on the following factors you have not been successful in meeting the required standard and therefore are unable to fulfil the requirements of your Line Pilot role.

A review of your training and checking results since your commencement on the 11<sup>th</sup> October 2021 have indicated the following concerns in relation to your competency as a Line Pilot:

- The core issue relates to your inability to accurately position the aircraft during precision handling and then maintain a stable hover. It is noted that this skill is key to safe aircraft winching operations.
- During challenging operational scenarios or in areas of low contrast, an unacceptable level of drift and movement is experienced.
- Hover performance has been inconsistent throughout your training ...”

**[143]** The Respondent’s training and checking standards for the position of Line Pilot include the consistent demonstration of competency in required flying skills. One such skill is the ability to consistently maintain a stable hover during NVIS winching operations. I accept that Ms Henderson’s failure to meet this standard constituted a “failure to attain and maintain necessary ... accreditations and the like necessary for the performance of the Employee’s duties” within the meaning of clause 16.2.1(iii) of the Enterprise Agreement. In any event, the bullet points in the termination letter provide clarity as to the Respondent’s reason for termination. Even if the reason articulated in those bullet points did not meet the requirements of clause 16.2.1(iii) of the Enterprise Agreement, it would not mean there was no valid reason for termination.

**[144]** I do not accept the argument that Ms Henderson had a right to complete her line check. It is a matter for the Respondent to determine whether a Line Pilot is at the standard to warrant a line check and, if successful, to then commence duties as a Pilot in Command. So much is clear from clause C4.3.3 of the TCM, which refers to the “point of recommendation for a Line Check” in the context of pilot line training. Also, clause C4.4.3(5) provides that prior to their initial line check, the “pilot under check shall meet all of the minimum experience and recency requirements of the CARs, CASRs, CAOs, the Ministry of Health Contract and this Operations Manual”. The Respondent formed the view that Ms Henderson had not met all such requirements because she had not demonstrated a consistent ability to maintain a stable hover, mainly during night winching exercises.

**[145]** There is a dispute between the parties as to whether the remedial training provisions of the TCM, on their proper construction, applied to Ms Henderson as a Line Pilot who was in training and had not undertaken her line check. By way of context, clause 20.4 of the Enterprise Agreement provides:

“Where an Employee fails to meet the training and checking standards that are a requirement to perform their role they will be relieved from operational duties. The Employee will be given an opportunity to undertake remedial training and retesting as outlined in the Operations Manual. Any failure to meet the training requirements after

remedial training will be referred to the appropriate Training and Checking Committee for further action...”

[146] Clause 12.1.1 of the Enterprise Agreement is also relevant. It relates to the probationary period for employees and provides:

“On commencement, the first six (6) months of employment are deemed to be a probationary period. During this time, the Employer is committed to assisting the Employee to gain the skill set required for the role and assess their suitability for the position.”

[147] The following provisions of the TCM, otherwise known as the Operations Manual, are relevant to this issue:

**“C4.3.1 TYPE RATING TRAINING – AW139(SP)**

1. All initial AW139(SP) Type Rating ground and flight training shall be undertaken at a facility, and in aircraft and simulators, approved by CASA.
2. Where a simulator is used, valid simulator and training provider certifications shall be obtained and retained by the Company in the Air Maestro Operational Documents Library.
3. On completion of this training the pilot shall be issued with an AW139(SP) Type Rating on their licence in accordance with the processes of CASR Part 61.

**C4.3.2 PILOT CONVERSION TRAINING**

1. Upon commencing work for the company a pilot will undergo Conversion and Line Training. The Conversion Training course detailed ground and flight syllabus are located within the Air Maestro Operational Document Library, files numbers 8044 and 8045 respectively. Air Maestro Check Form numbers 9001 to 9005 will be used as applicable to the flight. The syllabus outline for pilot Conversion Training is contained within Appendix 1 of this section.
2. Pilot Conversion Training flights may only be conducted by a TCP approved under this TCO.
3. Pilot Conversion Training consists of two phases:
  - a. 4 x 2.0-hour simulator sorties followed by an Operator Proficiency Check (OPC); and,
  - b. 1 x 1.5-hour day winch sortie followed by 3 x 1.5-hour NVG sorties prior to an NVIS Proficiency Check (these sorties are all in the aircraft).
4. The number of Conversion Training flights may be varied depending upon the background, experience, recency, and intended flying duties of the pilot, and as determined by the HTC. In all cases, a minimum of one day and one night simulator training flight will be conducted to confirm readiness for an OPC. And at least one day winch plus one NVIS winch sortie will be conducted in the aircraft to confirm readiness for an NVIS Proficiency Check.
5. Completion of the Conversion Flying Training program is to be achieved with a maximum of 18 hours ICUS flight time, depending upon the previous experience on Type and in a similar helicopter medical transport operation.

6. Conversion Training flights shall be conducted in QSTD and aircraft. Where conducted in the aircraft, and if non-normal exercises are required training elements, CASA approval under CAO 82.0 paragraph 7.3 is required.

#### **C4.3.3 PILOT LINE TRAINING**

1. Line Training shall be conducted after the Conversion Training and only following successful completion of an OPC and NVIS Proficiency Check. The requirements for Line Training are as follows:

- a. The trainee shall occupy the command seat of the aircraft, logging ICUS, with a TCP in the co-pilot seat. An ACO shall also be included as crew to allow their usual duties, as defined within A1.4.13, A5.14 and B6.2, to be conducted.
- b. If new to Type, a minimum of 15 hours ICUS, shall be attained prior to recommendation for a Line Check.
- c. Where the pilot is already experienced on Type a minimum of three Line Training flights shall be conducted, with a minimum of one being a primary scene response, and one being at night.
- d. Line Training flights are not required unless a pilot is employed to conduct operational missions.
- e. Line Training flights shall only be conducted in the aircraft, and conducted as part of a normal operational mission. Non-normal exercises are not permitted during Line Training flights.

2. The detailed Line Training syllabus is located within the Air Maestro Operational Document Library, file number 8046. The syllabus outline for pilot line training is located at Appendix 2 to this section.

3. Competency, to the point of recommendation for a Line Check, is to be achieved with a minimum of 3 and maximum of 6 operational missions whilst ICUS. Where actual mission tasking does not allow this to be achieved, simulated missions with a full crew may be utilised to meet the Line Training requirements. "Operational missions" are defined as being Primary or Secondary Air Ambulance or SAR missions tasked under contractual arrangements with state government authorities."

#### **"C4.3.9 REFRESHER ASSESSMENTS AND REMEDIAL TRAINING**

##### **C4.3.9.1 REFRESHER ASSESSMENTS**

1. Pilots returning to the line following periods of absence in excess of 45 days, where no flying as AW139 PIC has been undertaken, will be rostered for a training day to refresh knowledge of operational changes, including an assessment flight in order to assess their maintenance of competency standards for a return to Line Operations. Depending upon the period of absence, and at the discretion of the HTC, training may also be required prior to the Refresher Assessment. Sequences covered shall include Line Check elements as described within C4.4.3 including confined area, winch and IFR handling, plus an instrument approach.

2. Refresher assessments shall only be conducted by a Company TCP.

##### **C4.3.9.2 REMEDIAL TRAINING**

1. Remedial training shall be carried out whenever a pilot does not demonstrate the required level of competence during any training or checking, or as a result of poor performance during line operations.

2. The HTC shall notify any such remedial training requirements to the Chief Pilot.

3. Remedial training shall only be conducted by a CASR Part 61 Flight Instructor with the relevant training endorsement, or a Company TCP.
4. Following the failure to exhibit the necessary knowledge, skills, behaviour or attitude required of a pilot during any training, checking or line operations, the pilot will be removed from operational duties until satisfactory remedial training and checking has been completed.
5. The HTC shall arrange appropriate remedial training. In the case of knowledge assessment deficiencies, this shall take the form of assistance with theory training as required. In the case of flight performance deficiencies this shall be a minimum of one remedial tutorial, plus a maximum of two flights of 1.0 to 1.5 hours duration in an aircraft, synthetic trainer, or simulator, as appropriate to the training required.
6. Following the above remedial training, the pilot shall be retested in the deficient items of theory and/or flying skill.
7. If a pilot subsequently fails to exhibit the necessary knowledge or flying skill when under check following the remedial training, the matter shall be referred to a committee comprising of: CP, HTC, and relevant TCP(s) involved. Matters to be taken into consideration regarding any recommendation of the committee are: the pilot's experience level; recency; past record of remedial training; and any other relevant mitigating circumstances that could impact on pilot performance; for example, recent sickness, injury, or personal relationships.
8. Following a meeting of the above committee, the CP in consultation with the HTC, will direct the course of action to be taken in relation to additional remedial training and testing, or other administrative action.
9. If the CP determines the pilot should be permanently removed from flying operations, this recommendation shall be passed to the CEO for final consideration and appropriated action.
10. Any pilot undergoing remedial training shall be informed in writing of the progress and ramifications of each stage of the remedial training process. Should the pilot express dissatisfaction with any aspect of the training this shall be recorded and discussed with the HTC prior to the next stage in the process taking place. The CP shall have the final authority on dispute resolution.
11. Should any pilot require remedial training more than once in 18 months in relation to similar elements of training or checking, the matter shall be referred to the committee indicated above and the subsequent actions described followed.
12. Following successful remedial training the pilot shall return to full operational duties."

**[148]** I consider that there is ambiguity in clause C4.3.9.2 of the TCM as to whether the obligation to undertake remedial training applies to all pilots or just those who have passed their initial training and have been checked to line. The use of the undefined word "pilot" in clause C4.3.9.2 gives rise to this ambiguity. However, when the provisions are read in context, as they must be, it is relatively clear, in my opinion, that the remedial training provisions do not apply to pilots who have not yet been checked to line. Clauses C4.3.9.2(4) and (12) deal with a pilot being removed from "operational duties" to undertake remedial training and returned to "operational duties" following successful remedial training. This provides a strong indicator that the remedial training provisions only apply to those pilots who have passed their initial training, are checked to line, and are undertaking "operational duties". It would be odd to think of a pilot in training, who has not yet been checked to line, as having "operational duties" as a

pilot. Clause C4.4.3(1) makes pellucid that a line check must “be conducted prior to undertaking operational duties”. In addition, clause C4.3.2(4) addresses the circumstances of a pilot who is undertaking conversion training requiring further conversion training flights, depending on their “background, experience, recency”. Such additional training would be provided, at the discretion of the Head of Training and Checking, where the pilot undertaking the conversion training needs further (i.e. remedial) training to get them to the required standard. That the provisions of the TCM which govern the early stages of training for a pilot address the concept, albeit not by name, of remedial training is a further contextual indicator that the later general provisions concerning remedial training (clause C.4.3.9.2) do not apply to pilots who have not yet been checked to line. In construing the relevant provisions of the TCM and determining the obligations imposed by the TCM on the Respondent and its pilots, I have not given any weight to the opinions expressed by Mr Miller in his witness statement concerning what is said to be ‘common practice’, ‘normal’, ‘usual’, ‘unusual’ or what ‘most operators’ do in the industry, nor have I given weight to Mr Miller’s opinion evidence about regulatory matters. I consider that the TCM is the instrument that relevantly applies to the Respondent and its pilots; it has been prepared for use by the Respondent having regard to the regulatory environment in which it operates.

**[149]** The issue concerning whether the Respondent could have checked Ms Henderson to line with an operational limitation on NVIS winching is not relevant to the question of whether there was a valid reason for the dismissal because, where the employee’s incapacity to perform the inherent requirements of the position is being assessed, it is the employee’s substantive position that must be considered, not some modified, restricted duties or temporary alternative position.<sup>79</sup> I will consider this issue further as a relevant factor under s 387(h) of the Act.

**[150]** It is not permissible to have regard to Ms Henderson’s training and performance in her new employment with Toll Helicopters, after the termination of her employment with the Respondent, in assessing whether there was a valid reason for her dismissal. That is because the question of whether there was a valid reason must be assessed by reference to facts which existed at the time of the dismissal, even if they did not come to light until after the dismissal.<sup>80</sup>

**[151]** I am satisfied on the evidence that the Respondent had a valid reason to terminate Ms Henderson’s employment on the basis of her inability to consistently maintain a stable hover of the AW139 aircraft in all conditions and circumstances. I accept that the position of Line Pilot is a safety critical position and the requirement for a Line Pilot to be able to consistently maintain a stable hover is an essential element of the role. Ms Henderson was not able to meet this requirement on a consistent basis during her training from the commencement of her employment in October 2021 until the cessation of her training on 22 March 2022. Further, I am satisfied that the Respondent’s reason for termination related to the capacity of Ms Henderson because the reason was associated or connected with the ability of Ms Henderson to do her job as a Line Pilot.

**[152]** That the Respondent had a sound, defensible and well-founded reason to terminate Ms Henderson’s employment weighs against Ms Henderson’s contention that her dismissal was harsh, unjust and unreasonable.

#### **Notification of reason (s 387(b))**

[153] I am satisfied on the evidence that Ms Henderson was notified of the valid reason for her dismissal. The notification was provided in the termination letter and through the show cause process. This weighs in support of the Respondent's argument that Ms Henderson's dismissal was not harsh, unjust or unreasonable.

**Opportunity to respond (s 387(c))**

[154] During the investigation process Ms Henderson was given opportunities to respond, and did in fact respond, to the reason for her dismissal. In particular:

- (a) Ms Henderson responded to the Respondent's concerns about her performance in the meeting on 24 March 2022, at which time Ms Henderson read out her pre-written response; and
- (b) Ms Henderson responded to the Respondent's show cause letter in her detailed response dated 21 April 2022.

[155] I do not accept Ms Henderson's contention that she was not given an opportunity to respond to the reason for her dismissal because the Respondent predetermined the outcome before hearing from Ms Henderson and did not provide Ms Henderson with all the documents she requested.

[156] True it is that the show cause letter was prepared in draft form before the meeting at which the Respondent would listen to Ms Henderson's response to the concerns about her performance and decide whether she would be required to show cause why her employment should not be terminated. However, the decision to send the show cause letter to Ms Henderson was not made until Ms Henderson had provided her response at the meeting on 24 March 2022. Further, this part of the process took place well before the decision was made by the CEO of the Respondent to terminate Ms Henderson's employment. That decision was only made after a show cause letter was provided to Ms Henderson, an extension of time was given to Ms Henderson to respond to the letter, Ms Henderson provided a very detailed response to the show cause letter, and the CEO obtained recommendations from three members of the senior management team as to what decision should be made in relation to Ms Henderson.

[157] As to the request for documents, I am satisfied by the evidence that the Respondent explained in clear terms the concerns it had with Ms Henderson's performance and gave her every opportunity to respond to those concerns before it made any decision about the termination of her employment. I do not consider that Ms Henderson required any further documents to be given a fair opportunity to respond to the reason for her dismissal.

[158] Having regard to all the circumstances, I am satisfied that Ms Henderson was given an opportunity to respond to the reason for her dismissal which related to her capacity. This weighs in support of the Respondent's argument that Ms Henderson's dismissal was not harsh, unjust or unreasonable.

**Unreasonable refusal to allow a support person (s 387(d))**

[159] There is no dispute, and I am satisfied on the evidence, that there was not any unreasonable refusal by the Respondent to allow Ms Henderson to have a support person present to assist in any discussions relating to her dismissal.

**Warnings of unsatisfactory performance (s 387(e))**

[160] Ms Henderson submits that she was not warned that her unsatisfactory performance could result in dismissal, save for being told that failing her NPC could possibly result in termination of her employment. This occurred during the meeting between Ms Henderson, Mr de Winton and Ms O’Grady on 13 January 2022. Ms Henderson says that the meeting was not conveyed as a disciplinary meeting and the warning about termination was informal.

[161] Ms Henderson contends that a similar meeting took place on 19 January 2022. Ms Henderson says she was not warned about performance issues that could affect her ongoing employment and none were raised.

[162] Ms Henderson submits that the Respondent did not warn her about performance issues that could affect her ongoing employment at any time after 13 January 2022 or before 23 March 2022.

[163] The Respondent contends that Ms Henderson was warned about the areas in which her performance was deficient and was given an opportunity to improve her performance in those areas before a decision was made to terminate her employment.

[164] I am satisfied on the evidence that Ms Henderson was given feedback after each sortie about her performance during the sortie. The feedback included an explanation of the areas in which Ms Henderson needed to improve her performance. A common issue addressed in the feedback provided to Ms Henderson was the need for her to maintain a consistently stable hover, particularly when conducting NVIS winching in circumstances where there were no convenient points of reference. Further, in the meeting on 13 January 2022, Mr de Winton referred to the concern in relation to maintaining a stable hover during winching and warned Ms Henderson that her employment may be terminated if she did not pass her NPC, which involved assessing her skills in NVIS winching. For these reasons, I am satisfied that Ms Henderson was warned about the primary concern held by the Respondent in relation to her performance and was aware that her employment may be terminated if her performance in that area did not improve.

[165] I do not accept Ms Henderson’s contention that the warning given on 13 January 2022 was ‘discharged’ because she passed her NPC. Although I accept Mr de Winton’s evidence, about which he was adamant even in the face of Ms O’Grady’s notes, that he warned Ms Henderson that her employment may be terminated if she did not pass her NPC,<sup>81</sup> Mr de Winton clearly explained to Ms Henderson the concern about her ability to maintain a stable hover during NVIS winching as the reason she was being warned about the potential termination of her employment if she did not pass the NPC. I consider that a reasonable person in the position of Ms Henderson would have understood that her ability to maintain a stable hover needed to reach and remain at the required standard, not just during the NPC, in order to remain safe in her employment with the Respondent.



[166] In all the circumstances, I am satisfied that Ms Henderson had been warned about her unsatisfactory performance before her dismissal. This weighs in support of the Respondent's contention that Ms Henderson's dismissal was not harsh, unjust or unreasonable.

**Size of enterprise and absence of human resource specialists or expertise (s 387(f) and (g))**

[167] The Respondent is a substantial enterprise; it employed approximately 140 employees at the time it filed its Form F3 Response to Ms Henderson's unfair dismissal application. The Respondent has human resource management specialists and expertise. In all the circumstances, I am satisfied that neither the size of the Respondent's enterprise nor any absence of human resource management specialists or expertise had any impact on the procedures followed in effecting Ms Henderson's dismissal.

**Other relevant matters**

[168] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

Personal circumstances

[169] Ms Henderson has lived with her family on a farm in Lismore for about 10 years. It had been a long-held aspiration of Ms Henderson to gain a position as a Line Pilot with the Respondent at its Lismore base because the Respondent is the only locally based HEMS operator close to her family farm. Ms Henderson had applied for a position with the Respondent many times in the past and spent two and a half years as a HEMS pilot touring to Horn Island, away from her family, to gain industry experience and increase her competitiveness for a position with the Respondent.

[170] Having successfully gained a position with the Respondent in 2021, Ms Henderson had expected it to be her last flying job of her career from which she would retire. Ms Henderson had hoped to continue flying with the Respondent from its Lismore base for the next 20 years. There is no other alternative HEMS or similar work in her local area and in order to seek alternative employment Ms Henderson believed she would have to move her family or obtain employment in a touring position which would negatively impact on her family due to the time that she would have to spend away from her family. Further to the impact of the dismissal on Ms Henderson's personal circumstances, Ms Henderson and her husband have four children, the youngest of whom is approximately 10 years old and is autistic. His behaviour and mental health deteriorated in 2021. This was exacerbated by Ms Henderson's time away from home where she was not available to help calm him or talk him through his emotions and behaviour.<sup>82</sup>

[171] Ms Henderson's prediction about obtaining alternative employment away from her local area in a touring position has turned out to be accurate. Following her dismissal from the Respondent, on 22 August 2022 Ms Henderson gained employment with Toll Helicopters as a Crash Rescue Helicopter line pilot. It is a touring position, two weeks on and two weeks off, which requires Ms Henderson to be away from her family on a regular basis. Ms Henderson's remuneration in her new position with Toll Helicopters is very similar to the remuneration she earned during her employment with the Respondent. Ms Henderson was dismissed by the Respondent with five weeks' pay in lieu of notice on 6 May 2022 and there was a further 10

weeks and 2 days where she received no income before obtaining employment with Toll Helicopters.

[172] These matters weigh in support of Ms Henderson's argument that her dismissal was harsh in its consequences for her personal situation.

Mitigating factors associated with training provided to Ms Henderson

[173] I consider that the following significant mitigating factors must be considered when assessing the amount, quality and cost of the training provided to Ms Henderson during the first six months of her employment with the Respondent.

[174] First, the Respondent was aware when it made the decision to employ Ms Henderson that she had no previous experience with 'glass' instrumentation or the AW139 aircraft, had not undertaken any flight hours in the past three months and had achieved approximately 70 flight hours in the six months prior, and had limited HEMS experience.<sup>83</sup> It was known by the Respondent that there would be a significant training cost difference between employing a qualified and experienced AW139 pilot with extensive HEMS experience and employing Ms Henderson.<sup>84</sup> The Respondent was also aware that the background, experience and recency of a pilot may impact the number of conversion training flights required to be given to the pilot.<sup>85</sup> Notwithstanding these matters, the Respondent chose to employ Ms Henderson and knew it would be required to train her before she could be checked to line and undertake operational duties.

[175] Secondly, Ms Henderson was given the wrong simulator training course by Toll Helicopters at the commencement of her employment with the Respondent. She should have undertaken the single-pilot course in the AW139 aircraft, not the multi-pilot course. This error was not detected until late November 2021. Giving Ms Henderson the wrong course delayed the completion of her training and put her at a disadvantage at the commencement of her conversion training because she had not undertaken the pre-conversion training at the single-pilot level.

[176] Thirdly, unlike other pilots with similar backgrounds and experience, Ms Henderson was not provided with an initial flight to allow her to adapt to the AW139 aircraft, which is a complex aircraft. Instead, she was expected by Mr Shepherd, in her first flight as a pilot in a AW139 aircraft, to undertake a complex winching scenario under time pressure.

[177] Fourthly, Mr Shepherd made inappropriate comments to Ms Henderson during her initial training flight, including that he was keeping a 'paper trail' for the purposes of her dismissal. I consider that Mr Shepherd's conduct during this initial training flight damaged Ms Henderson's confidence. In my assessment and notwithstanding Ms Henderson's statement during the meeting on 13 January 2022 that she did not feel that the situation with Mr Shepherd had impacted her performance, the damage caused by Mr Shepherd to Ms Henderson's confidence undoubtedly had an impact on Ms Henderson's performance and progress during her training. This is because, as Ms Fisher explained, "flying training is very much about confidence ... and it's very easy for an instructor to load up a student or to create an environment in which it's not conducive to learning".<sup>86</sup>

[178] Fifthly, although Ms Henderson accepts that she did not perform well during her training sortie with Mr Overton on 5 January 2022, the weather conditions on that night were poor and Ms Henderson would not have accepted a mission in which she was required to winch in those conditions with her level of experience in the AW139.

[179] Sixthly, Ms Henderson's training was very disjointed for a range of reasons, some of which were outside the Respondent's control. The reasons for Ms Henderson's training being disjointed included the cancellation of training due to weather events or because an aircraft had been taken off line, flooding in the northern areas of New South Wales, waiting for Mr Humphreys to undertake his training with the Respondent so that he could assess whether Ms Henderson was ready to undertake her NPC, the impact of Covid-19 on the availability of trainers and other staff, breaking for Christmas, and the provision of the wrong initial simulator training course. These factors meant that Ms Henderson's training took longer than it should have and there were longer breaks between Ms Henderson's training flights than was ideal. As Mr Humphreys explained, ideally, in initial training when a pilot is new to an aircraft and company, there is a planned training continuum which involves the least amount of breaks between flying events so that the pilot can build on lessons from one flight and apply them to the next flight.<sup>87</sup>

#### Further training

[180] All the experienced trainer and instructor pilots who gave evidence were of the opinion that the deficiency in Ms Henderson's ability to consistently maintain a stable hover was remediable with further training.<sup>88</sup> It was "a narrow area of concern"<sup>89</sup> which primarily arose during NVIS winching when reference points were not ideally where Ms Henderson wanted them to be – in front of the aircraft.<sup>90</sup>

[181] Mr de Winton believes that Ms Henderson required a further period of training of about one week to get her to the standard required by the Respondent.<sup>91</sup> If she had been provided with such additional training, Mr de Winton believes that Ms Henderson would have met the Respondent's standard requirements.<sup>92</sup>

[182] Because Mr Humphreys had not come across this issue before for a pilot with Ms Henderson's background and training, he was cautious in estimating how much additional training would be required by Ms Henderson to overcome the deficiency in maintaining a consistently stable hover in particular circumstances. Mr Humphreys estimated that a two-week additional training program for Ms Henderson would be required (flying pretty much every day), and he was very hopeful that Ms Henderson could have reached the standard required after such additional training.<sup>93</sup>

[183] Mr Fisher was not willing to provide a timeframe for the additional training required to bring Ms Henderson to the standard required.<sup>94</sup> The closest Mr Fisher came to providing such an estimate was to accept in his oral evidence that in two weeks "we could have got Ms Henderson above the line potentially, but is it going to stay ..."<sup>95</sup> Mr Fisher was concerned that in light of the variability the Respondent had seen in Ms Henderson's ability to consistently maintain a stable hover, there was no certainty that additional training would bring Ms Henderson to the standard required.<sup>96</sup>

**[184]** I prefer the evidence given by Mr de Winton and Mr Humphreys over that given by Mr Fisher in relation to the amount of additional training that was likely to be required to bring Ms Henderson's performance in connection with the "narrow area of concern" to the Respondent's standards on a consistent basis. Mr Fisher wanted the Respondent to employ one of the other candidates for the position of Line Pilot, rather than Ms Henderson, because they were already trained and qualified to operate an AW139 aircraft.<sup>97</sup> Further, on the evidence before the Commission it is fair to say that after Ms Henderson was employed Mr Fisher repeatedly campaigned to have her employment terminated and an experienced AW139 pilot employed in her place. So much is clear from the following chronological events:

- (a) After only two months of employment with the Respondent, Mr Fisher prepared a memorandum on 13 December 2021 in which he recommended two options for Ms Henderson, one of which was to terminate her employment and the other was to provide additional training.<sup>98</sup>
- (b) About three weeks later, on 7 January 2022, Mr Fisher prepared a memorandum in which he urged the Respondent's management team to "seriously consider both options" of ceasing Ms Henderson's training and providing additional training.<sup>99</sup>
- (c) At a management meeting on 12 January 2022, Mr Fisher argued for the cessation of Ms Henderson's training and the termination of her employment.<sup>100</sup>
- (d) On 14 January 2022, Mr Fisher sent an email to the management team in which he explained why he was of the opinion that Ms Henderson's training should be ceased. The email could not be described as 'balanced'; it contained mostly critical comments about Ms Henderson's performance during training and included little of the positive aspects of her performance.<sup>101</sup>
- (e) At a meeting of management on 17 January 2022, Mr Fisher recommended that the Respondent permanently suspend Ms Henderson's training.<sup>102</sup>
- (f) On 17 March 2022, Ms Henderson conducted her hi-line training with Mr Fisher. Mr Humphreys observed the training flight from a rear cabin position and witnessed the normal range of pilot errors in circumstances where the pilot is conducting a hi-line for the first time.<sup>103</sup> Mr Fisher was far more critical of Ms Henderson's performance during hi-line training than Mr Humphreys.
- (g) At a training review meeting on 21 March 2022, Mr Fisher advocated again for the cessation of training to Ms Henderson. This time, Mr Fisher's view prevailed and agreement was reached by those at the meeting to cease Ms Henderson's training. It is noteworthy that Mr de Winton, who had previously supported Ms Henderson in such meetings, was not present because he had been removed from the position of Head of Flight Operations. I do not accept the Respondent's submission that Mr de Winton was biased in favour of Ms Henderson. First, that suggestion was not put to Mr de Winton in cross examination. Secondly, Mr de Winton was only one person on the recruitment team that selected Ms Henderson for employment in 2021. Thirdly, the Respondent's primary point about Ms Henderson's performance is that it varied and was not consistently at the standard required in relation to the narrow area of concern pertaining

to maintaining a stable hover. It is therefore not surprising that Mr de Winton did not have any concerns with Ms Henderson's performance during the particular training flights he conducted with her.

- (h) Ms Henderson's comprehensive response to the show cause letter was reviewed by three members of the management team: Mr Humphreys, Mr O'Grady and Mr Fisher. Mr Humphreys and Mr O'Grady told Ms Henderson that they recommended to the CEO that she be provided with additional training rather than dismissal.<sup>104</sup> It is obvious from Mr Fisher's evidence that he was of the view that Ms Henderson's employment should be terminated.
- (i) Finally, following the termination of Ms Henderson's employment, the Respondent employed the experienced AW139 pilot who Mr Fisher argued, in about September 2011, should have been employed in preference to Ms Henderson.

**[185]** I find on the balance of probabilities that, at the time of her dismissal, Ms Henderson required a further period of training of about two weeks and if she was provided with such further training, it is likely that she would have met the standard required by the Respondent in relation to consistently maintaining a stable hover.

**[186]** This additional period of training must be viewed in light of the Respondent's obligation in clause 12.1.1 of the Enterprise Agreement to commit during the first six months of an employee's employment "to assisting the Employee to gain the skill set required for the role and assess their suitability for the position". Weight should also be accorded to the offer made by Ms Henderson, as part of her response to the show cause process, to pay for a vertical reference course to improve her hovering without a reference.<sup>105</sup>

**[187]** In addition, when considering the amount of additional training required to get Ms Henderson to the standard required, it is relevant to note that although the Respondent provided Ms Henderson with more training than it initially had planned to provide it did not provide the following training recommended by senior employees of the Respondent:

- (a) Mr Fisher recommended, in his 7 January 2022 memorandum, that Ms Henderson be provided with additional conversion training and line training, including at least one night training sortie during each rostered shift period. I accept Ms Henderson's evidence that she did not receive this training;<sup>106</sup>
- (b) Mr Overton's report dated 7 January 2022 also recommended that additional training be provided to Ms Henderson prior to her NPC.<sup>107</sup> I accept Ms Henderson's evidence that she did not receive this training;<sup>108</sup> and
- (c) Mr Fisher recommended, in his 13 December 2021 memorandum, that Ms Henderson be provided with an additional day winching sortie.<sup>109</sup> I accept Ms Henderson's evidence that she did not receive this training.<sup>110</sup>

#### Restrictions on NVIS winching

[188] In my view, it would have been reasonable for the Respondent to act in accordance with Mr Humphreys' recommendation by permitting Ms Henderson to undertake her line check and, if successful, communicate with New South Wales Ambulance about whether it would be acceptable for Ms Henderson to undertake operational duties with a limitation on NVIS winching for a period of three to six months, during which time Ms Henderson would undertake further training. There was a chance that such an arrangement may not have been acceptable to New South Wales Ambulance having regard to the fact that only one aircraft operates from the Lismore base. But the evidence demonstrates that such arrangements had been put in place in the past with the approval of New South Wales Ambulance, indicating that there was at least some prospect of an operational limitation being acceptable in respect of Ms Henderson. The Respondent did not explore this possibility with New South Wales Ambulance. Instead, it chose to terminate Ms Henderson's employment.

Affording more time to Ms Henderson to respond to the show cause letter

[189] The Respondent acceded to Ms Henderson's request for additional time to respond to the show cause letter issued to her. As a result, Ms Henderson's employment extended just beyond the six-month minimum period of employment provided for in s 383 of the Act. I consider that the Respondent's conduct in agreeing to such an extension weighs in favour of its argument that Ms Henderson's dismissal was not harsh. I will accord this matter due weight when I make an overall assessment as to whether Ms Henderson's dismissal was harsh in all the circumstances.

**Conclusion on harsh, unjust or unreasonable dismissal**

[190] After considering each of the matters specified in section 387 of the Act, my evaluative assessment is that the Respondent's dismissal of Ms Henderson was not unjust, but it was harsh and unreasonable in all the circumstances.

[191] The dismissal was not unjust because the Respondent had a valid reason for the dismissal and it afforded procedural fairness to Ms Henderson prior to making a decision to bring her employment to an end.

[192] Having regard to all the circumstances, my assessment is that the dismissal was harsh, primarily because there were significant mitigating factors as to why Ms Henderson's training had taken longer and cost more than had been initially anticipated by the Respondent, her performance was deficient in a narrow area, it is likely that her deficiency could be remediated in a relatively short period of time with additional training (albeit such further training would continue to inconvenience to the operations and staff at the Lismore base and incur additional costs to the Respondent), Ms Henderson had excellent captaincy skills and had shown during her training that she made sound, carefully thought-out and safe decisions, and the dismissal was harsh in its consequences for Ms Henderson's personal situation.<sup>111</sup>

[193] The decision to dismiss Ms Henderson was also, in my assessment, unreasonable in all the circumstances. I accept that the decision to dismiss Ms Henderson had an evident and intelligible justification in light of her inability to consistently maintain a stable hover in all circumstances, but the existence of an evident or intelligible reason for a decision is not the only basis on which unreasonableness can be established.<sup>112</sup> The reasonableness of a decision

must be judged objectively having regard to all the circumstances.<sup>113</sup> It is not necessary to show that the decision in question is the preferable or most appropriate course of action or in accordance with ‘best practice’ or in the best interests of the parties. There may be a range of options open to an employer within the bounds of reasonableness.<sup>114</sup>

**[194]** The significant mitigating factors to which I have referred in paragraphs [174] to [179] above weigh in support of Ms Henderson’s contention that it was unreasonable of the Respondent to dismiss her rather than provide her with further training to bring her to the standard required. I have found on the balance of probabilities that it is likely that Ms Henderson would have met the standard required if she had been provided with a further period of training of about two weeks. Although the cost of training for a helicopter pilot is significant – about \$3,000 per hour not including the cost of Ms Henderson’s salary and the inconvenience and cost associated with not having an operational Line Pilot at the Lismore base for a further two weeks – the decision taken by the Respondent to dismiss Ms Henderson also involved significant costs, including paying Ms Henderson five weeks’ wages in lieu of notice (\$16,669.20)<sup>115</sup> and paying for the training necessary for an already experienced AW139 helicopter pilot to be ready to fly for the Respondent (\$43,000).<sup>116</sup> Apart from the narrow area of concern which needed to be remedied to bring Ms Henderson to the standard necessary to perform the role of Line Pilot safely, Ms Henderson had all the skills, experience and personal qualities to perform very well in the role of Line Pilot and make a meaningful and positive contribution to the Respondent’s business over a long period of time. Having regard to all the circumstances, my evaluative assessment is that the decision to dismiss Ms Henderson was unreasonable.

**[195]** I therefore find that the Respondent’s dismissal of Ms Henderson was unfair.

### **Remedy**

**[196]** Having found that Ms Henderson was protected from unfair dismissal, and that her dismissal was harsh and unreasonable, it is necessary to consider what, if any, remedy should be granted to her. Ms Henderson seeks the remedy of reinstatement, together with orders maintaining her continuity of employment with the Respondent and backpay.

**[197]** The Respondent submits that it would be inappropriate to reinstate Ms Henderson because it has lost trust and confidence in her such as to make reinstatement impractical. The Respondent contends that it does not have trust and confidence that Ms Henderson could safely and effectively perform the Line Pilot role and this view is soundly and rationally based on Ms Henderson’s employment history and the Respondent’s safety obligations. The Respondent emphasises the fact that the Line Pilot role is a safety critical role and Ms Henderson has failed, in the Respondent’s assessment, to demonstrate the competencies required to perform the role.

**[198]** The Respondent submits that it is difficult to see how an employment relationship could be restored with a sufficient level of cooperation, confidence and mutual trust following reinstatement to be viable in circumstances where Ms Henderson has demonstrated in her evidence and submissions:

- (a) A lack of recognition of the performance issues that occurred during her training, including those during the 4, 5 and 6 January 2022 training sorties and the subsequent

training review process and meetings with human resources that took place. Ms Henderson's written evidence did not acknowledge any shortcomings in her performance. Rather, she demurred and detracted from those matters. It was not until cross examination that Ms Henderson made any concessions regarding her flying and that was largely limited to accepting Mr Fisher did have some criticisms of her NVIS hovering on 20 and 21 December 2021, that she did not fly the sortie on 5 January 2022 'well' but it was due to other contributing circumstances such as weather and location, and that she received feedback on 16 March 2022 from Mr Humphreys regarding drift;

- (b) A lack of appreciation of the seriousness of the performance issues that led to her dismissal – being issues with the essential flying skills of a Line Pilot following more than 90 hours of training – or the inherent safety risk of those concerns; and
- (c) That she holds the view she was treated differentially by the Respondent. This submission is further supported by Ms Henderson's clear attack on the actions and opinions of Mr Fisher, the Respondent's Head of Flying Operations, both on a professional and personal basis. Mr Fisher's actions were reasonable in the performance of his senior roles that have statutory obligations to safely manage training activities and conduct safe, efficient and compliant operations in a highly regulated industry. Ms Henderson's characterisation of all actions taken by Mr Fisher to be biased since her recruitment supports the contention that a productive and viable relationship would not be able to be restored. This damaged relationship would undermine crew resource management and aviation safety leadership within the Respondent and has the potential to lead to future disputation in the workplace.

**[199]** The Respondent submits that a critical part of helicopter aviation is the importance for the entire crew to have trust in one another. It is submitted by the Respondent that such trust in Ms Henderson to perform the full inherent requirements of the Line Pilot role was not held by the Respondent's employees prior to her dismissal, with the exception of Mr de Winton who recruited Ms Henderson for the role. Where Ms Henderson is brought back into the Respondent's business as a Line Pilot by way of reinstatement order, this would impair the Respondent's managerial prerogative and ability to take risk mitigation measures to ensure that the crew has trust in one another where there are identified and documented concerns by multiple crew members. It would require Ms Henderson to fly with crew, who themselves did not have the requisite trust and confidence in her during employment, and paramedics, doctors and patients in a challenging and dynamic risk environment. The Respondent submits that this would foster a damaging culture within the workplace that is not productive or viable.

**[200]** The Respondent further submits that the Line Pilot role requires the Respondent to obtain the consent of New South Wales Ambulance to engage Ms Henderson to perform the services and New South Wales Ambulance has the contractual right to reject any proposed personnel. It is contended that it would not be appropriate for the Commission to order reinstatement in circumstances where Ms Henderson's ability to perform the inherent requirements of the role and obtain approval of New South Wales Ambulance would not be known to the Commission at the time of making the order.

**[201]** It is submitted by the Respondent that the Lismore base currently has five Line Pilots, including a new Line Pilot who replaced Ms Henderson on 25 July 2022. Because it is not



known what resources would be required to get Ms Henderson's performance to the Respondent's standard to perform the Line Pilot role, the Respondent contends that it would be inappropriate for the Commission to reinstate Ms Henderson. The Respondent also says that reinstatement would result in an additional unbudgeted cost of approximately \$190,000 per annum (wages plus superannuation) plus training costs for the Lismore base. Practically, the Respondent submits that reinstatement would mean that there is an additional pilot on base without work to perform because the resources required to under the services require a roster of 4 days on, 4 days off roster of 12 hour shifts that is already filled. If the roster was adjusted due to Ms Henderson's reinstatement to reduce the hours of other employees, or to have an additional pilot without duties at the base, then this would likely have flow-on issues, including impact the flying currency requirements hours of pilots.

**[202]** The Respondent does not agree that Ms Henderson would not require further training if she were reinstated. The Respondent's TCM would still apply to Ms Henderson and she would be required to undertake and complete additional training with the Respondent's training team prior to commencing operations as a Pilot in Command. In this regard, the Respondent says that Toll Helicopter's operations pursuant to the contract under which Ms Henderson is currently working are not identical to the Respondent's operations.

**[203]** The Respondent submits that Ms Henderson's assertions concerning her strong connections with, and support from, Lismore based pilots, ACOs, engineers, paramedics and doctors are not supported by evidence.

**[204]** Lastly on reinstatement, the Respondent relies on the requirement under the Act to ensure that a 'fair go all around' is accorded to both the employer and the employee in unfair dismissal proceedings. The Respondent contends that it is critical and in the public interest that, as an aviation provider who carries passengers and with safety responsibilities under CASA and workplace health and safety laws, the Respondent and its management team are able to make reasonably practicable decisions about the competency of its operational crew members, particularly where the crew members are conducting their initial training prior to commencing operational duties without supervision. It is submitted that the nature and quality of the work conducted in the Respondent's operations weighs in favour of the Commission not intervening to order reinstatement in this case.

**[205]** The Respondent acknowledges that it is the only locally based HEMS operator in the Lismore area, and that Ms Henderson has needed to return to touring pilot positions following her dismissal by the Respondent. However, the Respondent submits that those matters, particularly taking into account Ms Henderson's short employment period and the fact that she resided in the Lismore area without employment with the Respondent for approximately eight years prior to her six months and 26 days of employment with the Respondent, are not sufficient to counterbalance the strong competing considerations against and order for reinstatement given the particular circumstances of this case.

**[206]** In the event that the Commission finds in favour of Ms Henderson with respect to reinstatement, the Respondent submits that there ought to be no orders made for continuity of service or back pay. A decision to order reinstatement is separate and distinct from the exercise of a discretion to make an order maintaining an employee's continuity of employment and continuous service. It is submitted that the reinstatement of Ms Henderson would still require

the Respondent to assess her competency to commence Pilot in Command operations in accordance with clause C4.2.2 of the TCM. It is submitted that Ms Henderson's period of service with the Respondent should not be continuous taking into account the time that has now elapsed since she was employed by the Respondent, the time that it will take for her to undertake further training and the fact that she did not during her employment undertake the full requirements of the Line Pilot role.

[207] A Full Bench examined the relevant principles concerning an alleged loss of trust and confidence in the context of an application for reinstatement in *Nguyen and Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* (references omitted):<sup>117</sup>

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

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

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

[208] After the termination of her employment with the Respondent, Ms Henderson obtained employment with Toll Helicopters as a Crash Rescue Helicopter line pilot flying AW139 helicopters. That employment commenced on 22 August 2022. Ms Henderson has received extensive training during her employment with Toll Helicopters, including approximately 40 hours in the simulator and three weeks of training flights including day, night, NVIS, land, water, winching and vessel training.<sup>118</sup> The majority of these training sorties were responses to primary mission scenarios with various levels of complexity to replicate the sorts of challenges that might be faced during operational missions on both the Crash Rescue Helicopter contract and Toll Helicopter's contract to undertake HEMS work for New South Wales Ambulance from Bankstown.<sup>119</sup> Ms Henderson's training with Toll Helicopters was continuous with one or two flights each day. There was a large emphasis in the training on instruction and teaching, appreciating that the pilots were developing their high level of familiarity with the AW139 aircraft, local procedures and Toll Helicopter's procedures.<sup>120</sup> Ms Henderson progressed through the training well with no difficulty.<sup>121</sup>

[209] Following the completion of her proficiency checks with Toll Helicopters, Ms Henderson completed aircraft line training in Darwin, including simulated crash rescue helicopter response missions which incorporated day, instrument and NVIS flights, confined area flights and winching. At no stage were any concerns raised by Toll Helicopters with Ms Henderson about her flying ability, precision handling or ability to maintain a stable hover.<sup>122</sup> Ms Henderson has been checked to line by Toll Helicopters with no operational restrictions and is currently operational on the line in Darwin.<sup>123</sup> Ms Henderson's line check with Toll Helicopters involved a NVIS confined area and winching simulator mission.<sup>124</sup> Ms Henderson completed her line check 'first time' and did not require any further or remedial training.<sup>125</sup>

[210] At the time Ms Henderson made her reply witness statement on 19 October 2022 she had not completed hi-line and water training with Toll Helicopters. Ms Henderson gave evidence that such training was expected to be given in the coming months.<sup>126</sup>

[211] Ms Henderson says that the essential skills and requirements of a crash rescue helicopter pilot are the same as those required of a HEMS pilot and include single-pilot day, night, NVIS with landings required to remote land on sites as well as winching, which would be sufficient to gain approval as a line pilot with New South Wales Ambulance; it will also include search and rescue and water winching once the training has been conducted.<sup>127</sup> Mr Richard Maas, Line Trainer and Crash Response Helicopter Pilot employed by Toll in Darwin, who has experience in the HEMS industry, gave evidence that the position of crash response helicopter pilot requires the same skill sets as those required on the New South Wales HEMS contract, including NVIS winching.<sup>128</sup> Mr Fisher is not aware of the exact details of Ms Henderson's new job with Toll Helicopters, but says the tasking rate, being the number of missions to be undertaken each year, is lower.<sup>129</sup>

[212] Mr Maas also gave unchallenged evidence, which I accept, that he:<sup>130</sup>

- considered that Ms Henderson planned and conducted her line check mission with Toll Helicopters to a high standard;
- was impressed with Ms Henderson's professionalism and pure flying skills; and

- is of the opinion that Ms Henderson has adapted to the flying conditions in the Northern Territory (which can be very difficult with low contrast terrain and poor visibility) and operates in a very safe and deliberate manner.

**[213]** I accept the consistent evidence given by Ms Henderson and Mr Maas that the essential skills and requirements of a crash rescue helicopter pilot are essentially the same as those required of a HEMS pilot, including NVIS winching. It follows that, in the period since 22 August 2022, Ms Henderson has received significant additional training and experience in an AW139 aircraft undertaking similar work to that which is required of a Line Pilot employed by the Respondent. This additional training and experience with Toll Helicopters, coupled with the fact that Ms Henderson had a narrow area of deficiency when she was being trained by the Respondent, gives me confidence that Ms Henderson would be able to perform the requirements of the role of Line Pilot with the Respondent in a safe and competent manner if she were reinstated. I accept that the Respondent would need to assess Ms Henderson's competency and provide her with further training in accordance with the requirements of the TCM before checking her to line and giving her operational duties if she were reinstated. On the evidence before the Commission, I am satisfied on the balance of probabilities that if Ms Henderson were reinstated by the Respondent she would be checked to line within a reasonably short period of time and then able to be assigned operational duties.

**[214]** As to the Respondent's contention that it does not have the trust and confidence in Ms Henderson's ability as a pilot to reinstate her as a Line Pilot, I accept that the position of Line Pilot is a safety critical role and it is essential that the Respondent's Line Pilots be able to conduct their duties in a consistently safe and competent manner. However, the Respondent's area of concern in relation to Ms Henderson's skills and ability was narrow, it was agreed that the deficiency was remediable with further training, and Ms Henderson has received a significant amount of additional training and experience in an AW139 aircraft since her dismissal. There has never been any doubt about Ms Henderson's captaincy skills or her ability to make safe and well-thought-out decisions as a Pilot in Command. The evidence demonstrates to my satisfaction that Ms Henderson either now has, or will have after a brief period of further training by the Respondent, the skills and ability to undertake the role of Line Pilot for the Respondent in a safe and competent manner on a consistent basis, including maintaining a consistently stable hover during NVIS winching and other activities. Assuming that Ms Henderson performs well in her further training by the Respondent and is checked to line (as I expect will be the case), there would be no rational basis for any of the Respondent's employees or any paramedics, doctors or patients to have a lack of trust or confidence in Ms Henderson's ability to safely and competently operate a AW139 aircraft.

**[215]** There would clearly be a cost to the Respondent to assess Ms Henderson's competency and provide her with whatever additional training is required by the Respondent's TCM before conducting her line check following her reinstatement. This is a matter which weighs against making an order for reinstatement. However, no evidence was adduced to suggest that the Respondent could not afford such costs or that they would cause the Respondent significant financial difficulties. As a result, the weight to be given to this factor is not as significant as it would be in a case where the costs associated with assessing the competency of an employee and providing further training to them after reinstatement would cause significant financial difficulties to the employer.

**[216]** I do not accept the Respondent's contention that Ms Henderson demonstrated a lack of recognition of the performance issues that occurred during her training or a lack of appreciation of the seriousness of those performance issues. For example, Ms Henderson has always accepted that she did not perform well during her training sortie with Mr Overton on 5 January 2022.<sup>131</sup> Ms Henderson clearly regrets, in hindsight, attempting the winching exercise during the poor weather conditions on the night of 5 January 2022, but she has never pretended that she performed well during the training exercise.<sup>132</sup> Understandably, Ms Henderson was surprised and upset when she was prevented from undertaking her check to line on 22 March 2022, having passed every proficiency check given to her by the Respondent and completed her line training. Ms Henderson's recognition and appreciation of the performance concern identified by the Respondent is evident from the three options proposed by her in her response to the show cause letter: option 1 was to permit Ms Henderson to undertake her check to line and then potentially place an operational restriction on her ability to undertake NVIS winching for a period of time; option 2 was to provide further remedial training; and option 3 was to allow Ms Henderson to "pay for a vertical referencing course at ... [her] own expense to improve ... [her] hovering without a reference".<sup>133</sup>

**[217]** True it is that Ms Henderson has been critical in her evidence and submissions of particular conduct on the part of Mr Shepherd and Mr Fisher. Mr Shepherd has left his employment with the Respondent. As a result, he will not be working at the Lismore base if Ms Henderson is reinstated. In any event, Mr Shepherd did make inappropriate comments to Ms Henderson during her first training flight, including that he was keeping a 'paper trail' for the purposes of her dismissal. As to Mr Fisher, I have found for the reasons explained in paragraph [184] above that he wanted the Respondent to employ an experienced and qualified AW139 pilot in lieu of Ms Henderson, and after he was not able to convince others to agree to that course of action, he repeatedly campaigned for Ms Henderson's dismissal throughout her employment. On the evidence before the Commission it is clear that Mr Fisher was the chief instigator, and most forceful advocate in favour, of the decision ultimately made by the CEO to dismiss Ms Henderson. That is a decision which I have assessed to be harsh and unreasonable in all the circumstances. It follows that Ms Henderson had a sound and rational basis in her evidence and submissions to criticise Mr Fisher's role in the termination of her employment. Notwithstanding this, Ms Henderson came across during her evidence as a very calm and level-headed person; I do not sense that Ms Henderson has any personal animosity towards Mr Fisher and I am confident that Ms Henderson would be able to work with Mr Fisher in a professional and courteous manner in his role of Head of Flight Operations based in Newcastle, if she were reinstated to her position of Line Pilot based in Lismore.

**[218]** Having regard to all the circumstances, I am comfortably satisfied that a sufficient level of trust and confidence can be restored to make an employment relationship between Ms Henderson and the Respondent viable and productive.

**[219]** That New South Wales Ambulance has the contractual right to reject any proposed personnel engaged by the Respondent does not, in my assessment, weigh in support of an argument that it would be inappropriate to order the reinstatement of Ms Henderson. There is no evidence or reason to suggest that New South Wales Ambulance would exercise this right unless it had any genuine concerns about the safety, competency or relevant personal traits of a Line Pilot employed by the Respondent. For the reasons I have already explained, I consider it highly likely that Ms Henderson will be checked to line by the Respondent within a short

period of time and assessed as safe and competent to work as a Pilot in Command on an AW139 aircraft.

[220] I accept that the Respondent has five Line Pilots employed at the Lismore base, does not require any other Line Pilots based at Lismore, and will incur additional costs and inconvenience to its operations and potentially to other Line Pilots if Ms Henderson is reinstated to her position as a Line Pilot based in Lismore.

[221] It is not uncommon for a position occupied by an applicant for relief from unfair dismissal to no longer be vacant at the time the unfair dismissal application is determined. However, this “bare fact would rarely, on its own, justify a conclusion that an order for reinstatement was not ‘appropriate’. To adopt such an approach would tend to defeat the remedial purpose of the legislation. The unavailability of a job vacancy is simply one factor to be taken into account in deciding whether or not an order for reinstatement is appropriate.”<sup>134</sup>

[222] Of relevance in the present case is the fact that one of the five Line Pilots based in Lismore was employed on 25 July 2022 to replace Ms Henderson. Another one of the five Line Pilots based in Lismore was also employed on 25 July 2022 to replace Mr Shepherd, who resigned with effect on 9 June 2022.<sup>135</sup> The evidence does not reveal whether either or both of those Line Pilots were engaged on a fixed term or outer limit employment contract.

[223] Ms Henderson’s union representatives lodged her unfair dismissal application in the Commission on about 25 May 2022. The remedies sought by Ms Henderson in that application were reinstatement, an order to maintain continuity of employment, and an order to restore lost pay. Accordingly, the Respondent was aware when it employed two new Line Pilots at the Lismore base on 25 July 2022 that Ms Henderson was challenging the fairness of her dismissal and was seeking to be reinstated to her position as a Line Pilot at the Lismore base. If the Respondent has not taken any steps to engage at least one of the new Line Pilots based in Lismore on an outer limit contract or some other basis that would address the prospect that Ms Henderson could be reinstated to her position as Line Pilot based in Lismore, then the cost and inconvenience associated with ordering the reinstatement of Ms Henderson to the position of Line Pilot at the Lismore base such that there are six Line Pilots at that base is largely a consequence of the Respondent’s own actions or inactions. For these reasons, I will give limited weight to the matters referred to in paragraph [220] above when assessing the appropriateness of an order requiring the Respondent to reinstate Ms Henderson.

[224] Having regard to all the circumstances, I do not consider that the making of an order to require the Respondent to reinstate Ms Henderson would result in the Respondent not being accorded a ‘fair go all around’. There is no doubt that the Respondent and its management team should, as an aviation provider who carries passengers and with safety responsibilities under CASA and workplace health and safety laws, be permitted to make decisions about the competency of its operational crew members, particularly where the crew members are conducting their initial training prior to commencing operational duties without supervision. However, such decisions must not be unreasonable, harsh or unjust if the employee concerned is protected from unfair dismissal and the Respondent wishes to avoid the risk of a reinstatement order being made.

### **Conclusion on remedy**

[225] In all the circumstances, my evaluative assessment is that the appropriate remedy in this case is an order under s 391 of the Act reinstating Ms Henderson to the position in which she was employed immediately before the dismissal: Line Pilot based at Lismore. For the reasons already explained, I am satisfied that a sufficient level of trust and confidence can be restored to make an employment relationship between Ms Henderson and the Respondent viable and productive. The other matters raised by the Respondent do not persuade me that reinstatement would be inappropriate in all the circumstances of this case.

[226] I also consider it appropriate to exercise my discretion to make an order under s 391(2)(a) of the Act to maintain the continuity of Ms Henderson's employment with the Respondent. I am not persuaded by the Respondent's arguments that such an order should not be made having regard to the time that has now elapsed since Ms Henderson was employed by the Respondent, the time that it will take for her to undertake further training and be assessed by the Respondent, and the fact that she did not during her employment undertake the full requirements of the Line Pilot role. Ms Henderson was employed by the Respondent for just over six months. She worked diligently and to the best of her ability during that period before being harshly and unreasonably dismissed. I consider that the interests of justice warrant the making of an order for continuity of employment in all the circumstances.

[227] However, I am not prepared to exercise my discretion to make an order for backpay in this case. Notwithstanding that Ms Henderson was without any income for a period of 10 weeks and 2 days before she commenced employment with Toll Helicopters (at a slightly higher rate of pay than she received during her employment with the Respondent), I do not consider that it would be just in all the circumstances of this case to make an order for backpay. In making this evaluative assessment I am mindful of the fact that the Respondent spent approximately \$169,000 on Ms Henderson's training, which was approximately \$58,100 more than initially budgeted.<sup>136</sup> Further, the Respondent will be required to undertake further training of Ms Henderson in accordance with the TCM when it reinstates her.

[228] A separate order [[PR750263](#)] will be issued giving effect to this decision.



DEPUTY PRESIDENT

*Appearances:*

*Mr D Stephens*, Senior Industrial Officer, and *Mr J Marks*, Senior Legal and Industrial Officer, of the AFAP, for the Applicant

*Ms E Gruschka and Ms J Phillips*, solicitors, for the Respondent

*Hearing details:*

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2022

*Final written submissions:*

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<sup>1</sup> PN2167; PN2202; Court Book at p 1023 (penultimate paragraph)

<sup>2</sup> PN1205

<sup>3</sup> Ex A6 at [5]

<sup>4</sup> PN2037-2038

<sup>5</sup> This figure of \$110,800 is slightly different to the figure provided by Mr Fisher in his witness statement (Ex R4 at [50] all) of \$106,300.

<sup>6</sup> Court Book at p 560

<sup>7</sup> PN203-204

<sup>8</sup> Court Book at p 528

<sup>9</sup> Court Book at p 544

<sup>10</sup> PN1942

<sup>11</sup> PN1910

<sup>12</sup> PN1912

<sup>13</sup> PN1919

<sup>14</sup> PN2180

<sup>15</sup> Ex A5 at [13]

<sup>16</sup> Court Book at p 553

<sup>17</sup> Court Book at pp 560-563

<sup>18</sup> Court Book at p 561

<sup>19</sup> Court Book at p 562

<sup>20</sup> Court Book at p 562

<sup>21</sup> Ex A5 at [15]

<sup>22</sup> Court Book at p 579

<sup>23</sup> Ex R2 at [28]-[29]

<sup>24</sup> PN341

<sup>25</sup> PN346

<sup>26</sup> PN1185; Ex A5 at [19]

<sup>27</sup> Ex R2 at [11]

<sup>28</sup> Court Book at p 630

<sup>29</sup> Court Book at pp 628-630

<sup>30</sup> Court Book at p 629

<sup>31</sup> Ex A4 at [5]

<sup>32</sup> PN1960-1965



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<sup>33</sup> PN914

<sup>34</sup> Ex A6 at [8]

<sup>35</sup> PN947

<sup>36</sup> Court Book at p 1002

<sup>37</sup> PN953

<sup>38</sup> PN1991-2015

<sup>39</sup> PN1292-1299

<sup>40</sup> PN1358

<sup>41</sup> PN1371

<sup>42</sup> PN1403-1405

<sup>43</sup> PN1392-1397

<sup>44</sup> PN1398-1401

<sup>45</sup> Ex A3 at [79]

<sup>46</sup> Ex A3 at [102]

<sup>47</sup> Court Book at p 1093

<sup>48</sup> Ex A3 at [119]

<sup>49</sup> PN1259

<sup>50</sup> PN1228-1230

<sup>51</sup> PN1228

<sup>52</sup> PN1231-1233

<sup>53</sup> PN1234

<sup>54</sup> PN1290-1291

<sup>55</sup> Ex A6 at [16]

<sup>56</sup> PN1129

<sup>57</sup> PN1416-1419; PN1446; Ex R1 at [80]

<sup>58</sup> PN1414

<sup>59</sup> PN1438-1440

<sup>60</sup> Ex R1 at [67]

<sup>61</sup> Ex R1 at [68]

<sup>62</sup> Ex R2 at [52]

<sup>63</sup> Ex R2 at [57]

<sup>64</sup> Ex R2 at [58]

<sup>65</sup> Ex R4 at [4]-[8]

<sup>66</sup> PN2165

<sup>67</sup> PN1134

<sup>68</sup> PN1138-9

<sup>69</sup> PN2039-2041

<sup>70</sup> *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

<sup>71</sup> *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

<sup>72</sup> *Ibid*

<sup>73</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

<sup>74</sup> *Ibid*

<sup>75</sup> *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24]

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<sup>76</sup> Ibid

<sup>77</sup> *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14]

<sup>78</sup> *Crozie v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* (2000) 98 IR 137 at [62]

<sup>79</sup> *J Boag & Son Brewing Pty Ltd v Button* (2010) 195 IR 292 at [22]

<sup>80</sup> *Newton v Toll Transport Pty Ltd* [\[2021\] FWCFB 3457](#) at [99]

<sup>81</sup> PN953

<sup>82</sup> Court Book at p 255

<sup>83</sup> Court Book at pp 528-529

<sup>84</sup> Court Book at pp 53-531

<sup>85</sup> Clause C4.3.2 of the TCM

<sup>86</sup> PN2180

<sup>87</sup> Ex R1 at [67]

<sup>88</sup> Mr Overton (see paragraph [124] above); Mr de Winton (see paragraph [116] above), Mr Humphreys (see paragraph [121] above and Ex R1 at [73]), and Mr Fisher (see Court Book at p 562[14] and Court Book at p 630[15])

<sup>89</sup> PN2167

<sup>90</sup> Ex R1 at [51]-[55]

<sup>91</sup> PN1228-1230

<sup>92</sup> PN1231=1233

<sup>93</sup> PN1416-1419; PN1446; Ex R1 at [80]

<sup>94</sup> PN2162-2165

<sup>95</sup> PN2165

<sup>96</sup> PN2162

<sup>97</sup> See paragraphs [26]-[30] above

<sup>98</sup> Court Book at p 562

<sup>99</sup> Court Book at p 630

<sup>100</sup> See paragraph [74] above

<sup>101</sup> See paragraph [77] above and Court Book at pp 633-636

<sup>102</sup> See paragraph [79] above

<sup>103</sup> PN1392-1397

<sup>104</sup> See paragraph [112] above

<sup>105</sup> Court Book at p 48 (Option 3)

<sup>106</sup> Ex A4 at [7]

<sup>107</sup> Court Book at p 599

<sup>108</sup> Ex A4 at [7]

<sup>109</sup> Court Book at p 561

<sup>110</sup> Ex A4 at [7]; Court Book at p 234

<sup>111</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465

<sup>112</sup> *CFMMEU v Mt Arthur Coal* [\[2021\] FWCFB 6059](#) at [263]

<sup>113</sup> Ibid at [72]-[79] & [95]-[96] & [263]

<sup>114</sup> Ibid at [263]

<sup>115</sup> Ex R3 at [63]

<sup>116</sup> Court Book at pp 628-630

<sup>117</sup> [\[2014\] FWCFB 7198](#)

<sup>118</sup> Ex A4 at [36]

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<sup>119</sup> Ibid

<sup>120</sup> Ex A4 at [37]

<sup>121</sup> Ibid

<sup>122</sup> Ex A4 at [38]

<sup>123</sup> Ibid

<sup>124</sup> Ex A2 at [5]

<sup>125</sup> Ibid

<sup>126</sup> Ex A4 at [39]

<sup>127</sup> Ex A4 at [40]

<sup>128</sup> Ex A2 at [7]

<sup>129</sup> PN2328

<sup>130</sup> Ex A2 at [6]

<sup>131</sup> See, for example, Ex A3 at [44]; Court Book at p 231 (“During the initial winch I struggled to maintain a hover within the required tolerance for accuracy as my hover reference was poor ...”); PN959

<sup>132</sup> PN465

<sup>133</sup> Court Book at p 246

<sup>134</sup> *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at [15]

<sup>135</sup> Ex R3 at [64]-[65]

<sup>136</sup> Ex R4 at [234]