

[2023] FWC 501 [Note: An appeal pursuant to s.604 (C2023/1491) was lodged against this decision - refer to Full Bench decision dated 20 June 2023 [\[\[2023\] FWC 85\]](#) for result of appeal.]



# DECISION

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

**Nathan Woods**

**v**

**Jetstar Airways Pty Ltd**  
(U2022/672)

COMMISSIONER P RYAN

SYDNEY, 28 FEBRUARY 2023

*Application for an unfair dismissal remedy Application for an unfair dismissal remedy*

## Introduction

[1] Mr Nathan Woods (**Applicant**) has made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that he had been unfairly dismissed from his employment with Jetstar Airways Pty Ltd (**Respondent**) on 22 December 2021.

[2] The matter was heard before me on 17-18 May and 3 June 2022. Following the hearing of the matter, the parties filed written submission in accordance with directions.

[3] I exercised my discretion to grant permission to the parties to be represented by a lawyer, as I was satisfied as to the matters set out in s.596 (2)(a) and (c) of the FW Act. The Applicant was represented by Mr L Saunders. The Respondent was represented by Ms V Bulut.

[4] Witness statements were tendered from the following persons, who also gave evidence at the hearing:

- The Applicant (Exhibits A1, A2 and A3);
- Mr Brad Stewart, National Organiser employed by the Australian Licensed Aircraft Engineers Association (**ALAEA**) (Exhibits A4 and A5);
- Mr Corey Smith, Licensed Aircraft Maintenance Engineer employed by the Respondent (Exhibit R1);
- Mr Craig Reid, Senior Manager, Approved Maintenance Organisation employed by the Respondent (Exhibit R2);
- Mr Joel Richardson, Regional Maintenance Manager (NSW & QLD) employed by the Respondent (Exhibit R3);

- Mr Shaun Castrodes, Aircraft Maintenance Engineer employed by the Respondent (Exhibit R4);
- Mr Matthew Dale, Licensed Aircraft Maintenance Engineer employed by the Respondent (Exhibit R5); and
- Mr Kristian Troyak, Licensed Aircraft Maintenance Engineer employed by the Respondent (Exhibit R6).

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

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

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

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

**When is a person protected from unfair dismissal?**

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

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

**When has a person been unfairly dismissed?**

[8] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and

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

### **Relevant Background**

[9] The Respondent is part of the Qantas Group.

[10] On 15 August 2005, the Applicant commenced employment with the Respondent as a Licensed Aircraft Maintenance Engineer (**LAME**).<sup>1</sup> A LAME is licensed to perform checks and sign off on maintenance work.<sup>2</sup>

[11] The Applicant's contract of employment required him to comply with the Respondent's policies and procedures as determined or varied from time to time.<sup>3</sup>

[12] One of the policies the Applicant was required to comply with was the Qantas Group's 'Standards of Conduct Policy' (**Conduct Policy**).<sup>4</sup>

[13] Clause 2 of the Conduct Policy stated the purpose of the policy is to set out the standards of conduct that is expected of employees and to outline a range of informal and formal disciplinary processes that may be activated to address conduct by an employee that does not meet the standard required.<sup>5</sup>

[14] In broad terms, the standards set out in Conduct Policy require employees to:

- Act with honesty and integrity;
- Abide by applicable laws and regulations, policies and procedures;
- Conduct their duties in a safe manner to ensure personal safety, the safety of others, including other Staff, customers and visitors, as well as the safety of operations and assets;
- Treat other Staff with respect and work as a team, including not engaging in conduct which constitutes discrimination, harassment, bullying or victimisation;
- Act in the best interests of the Qantas Group and protect and enhance the Qantas Group's image, profitability and success; and
- Exercise reasonable care and skill in the performance of their duties.<sup>6</sup>

[15] If an employee breaches the Conduct Policy, disciplinary action may be taken which can include the termination of employment.<sup>7</sup>

[16] The Respondent's engineering operations in Sydney are responsible for the safe and compliant maintenance of the Respondent's aircraft, as well as customer aircraft, in line with the Respondent's Part 145 Maintenance Organisation Exposition and other applicable requirements. To achieve this, the engineering operations in Sydney are organised into crews

that work 11-hour shifts on a 4-days on, 4-days off basis across a continuous 24-hour cycle. Each crew has a supervisor and a 2IC and 15-20 workers comprising LAME's and Aircraft Maintenance Engineers (AME).<sup>8</sup> An AME is an unlicensed engineer and must have their work checked and signed off by an approved LAME.<sup>9</sup>

[17] In or around 2013, the Applicant was promoted to the role of Shift Supervisor.<sup>10</sup> A Shift Supervisor is responsible for supervision and management of a crew of 15-20 employees and contractors and includes:

- Leading and organising shifts to achieve maintenance objectives;
- Acting as a key point of contact in the absence of local management;
- Managing the performance of team members, including adherence with the Respondent's policies and procedures;
- Escalating significant breaches of policies and procedures to the Local Maintenance Manager (LMM); and
- If a LAME, maintaining accreditation/Respondent approval as a LAME.<sup>11</sup>

[18] On 16 February 2021, Mr Smith made a harassment complaint to Mr Richardson regarding somebody impersonating him and registering him with Fernwood Fitness, a women's only gym.<sup>12</sup>

[19] On 17 February 2021, Mr Smith advised the Applicant of the matter and that he suspected it was a member of the crew who had done so, as it occurred at 1:59am on 10 February 2021 and included Mr Smith's work email address as part of the registration. Mr Smith advised the Applicant that he had informed Mr Richardson of the matter. The Applicant advised Mr Smith that he would make enquiries.<sup>13</sup>

[20] Later that day, the Applicant mentioned the matter to Mr Reece Jumeau, the crew 2IC. Mr Jumeau admitted to the Applicant that he was responsible for the matter and did it as a joke. The Applicant then directed Mr Jumeau to contact Mr Smith to resolve the issue before it escalated further.<sup>14</sup>

[21] Throughout the course of the day both Mr Jumeau and Mr Smith confirmed to the Applicant that Mr Jumeau had apologised and that the matter was resolved.<sup>15</sup>

[22] At 6:10pm on 17 February 2021, Mr Smith sent an email to Mr Richardson confirming that the person responsible had come forward and apologised and that he did not wish to proceed with the complaint.<sup>16</sup>

[23] On 23 February 2021, the Applicant and Mr Troyak had a disagreement regarding the approach to rectifying a defect with a waste service drain on aircraft VH-VQP which led to a heated argument between them.

[24] On 19 March 2021, Mr Troyak and Mr Dale responded to a cabin defect on aircraft VQK. The aircraft was boarded and awaiting departure. Mr Dale took some fiberglass tape in the event that it was needed. Upon inspection, the extent of the defect was a cabin window surround that had become dislodged. Mr Troyak rectified the defect by pushing the surround back into place and clicking it into the internal mounting clips.<sup>17</sup>

[25] Mr Dale then informed the flight crew that the defect was rectified and was advised that the flight crew had not 'logged' the defect and therefore, there was no entry to signoff. Mr Dale informed Mr Troyak of this.<sup>18</sup>

[26] Upon their return to the engineering office, Mr Troyak advised the Applicant that "*it was a bit of trim from around the window, all good, no paperwork*". Mr Troyak did not log a maintenance report in relation to the cabin window surround.<sup>19</sup>

[27] Unbeknownst to Mr Troyak and Mr Dale, a passenger took photographs of them rectifying the defect which were uploaded to social media. The photographs were subsequently published in an article by the Daily Mail later that day<sup>20</sup>, prompting enquiries by the Respondent's Maintenance Watch and Media departments as to the extent of any maintenance undertaken.<sup>21</sup>

[28] Despite the Respondent requiring all maintenance work to be logged, Mr Troyak did not log the maintenance work carried out and did not, initially, self-report the failure to log the maintenance work by completing an OSCAR which is the Respondent's reporting system for safety-related incidents.<sup>22</sup>

[29] This led to the Applicant holding a toolbox talk at approximately 4:40am on 20 March 2021, to discuss the importance of logging any maintenance work undertaken.<sup>23</sup> While the parties are in dispute about what was said in this meeting, it is not disputed that the Applicant requested Mr Troyak to complete an OSCAR.<sup>24</sup>

[30] Later that day, the Applicant and Mr Troyak had a further discussion about the matter during which both stated they would escalate the matter. After the matter was raised with Mr Adam Renfree, an LMM, Mr Troyak completed an OSCAR.<sup>25</sup>

[31] On 21 March 2021, Mr Dale heard the Applicant and Mr Jumeau making sarcastic comments to each other about "*raising tech logs*".<sup>26</sup>

[32] On 21 April 2021, Mr Troyak sent an email to Mr Gregory Lawton and Mr Renfree (both LMM's), which was copied to Mr Richardson, complaining about the Applicant with reference to:

- A disagreement with the Applicant on 23 February 2021 regarding the approach to rectifying a defect with a waste service drain on aircraft VH-VQP and a 'heated argument' that followed between them; and
- The Applicant having singled Mr Troyak out and made an example of him in front of the shift crew at the toolbox talk on 20 March 2021 regarding Mr Troyak's failure to log maintenance work undertaken on 19 March 2021. Mr Troyak also stated that

he had been advised by Mr Smith that the Applicant and Mr Jumeau were ‘mocking’ Mr Troyak’s maintenance error by making sarcastic comments in the office. Mr Troyak concluded his complaint by expressing views that he did not consider the Applicant was suitable to continue in the role of a supervisor.<sup>27</sup>

[33] On 22 April 2021, Mr Renfree forwarded Mr Troyak’s email to Mr Mark Moss and Ms Wendy Waring in the Respondent’s People Team seeking their preliminary views on the matters raised by Mr Troyak and the next steps to be taken.<sup>28</sup>

[34] On 3 May 2021, Mr Moss sent a response to Mr Renfree referring to a discussion in the previous week and attaching a document to assist Mr Renfree to gain more information regarding the matters raised by Mr Troyak.<sup>29</sup>

[35] On 9 May 2021, Mr Renfree sent an email to Mr Moss expressing difficulties with meeting with the relevant persons referred to in Mr Troyak’s complaint due to those persons working night shift and enquired whether any further details could be sought by email.<sup>30</sup>

[36] On 11 May 2021, Mr Moss responded confirming that while in person discussions are preferred, email can be used.<sup>31</sup>

[37] On 16 May 2021, Mr Renfree sent an email to Mr Troyak seeking further information about the matters raised in Mr Troyak’s complaint dated 21 April 2021.<sup>32</sup>

[38] On 24 June 2021, the Applicant and Mr Troyak had a further disagreement relating to the Applicant’s approach to dealing with an aircraft on ground (AOG) situation involving a leak in a dry bay on aircraft VQH.

[39] On the morning of 2 July 2021, the Applicant convened a toolbox talk to discuss the importance of ‘good communication’ between crew members and the supervisory staff regarding the approach to defect rectification and port capabilities. During this meeting, Mr Troyak said “*this is absolute horse shit and I’m not going to sit here and listen to it*”, before leaving the toolbox talk.<sup>33</sup>

[40] At 10:13am on 2 July 2021, the Applicant sent an email to Mr Lawton, Mr Renfree and Mr Richardson raising concerns about Mr Troyak and the difficulty the Applicant and Mr Jumeau were having in managing Mr Troyak. The email stated<sup>34</sup>:

*Hi All*

*I toolbox talked the crew today about the importance of good communication between crew members and the supervisor staff. In particular, the need to ensure that items are discussed with the supervisor before making decisions and sending emails about defect rectification or port capabilities.*

*Unfortunately Kristian would not listen to the conversation and left the room. His lack of respect for myself and Reece has become increasingly difficult to manage. This also follows on from his refusal to follow instruction from myself to fill out an OSCAR<sup>35</sup> when*

*he was photographed in the cabin and not documenting the maintenance that was conducted.*

*I am requesting a meeting with the management team and will require Kristian to be placed on a performance program to demonstrate his understanding of respect towards his management team. I would also like you to arrange for some LMS training to be loaded into Kristian's profile around code of conduct and respect in the workplace.*

*Thank you for your support around managing expectations from our staff.*

*Nathan Woods  
Sydney Engineering  
Crew D shift Supervisor.*

[41] At 12:36pm on 2 July 2021, Mr Renfree responded to the Applicant advising him to address his concerns directly with Mr Troyak and report back on the outcome. This email stated<sup>36</sup>:

*Hi Nathan,*

*As a first step, could you please have a conversation with Kristian regarding your concerns. As always, these matters are best resolved at the lowest possible level and with those that were present during the interaction(s) in question.*

*As you are his supervisor and were present during these interactions, I think a discussion between yourself and Kristian addressing your concerns is the first step.*

*I would recommend organising a meeting with Kristian and articulating your concerns in line with the SBI-BI Model (Situation, Behaviour, Impact – Expected Behaviour, Impact).*

*Following this conversation please let me know the outcome and we can discuss next steps.*

*Thanks,  
Adam*

[42] At approximately 2:00pm on 2 July 2021, the Applicant asked Mr Troyak to meet with him. Mr Troyak invited Mr Smith to attend as a witness. During this meeting, Mr Troyak apologised for the making the 'horse shit' remark and walking out. The Applicant stated that he considered Mr Troyak's conduct was disrespectful and that he would be placing him on a performance review to improve his communication skills.<sup>37</sup>

[43] Short time later, Mr Troyak received an email from Mr Jumeau regarding the approach to rectifying the leak in a dry bay on aircraft VQH. Upon receiving this email, Mr Troyak immediately requested a meeting with the Applicant in which he challenged the Applicant's decision with respect to the way in which this defect was being managed.<sup>38</sup>

[44] At 10:45pm on 2 July 2021, Mr Troyak sent a six-page email to Mr Lawton, Mr Renfree and Mr Richardson complaining about the Applicant's approach to dealing with the aircraft on ground (AOG) situation involving aircraft VQH. The substance of Mr Troyak's complaint was that the Applicant was not involving the engineer who was allocated the job in discussions regarding the approach to the job, nor did the Applicant or Mr Jumeau, inspect the aircraft before making a decision on how to deal with the issue.<sup>39</sup>

[45] At 11:17am on 3 July 2021 and following a discussion with Mr Renfree on the previous day, Mr Smith sent an email to Mr Renfree complaining about the 'toxic atmosphere' on shift which has developed under the Applicant and Mr Jumeau. This email stated<sup>40</sup>:

*Good morning Adam*

*Thanks for your time yesterday on the phone regarding the further degeneration currently on the crew. It's very much appreciated.*

*There is currently a lot of tension and toxic atmosphere at work, in 8 years at Jetstar I have never encountered upon another shift. The past 8 months I have witnessed a string of issues and been involved in number of conflicts myself, again which I have never encountered prior to this.*

*The constant 'bad mouthing' and derogatory comments regarding local management, the CAMO, 'hero' engineers being eluded to as being unsafe (for being enthusiastic and acquitting work in my opinion) from the crew supervisor and 2ic has an extremely negative affect especially on younger crew members and AMEs but also for experienced LAMES.*

*The teamwork on the shift is basically non existent as full control of work allocation has to be through the supervisor (which technically is right) but in real terms results in some engineers sitting idle for hours while others have extremely heavy work loads. There is also biased work allocations, for example certain engineers not being allocated to work a single shift on the 787 despite having 3 months of opportunity and expressing their desire to familiarise themselves.*

*In 8 months I honestly cannot recall a single time the supervisor has given anyone on shift positive feedback, despite some of the tremendous effort and hard work over that time. From RTS, A chks, THS cable changes, lightning strike repairs, engine changes, waste tank defect rectification on a transit ect, the ONLY feedback I have experienced or witnessed others experiencing, is questioning use of approved data, tooling ect, in a manner that isn't interpreted as helpful but trying to highlight anything wrong with your actions.*

*I believe this creates an atmosphere that has the crew walking on eggshells and as the months have gone on the crew has become quieter and quieter and has a detrimental effect on confidence and workplace enjoyment is all time low. I personally have bypassed the supervisor and submitted bravos to recognise individuals, which results in indirect comments amongst the crew leadership about bravos in general being a*



*'joke' ect and engineers don't need them for 'just doing our job'. The supervisor and 2ic then began submitting sarcastic bravos recognising each other.*

*I have a great friendly relationship with many engineers across all crews which I've established over the last 8 years and I also can confirm there is a feel within many engineers that they don't want to work overtime on our crew which they may otherwise have worked, due to the 'toxic vibe' generated. When the 'crew shuffles' took place at the end of last year, again many engineers expressed how happy they were to be on any other shift but my one. My opinion and interpretation is not isolated. It's a common theme. Given the personality of the supervisor and 2ic people are not confidently going to speak up against them.*

*As spoken about on the phone yesterday there is now open infighting in the crew and a bigger divide than ever which I believe requires immediate action to be taken. Although it's ok to have a differing opinion over a task, some of the comments I witnessed yesterday and behaviour has no place in aviation. The lame running with an AOG was told by the crew 2ic, with support of the supervisor, to 'not care so much' as he will be 'stood down and pumping gas into buses next week', referring to his job during stand down last year. I personally found this comment absolutely disgusting.*

*As you know I have also had my personal details submitted online by the 2ic to a female only gym with the knowledge of the supervisor, which I reported to HR. I have been told by the supervisor I'd be a good swimmer as I look 'buoyant' and also asked if I donate money to the gym in a membership as I pay them and doesn't look like I go by the supervisor. I can laugh these off these comments as a 'joke', but since have been told by other crew members that when I am not in the office the supervisor and 2ic talk about how much they hate me and other crew members talking about the gym or working out. It's obviously personal.*

*Yesterday I was asked to witness a private conversation between my supervisor and a lame on shift where the lame was told he'd be performance managed. This lame is one of our most enthusiastic and talented engineers in Syd. This made me feel extremely uncomfortable and I cannot express my opinion freely on shift without risking vindictive comments and behaviour from the supervision.*

*My personal enjoyment at work is honestly the lowest of my 12 year aviation career generated by the environment on my current crew, when I work overtime I am honestly astonished at the positive 'vibe' on the 3 other crews in comparison.*

*Please take this email as direct feedback that if personnel changes aren't made on my current crew the situation will degenerate to a dangerously low level. If the current supervision remains certain individuals that are known to local management need to be changed onto other crews, I regard myself as one and I believe others are known to yourself.*

*Please also note in 2016 I was asked to swap crews onto a crew run by the current supervision due to another employee requesting to change. I worked as an ame from 2016 until June 2017 at which time I also requested local management at the time*

*swap me from this crew for the exact same reasons. I then undertook 3 happy years of work under Simon Thompson with absolutely zero complaints. For the record I have also worked 3 years under cam Jones where I was extremely happy at work. I have been in this position before and am extremely disappointed to be put in this position again.*

*I insist this email being kept anonymous and my details not shared, as if my current crew supervision gained knowledge of details in this email my experience on shift will suffer even more so.*

[46] At 10:15pm on 3 July 2021, Mr Matthew Paynter, a LAME who is part of the Applicant's crew, sent an email to Mr Richardson, Mr Lawton and Mr Renfree praising Mr Troyak's efforts in relation to resolving the leak in the dry bay on aircraft VQH. This email stated<sup>41</sup>:

*Hi,*

*[Troyak] deserves a massive wrap for his efforts on this aircraft.*

*As far as I can see, if he wasn't willing to get involved using his own initiative the aircraft would be sitting there untouched. No one was asking about possible solutions.*

*We would not even have pictures inside the dry bay.*

*It has been one person pushing this with zero support. It is a testament to his character that he comes to work willing to do it all again the next day.*

*I would hope that you offer him your support and help resolve some of the conflicts that he has faced so they do not happen again in the future.*

*Matt Paynter.*

[47] At 12:52pm on 13 July 2021, Mr Smith sent another email to Mr Renfree complaining about further conduct by the Applicant. This email stated<sup>42</sup>:

*Hi Adam*

*Unfortunately there has been further comments and behaviour on my shift in my most recent block that attributes to a toxic work environment.*

*On our second day shift, the supervisor Nathan Woods, publicly read out an email from Daniel Benicasa, in which Daniel requested a deferral from the previous shit. Daniel was stated as being a 'f\*\*\*ing dumb c\*\*t' for making 'us look s\*\*t and stupid as a port'.*

*It's was said in a serious tone unprovoked and with intent. It was said in the direction of Clint Taylor and myself who are friends with Daniel in and outside of work. I believe Nathan was baiting.*

*Last night at the start of night shift Nathan raised his voice in the office and expressed his opinion about the residents of Fairfield council being responsible for spreading COVID-19, pretending they can't speak English and not following health orders. Victor of Chinese background questioned what he meant, Nathan replied, 'I lived there, they're Asians, I know what they're like'. Present on shift as mentioned was Victor and Weng Mak from China and Shaun from the Philippines.*

*Aside from these comments Nathan had zero engagement with our crew last night. With a busy shift and lots of jobs, Nathan sat silent at his computer looking at his phone for hours and hours and not checking in with anyone or displaying any sort of qualities a supervisor should. I personally had 2 boroscope inspections and we did not have a single conversation last night. In fact the only communication I witnessed was arranging times to go for coffee with Clint around Clint's workload.*

*Furthermore at approx midnight Nathan retired to the quiet room until 4am, he was not sleeping but sitting awake on the couch looking at his phone. Work was still happening and we had an AOG situation, with Victor and Shaun on afternoon shift staying back until 0330, Nathan still didn't come out, show any interest or attempt to help or take over, despite being a B2 on nightshift and the job being B2 related (eec software upgrade)*

*Apologies for language used in this email but it's a true account of exact language witnessed.*

[48] Following further discussions between Mr Renfree and Mr Richardson, the matters set out in Mr Smith's emails of 3 and 13 July 2021 were provided to Mr Moss and Ms Waring for their advice.<sup>43</sup>

[49] On or about 20 July 2021, Mr Richardson discussed the complaints made about the Applicant's conduct with Mr Reid. Mr Reid gave evidence that he was concerned by the complaints and directed Mr Richardson to investigate the Applicant's conduct.<sup>44</sup>

[50] On 20 July 2021, Mr Richardson sent correspondence to the Applicant setting out seven allegations, which if proven may amount to misconduct and potentially a breach of the Conduct Policy (**First Letter of Allegations**). The seven allegations were set out as follows<sup>45</sup>:

- (i) *On 16 February 2021, you had knowledge that Reece submitted Corey Smith's (LAME B1) personal details online to a female only gym and took no action in relation to this inappropriate conduct;*
- (ii) *On 23 February 2021 there was an aircraft defect identified (VH-VQP waste service drain valve not opening). Once the job was completed you returned to the office and stated in the presence of other employees that Kristian Troyak 'should have just let the aircraft fly and raise a special for engineers to take the rear cargo panel off and manually open/close the valve so it can be serviced'. Kristian responded that this could not be done as there is no AMM procedure to open/close the valve by hand, to which you responded, 'that's*

*why we have grey areas at Jetstar'. Kristian disagreed with you and you further responded, 'we've done it this way before';*

- (iii) On 20 March 2021, at approximately 4:40am, you held a toolbox talk with your crew. During this toolbox talk you singled out Kristian Troyak (LAME B1/B2) when discussing a maintenance error from the previous day involving a window trim stating 'to you AME's this is a great experience of what not to do and you should learn from KT's error in making sure you document everything';*
- (iv) On 21 March 2021 you and Reece Jumeau (2IC / LAME B1), publicly mocked Kristian's maintenance error (referred to in the above point) by sarcastically asking one another if you both should raise a tech log for the maintenance you have done. You did this on numerous occasions, out aloud in front of people in the office. You have made this comment with the knowledge that it is a requirement to raise a tech log on each occasion you perform maintenance.*
- (v) On 10 July 2021 you read out an email from Daniel Benincasa (LAME B1), in the email Daniel had requested a deferral from the previous shift. Following reading out this email you referred to Daniel as being a 'fucking dumb cunt for making us look shit and stupid as a port';*
- (vi) On 12 July 2021, while in the office area, you expressed your opinion that the residents of Fairfield Council were responsible for spreading COVID-19 and that your view was that they pretend they cannot speak English and don't follow health orders. When questioned by Victor Tam (LAME B1/B2) about your comments, you responded 'I lived there, they're Asians, I know what they're like';*
- (vii) On 13 July 2021, between approximately midnight and 4:00am, you were witnessed in the quiet room sitting on the couch interacting with your mobile phone. You were doing so while your team was performing work which included an AOG situation. At no point during this four (4) hour span did you ascertain the needs of the team or offer assistance.*

**[51]** The First Letter of Allegations directed the Applicant to provide a written response by close of business on 26 July 2021 ahead of a meeting at 3:00pm on 2 August 2021. The Applicant was also advised that he would be stood down on pay in accordance with the *Jetstar Engineering and Maintenance Enterprise Agreement 2018* for the duration of the investigation.

**[52]** On 22 July 2021, the Applicant provided a written response to the First Letter of Allegations (**First Woods Response**) as follows<sup>46</sup>:

*To Joel Richardson*

*I refer to the email sent on Tue 20/07/2021 2:05 PM from you (Joel Richardson), outlining the alleged allegations on the attached letter. Please see my responses below to each of the alleged allegations.*

*Examples of this conduct include:*

- (i) ***On 16 February 2021, you had knowledge that Reece submitted Corey Smith's (LAME B1) personal details online to a female only gym and took no action in relation to this inappropriate conduct;***

*Corey Smith and I had a phone conversation on 17th Feb 2021 (after sending a phone TXT to me at 1224 on the same day). He informed me that he had been signed up to a women's gym and had been contacted by the gym business. He also informed me that he had already asked staff members on shift if they had signed him up, but had not had any response from the crew. I was uncertain who it could have been that carried it out and decided to converse with my 2IC Reece Jumeau. Reece Jumeau and I discussed the matter via phone. Reece confirmed with me that he had carried out the 'joke' and I requested that he discuss this with Corey and see if the misunderstanding could be resolved. At 1515 on 17th Feb 2021 I received a phone TXT from Reece reading 'Gave Corey a buzz All ironed out'. I replied with 'Thanks mate. Appreciate talking to him'. I spoke with Corey following this (when I got into work for afternoon shift) and confirmed with him if he was happy with the outcome and asked if he needed anything further from myself. Corey informed me that he was happy with Reece's explanations and did not want to take the matter any further. Corey informed me that he would tell Joel Richardson that the matter had been resolved.*

*Why was this allegation not raised in a timely manner instead of in a letter to me dated 20 July 2021?*

- (ii) ***On 23 February 2021 there was an aircraft defect identified (VH-VQP waste service drain valve not opening). Once the job was completed you returned to the office and stated in the presence of other employees that Kristian Troyak 'should have just let the aircraft fly and raise a special for engineers to take the rear cargo panel off and manually open/close the valve so it can be serviced'. Kristian responded that this could not be done as there is no AMM procedure to open/close the valve by hand, to which you responded, 'that's why we have grey areas at Jetstar'. Kristian disagreed with you and you further responded, 'we've done it this way before';***

*I refute the statement 'should have just let the aircraft fly'. This defect was not assigned to Kristian Troyak, it was assigned to Clinton Taylor. I suggested that we speak with Maintenance Watch and ask for advice based on the fact that we had numerous occasions of this exact scenario at Jetstar in the past and Maintenance Watch had been OK with allowing this to be carried out (See attached EMN special dated 21-7-17 for VH-VQS as an 581 example). Kristian and Clinton both replied that they had never seen this defect before. I discussed the defect with Reece Jumeau and David Hampton, who both confirmed that we had released the aircraft in that configuration in the past. In fact, Clinton had been assigned the aircraft defect by myself, and Kristian decided to get involved without my knowledge, this increased the confusion over the course of action for this defect and added confusion to Clinton who was the certifying engineer for the task. I also spoke and wrote to maintenance watch (see attached email- Toilet*

*service email to Steven E McGowan 23-2-21 at 11.41am explaining to him that we had sent out a special for this in the past) Both Steven E McGowan and me spent then proceeding weeks (via email to Airbus) trying to resolve the matter to no avail.*

*Why was this allegation not raised in a timely manner instead of in a letter to me dated 20 July 2021?*

- (iii) *On 20 March 2021, at approximately 4:40am, you held a toolbox talk with your crew. During this toolbox talk you singled out Kristian Troyak (LAME B1/B2) when discussing a maintenance error from the previous day involving a window trim stating ‘to you AME’s this is a great experience of what not to do and you should learn from KT’s error in making sure you document everything’;***

*I refute the statement that Kristian Troyak was singled out. The discussion was held with all staff members of the crew and was a generalised conversation outlining the importance of understanding that we are being watched all the time whilst on duty. This includes (but not limited to social media and CCTV surveillance) and understanding that people with mobile phones can film us without understanding the task we are conducting (See attached email VQK social media event to Joel Richardson, Adam Renfree, Greg Lawton dated 20th March 20121 at 1418).. The previous day (via a phone call from maintenance watch) I was requested to provide a copy of the technical log of the maintenance carried out. Kristian Troyak informed me that no maintenance was carried out, therefore no technical log was required (which I informed maintenance watch of via the phone). This information turned out to be false, when in fact the video footage of the passenger proved that Kristian Troyak had in fact carried out a maintenance action by re-installing the window surround and not documented the maintenance event. The following day (during the toolbox meeting with a statement to all staff) I requested that Kristian Troyak fill out an OSCAR to capture this error to ensure that we were reporting events in the correct format. Kristian replied with words to the effect that he would not be filling out the OSCAR as he did not see that it was required, and he left the meeting. I spoke with him later and informed him of the importance of filling out the OSCAR to prove to the CAMO that the AMO self-reports these types of events. I spoke with Adam Renfree that same day of the toolbox meeting and explained that Kristian was refusing to fill out the OSCAR to capture the fact that he had conducted maintenance without documenting it (a breach of company and CASA regulations). Adam informed me that he would follow it up. I have not received an outcome from that discussion with Adam Renfree.*

*Why was this allegation not raised in a timely manner instead of in a letter to me dated 20 July 2021?*

- (iv) *On 21 March 2021 you and Reece Jumeau (2IC / LAME B1), publicly mocked Kristian’s maintenance error (referred to in the above point) by sarcastically asking one another if you both should raise a tech log for the maintenance***

*you have done. You did this on numerous occasions, out aloud in front of people in the office. You have made this comment with the knowledge that it is a requirement to raise a tech log on each occasion you perform maintenance.*

*I refute that accusation that Kristian was publicly mocked. Supervisors and 2IC hold discussions from time to time on matters relating to the running of the crew and how we expect staff to conduct themselves. We operate in an open plan office and private conversation may at times be overheard by other staff members. This is in no way mocking an individual crew member and is not something that I condone.*

*Why was this allegation not raised in a timely manner instead of in a letter to me dated 20 July 2021?*

- (v) *On 10 July 2021 you read out an email from Daniel Benincasa (LAME B1), in the email Daniel had requested a deferral from the previous shift. Following reading out this email you referred to Daniel as being a ‘fucking dumb cunt for making us look shit and stupid as a port’;*

*I refute the statement ‘fucking dumb cunt for making us look shit and stupid as a port’. A conversation was held between me and another crew member (Clinton Taylor, who sometimes carries out supervisor duties) about the importance of not deferring tasks early in the night when the task could be carried over to the next day (during current covid-19 operations). These tasks had been arranged between me and planning the previous day and agreed to. This is another example of the importance of direct handovers between dedicated supervisors to avoid such confusion. This topic has been well discussed between me and the Sydney management team and has been previously OSCAR with no resolution. At no point in my discussion did I refer to another supervisor in such a manner.*

- (vi) *On 12 July 2021, while in the office area, you expressed your opinion that the residents of Fairfield Council were responsible for spreading COVID-19 and that your view was that they pretend they cannot speak English and don’t follow health orders. When questioned by Victor Tam (LAME B1/B2) about your comments, you responded ‘I lived there, they’re Asians, I know what they’re like’;*

*I refute that I claimed that a particular race of residents ‘are spreading covid-19’. The crew were discussing the latest outbreak of covid-19 in Sydney, and I discussed with Victor Tam (who asked me a direct question) how these areas typically have large families (I know because I grew up in the area) and they do not understand the importance of not mixing in large groups to prevent the spread of covid-19. This is in no way a statement based on racial profiling, it is simply an observation from my experience of living in the area. To contextualise what I am saying Language barriers – state and federal government literature up until recently has excluded people that have English as a second language*

*therefore, it places that community and the rest of the community at much higher risk in transmitting COVID 19.*

- (vii) *On 13 July 2021, between approximately midnight and 4:00am, you were witnessed in the quiet room sitting on the couch interacting with your mobile phone. You were doing so while your team was performing work which included an AOG situation. At no point during this four (4) hour span did you ascertain the needs of the team or offer assistance.*

*I refute the timing of the claimed rest period. I took a fatigue break that evening due to suffering a headache and sore eyes due to fatigue. I kept the company phone and personal phone on me during the approximately 90 mins that I rested for and at no point was I uncontactable by the crew members. The work mentioned was covered by the assigned LAME and did not require my assistance during this time. On that same evening I had given permission for other crew member (Clinton Taylor) to rest, who also required fatigue mitigation. As all employees are entitled to, supervisors will from time to time require rest periods. I have OSCAR and personally discussed with Sydney management team (see attached Rostering email) of how the new rostering is fatiguing for supervisors due to the increased concentration that the role requires over just the role of a LAME. This is yet to be addressed.*

#### *Summary*

*It is my opinion that the above-mentioned allegations have surfaced from an individual/s that have taken offence to the suggestion that they are to be placed onto a performance management plan (see attached email dated 2nd July 2020 Kristian to Joel Richardson, Adam Renfree, Greg Lawton regarding Kristian's lack of respect for supervisory staff) or have taken offence to my stance on ensuring that crew members adhere to respecting supervisor staff and having good communication (see attached email date Fri 2/07/2021 Kristian to Joel Richardson, Adam Renfree, Greg Lawton). The attached BRAVO screenshot is further evidence of my one team and inclusive supervisory style. I do not condone any poor behaviour from crew members, nor do I single out staff or treat individual crew members differently.*

*Nathan Woods*

**[53]** Following receipt of the First Woods Response, Mr Richardson conducted interviews with the complainants and witnesses in relation to the allegations. During the interviews with the complainants and witness, additional allegations of misconduct against the Applicant were raised.<sup>47</sup>

**[54]** On 5 August 2021, Mr Richardson and Mr Moss met with the Applicant and Mr Stewart via Microsoft Teams. The purpose of the meeting was to discuss the First Woods Response and clarify any matters arising from the witness interviews.<sup>48</sup>



[55] On 6 August 2021, Mr Richardson sent correspondence to the Applicant setting out additional questions relating to the First Letter of Allegations as well as three additional allegations (**Second Letter of Allegations**). The three additional allegations were set out as follows<sup>49</sup>:

- (i) *During the period around August of 2020, Rob Clarke came into the office with two similar parts and asked you which one was the correct part to use. You provided the answer and when Rob left the office stated ‘what a dumb cunt’ in reference to Rob Clarke.*
- (ii) *Around May of this year, Pat Bagnet sent an email to SYD ENG in reference to aircraft damage form a cargo loader and the requirement to use a hangar. You then referred to Pat in the Sign-Up Room as a “fucking dumb cunt”.*
- (iii) *Around Christmas of 2020, you referred Sean Castrodes as “the Bali Bomber” while in a vehicle with others present.*

[56] On 13 August 2021, the Applicant provided a written response to the Second Letter of Allegations (**Second Woods Response**). After responding to each of the questions relating to the First Letter of Allegations, the Applicant provided the following response to each of the three additional allegations:

*Nathan Woods 13th August 2021.*

*On Thursday 5th August 2021 I responded to your Skype meeting that I would take your questions on notice and respond in writing.*

*This question was not part of the original allegations emailed to me on 20th July 2021.*

*I refute the premise of this question.<sup>50</sup>*

[57] On 2 September 2021 and after giving consideration to the material collated as part of the investigation, Mr Richardson and Mr Moss met with the Applicant and Mr Stewart via Microsoft Teams to discuss the findings of the investigation.<sup>51</sup>

[58] On 3 September 2021, Mr Richardson sent correspondence to the Applicant setting out the findings of the investigation as follows<sup>52</sup>:

<i>No.</i>	<i>Allegation</i>	<i>Finding</i>
<i>1</i>	<i>(i) On 16 February 2021, you had knowledge that Reece submitted Corey Smith’s (LAME B1) personal details online to a female only gym and took no action in relation to this inappropriate conduct;</i>	<i>From the evidence obtained this claim was <b>Unsubstantiated.</b></i>
<i>2</i>	<i>(ii) On 23 February 2021 there was an aircraft defect identified (VH-VQP waste service drain</i>	<i>Our investigation determined there was a lack</i>

	<p>valve not opening). Once the job was completed you returned to the office and stated in the presence of other employees that Kristian Troyak 'should have just let the aircraft fly and raise a special for engineers to take the rear cargo panel off and manually open/close the valve so it can be serviced'. Kristian responded that this could not be done as there is no AMM procedure to open/close the valve by hand, to which you responded, 'that's why we have grey areas at Jetstar'. Kristian disagreed with you and you further responded, 'we've done it this way before';</p>	<p>of evidence to substantiate this claim. As such this claim is <b>Unsubstantiated</b></p>
3	<p>(iii) On 20 March 2021, at approximately 4:40am, you held a toolbox talk with your crew. During this toolbox talk you singled out Kristian Troyak (LAME B1/B2) when discussing a maintenance error from the previous day involving a window trim stating 'to you AME's this is a great experience of what not to do and you should learn from KT's error in making sure you document everything';</p>	<p>On the balance of probabilities, based on the evidence gathered, this allegation is considered <b>Substantiated</b>.</p>
4	<p>(iv) On 21 March 2021, you and Reece Jumeau (2IC / LAME B1), publicly mocked Kristian's maintenance error (referred to in the above point) by sarcastically asking one another if you both should raise a tech log for the maintenance you have done. You did this on numerous occasions, out aloud in front of people in the office. You have made this comment with the knowledge that it is a requirement to raise a tech log on each occasion you perform maintenance.</p>	<p>On the balance of probabilities, based on the evidence gathered, this allegation is considered <b>Substantiated</b>.</p>
5	<p>(iv) On 10 July 2021 you read out an email from Daniel Benincasa (LAME B1), in the email Daniel had requested a deferral from the previous shift. Following reading out this email you referred to Daniel as being a 'fucking dumb cunt for making us look shit and stupid as a port';</p>	<p>On the balance of probabilities, based on the evidence gathered, this allegation is considered <b>Substantiated</b>.</p>
6	<p>(vi) On 12 July 2021, while in the office area, you expressed your opinion that the residents of Fairfield Council were responsible for spreading COVID-19 and that your view was that they pretend they cannot speak English and don't follow health orders. When questioned by Victor Tam (LAME B1/B2) about your comments, you responded 'I lived there, they're Asians, I know what they're like';</p>	<p>On the balance of probabilities, based on the evidence gathered, this allegation is considered <b>Substantiated</b>.</p>

7	<i>(vii) On 13 July 2021, between approximately midnight and 4:00am, you were witnessed in the quiet room sitting on the couch interacting with your mobile phone. You were doing so while your team was performing work which included an AOG situation. At no point during this four (4) hour span did you ascertain the needs of the team or offer assistance.</i>	<i>On the balance of probabilities, based on the evidence gathered, this allegation is considered <b>Partially Substantiated</b>.</i>
8	<i>(iix) During the period around August of 2020, Rob Clarke came in to the office with two similar parts and asked you which one was the correct part to use. You provided the answer and when Rob left the office stated ‘what a dumb cunt’ in reference to Rob Clarke</i>	<i>On the evidence obtained from witnesses this allegation is considered <b>Substantiated</b>.</i>
9	<i>(ix) Around May of this year, Pat Bagnet sent an email to SYD ENG in reference to aircraft damage form a cargo loader and the requirement to use a hangar. You then referred to Pat in the Sign-Up Room as a “fucking dumb cunt”.</i>	<i>On the evidence obtained from witnesses this allegation is considered <b>Substantiated</b>.</i>
10	<i>(x) Around Christmas of 2020, you referred Sean Castrodas as “the Bali Bomber” while in a vehicle with others present.</i>	<i>On the evidence obtained from witnesses this allegation is considered <b>Substantiated</b>.</i>

[59] On 8 September 2021, the Applicant sent a notification of a workplace dispute to Mr Richardson as follows<sup>53</sup>:

- 1. I write in order to notify you of a dispute in accordance with cl.20 **RESOLVING WORKPLACE CONCERNS OR DISPUTES** of the Jetstar Airways Engineering and Maintenance Agreement 2018 (**the Agreement**).*
- 2. I am raising this with you as my Regional Maintenance Manager (NSW-QLD).*
- 3. I wish to be represented by Brad Stewart and Sean Morgan from the ALAEA, per cl.20.6 of the Agreement. The nature of the dispute is set out below.*
- 4. The dispute relates to the allegations emailed to me dated 20 July 2021, and additional allegations presented on 2 August 2021.*
- 5. The dispute pertains to cl.11 (of the Agreement) **THE COMPANY RESPONSIBILITIES**, in particular subclause. 11.3 (of the Agreement) To abide by the requirements of Company policies and procedures.*

*6. In relation to the above mentioned matters, it is my opinion that clause 3.3, 4.2 (d) and 5.1 (m) of Standards of Conduct Policy have been breached by the reporters/witnesses in the alleged allegations. Failure to report the matter immediately, reporting the matter promptly and honestly, and making vexatious and frivolous complaints or allegations about myself.*

*In relation to the email dated 20 March 2021 (VQK social media event) and 2nd July 2021 (Kristian Troyak) to Greg Lawton, Adam Renfree, and yourself (Joel Richardson), it is my opinion that clauses 4.1 (f) and 5.1 (c) of the Standards of Conduct Policy have been breached. Failure to take appropriate action to deal with any Employee Grievances and breaches of any applicable Qantas Group policy. Failure to behave in a fair and consistent manner in all dealings with Staff.*

*In relation to email dated 20 March 2021 (VQK social media event) and 2nd July 2021 (Kristian), it is my opinion that Kristian Troyak is in breach of clause 5.2 (c) by not meeting the regulatory requirements to document maintenance and clause 5.4 (a) (f) for failure to co-operate with myself and follow a reasonable direction.*

*7. Per cl.20.1 of the Agreement I request that we discuss the issue. This is an urgent matter, and I request that we meet as soon as possible. My representatives and myself are available at suitable times on 10 September 2021. Even if we are not able to meet, I will require a written response within 72 hours of this notification.*

*8. If I do not hear from you in that time, I will assume the dispute cannot be resolved at any meeting between us and will take it that Jetstar has elected to proceed to cl.20.2. of the Agreement.*

*9. I have copied Mark Moss from HR into this correspondence. If you or Jetstar have any concerns about the process I am proposing to follow, including any that it would rely on to (if the dispute remains unresolved) object to the dispute being referred to the Fair Work Commission, I expect these to be raised urgently so I can take any necessary steps to correct this.*

*10. From hereon [sic] in I request that ALL correspondence be emailed to my ALAEA representatives [EMAIL ADDRESS REDACTED] and cc to my work email as well as my private email [EMAIL ADDRESS REDACTED].*

**[60]** On 13 September 2021, Mr Richardson and Ms Renee Edgley, the Respondent's head of employee relations, met with the Applicant, Mr Stewart and Mr Sean Morgan, a legal officer employed by the ALAEA.<sup>54</sup> During this meeting the parties agreed that the Applicant and the ALAEA would provide the details of allegations regarding Mr Troyak in writing and that the Respondent would not make any decision concerning the Applicant's employment until it had considered the allegations relating to Mr Troyak.<sup>55</sup>

**[61]** On 21 September 2021, Mr Morgan sent an email to Ms Edgley, attached to which were statements from the Applicant, Mr Jumeau and three LAMEs concerning Mr Troyak's conduct in the workplace.<sup>56</sup> By way of summary, the statements alleged the following:

- (i) Mr Andrew Edwards, a B2 LAME, stated he has observed Mr Troyak rubbing his genitals through his pants on multiple occasions and that Mr Troyak would be overly flatulent in the workplace. Mr Edwards also stated that Mr Troyak had bullied another B1 LAME.
- (ii) Mr Brett Wilkinson, a B1 LAME, stated that on or about 2 July 2021, he witnessed a disagreement between the Applicant and Mr Troyak, in which Mr Troyak described the Applicant's attitude as embarrassing.
- (iii) Mr David Hampton, a B1 LAME, stated that on or about 2 July 2021, Mr Troyak was disrespectful towards the Applicant. Mr Hampton also stated that Mr Troyak regularly rubs and displays his erect penis through his trousers, is overly flatulent in the workplace and makes racist and sexist remarks.
- (iv) Mr Jumeau stated that Mr Troyak poured 'tuna oil' over another LAME's toolbox who disliked tuna, would openly rub his erect penis through his trousers, was regularly insubordinate towards the Applicant, and would make inappropriate comments such as regularly yelling "*fuck me Pauline*" in the workplace.
- (v) The Applicant stated that it had been reported to him over the period of 2020 to July 2021 that Mr Troyak would display his erect penis through his trousers and attempt to press himself against other staff members or 'pet' his penis in front of others. The Applicant stated that he had advised those reporting Mr Troyak's conduct that he would not accept such behaviour on his crew if he witnessed it. The Applicant also stated that Mr Troyak was insubordinate and makes racist and sexist remarks in the workplace.

[62] Under cross examination both the Applicant and Mr Stewart agreed that the purpose of providing these statements to the Respondent was to undermine Mr Troyak's credibility<sup>57</sup> for the purpose of seeking a more favourable outcome in the investigation of the Applicant.<sup>58</sup>

[63] Upon reviewing the allegations against Mr Troyak, Mr Reid formed the view they were 'serious' and directed Mr John Tessarolo, the Respondent's Safety and Quality Manager, to undertake a formal investigation into them.<sup>59</sup>

[64] Over the period of 21-26 October 2021, the Respondent conducted interviews with the Applicant and other witnesses regarding the alleged conduct of Mr Troyak.<sup>60</sup>

[65] On 4 November 2021, Mr Richardson met with Ms Edgley, Ms Vautin and Mr Cameron Clulow, the Respondent's People Manager – Engineering, to discuss further allegations relating to the Applicant's failure to report Mr Troyak's conduct.

[66] On 9 November 2022, Mr Richardson sent correspondence to the Applicant setting out three further allegations (**Third Letter of Allegations**). The three further allegations were set out as follows<sup>61</sup>:

*Further allegations*

*Between February and July 2021, it is alleged that you engaged in behaviour which, if proven, may amount to a failure to discharge your responsibilities as a Supervisor and was also potentially in breach of the Qantas Group Standards of Conduct Policy, which provides that:*

- 1. Managers are responsible for taking reasonable steps to prevent staff from engaging in conduct contrary to any applicable Qantas Group policy;*
- 2. Managers are responsible for taking appropriate action to deal with any breach of any applicable Qantas Group policy; and*
- 3. Employees are responsible for reporting concerns regarding possible breaches of any Qantas Group policy, promptly, honestly and respectfully.*

*Examples of this conduct include:*

- (i) Between mid-February 2021 and July 2021, members of your crew, including Reece Jumeau and David Hampton, reported to you that Kristian Troyak, a member of your crew, regularly displays an erection whilst at work and deliberately touches his penis through his clothing in view of other crew members. You failed to report this conduct to your line manager, a People & Culture / HR representative and/or Employee Relations.*
- (ii) In February 2021, you witnessed Mr Troyak make an inappropriate comment about 'gas chambers' to Matt Paynter, a member of your crew with Jewish heritage. You failed to report this conduct to your line manager, a People & Culture / HR representative and/or Employee Relations.*
- (iii) Between mid-February 2021 and July 2021, you witnessed Mr Troyak repeatedly engage in inappropriate and anti-social behaviour in the workplace, specifically passing wind loudly and publicly, but have failed to counsel Mr Troyak about this behaviour or report the conduct to your line manager, a People & Culture / HR representative and/or Employee Relations.*

**[67]** On or about 22 November 2021, the Applicant provided the following response to the Third Letter of Allegations (**Third Woods Response**)<sup>62</sup>:

*Subject to what I say below, I refute the allegations and maintain my position as stated in my written statement, and the responses given to Kasandra Le Roux and Emma Vautin during the course of interview on the 26th October 2021.*

*If matters are brought to my attention I would respond and have them dealt with appropriately. If I witnessed such conduct, I would nip it in the bud.*

*With respect to the second allegation, again, I can only repeat what I said in the meeting. That is to say that I would rather not single people out, but instead use toolbox talks to remind those I supervise to be mindful of what they say to others and to treat each other fairly, and be mindful of how to conduct themselves in the workplace. That is not to say that banter that crosses the line in does not happen, as it was the situation in relation to second allegation.*

*However, it is very important to remind you that it was in the context of two LAMEs who dish- out as much as they get in return. As I have said above, in situations where this occurs, and where no-one has come to me with a formal complaint, I have adopted an educational approach instead of a punitive one as it is more effective in achieving the desired outcomes with regard to workplace behaviour.*

**[68]** In late November 2021, Mr Reid met with Mr Richardson, Ms Vautin and Mr Clulow to discuss the findings of the investigation into the Applicant’s conduct. Upon a review of the investigation report, Mr Reid adopted the findings of Mr Richardson and was also satisfied that the allegations against Mr Troyak did not change the factual findings made in relation to the Applicant and set out in correspondence dated 3 September 2021.<sup>63</sup>

**[69]** On 2 December 2021, Mr Richardson sent correspondence (**Show Cause Letter**) to the Applicant advising:

- (i) That Respondent had reviewed the findings made on 3 September 2021 and did not consider those findings were disturbed by the matters raised by the Applicant concerning Mr Troyak’s conduct;
- (ii) That the Respondent found the allegations set out in the Third Letter of Allegations were substantiated;
- (iii) That the Respondent considered the 11 substantiated allegations to be in breach of the Conduct Policy; and
- (iv) That the findings are “*very serious*” and inviting the Applicant to provide a written response as to why his employment should not be terminated ahead of a meeting to held with Mr Reid on 13 December 2021.<sup>64</sup>

**[70]** In relation to the findings that the Applicant’s conduct was in breach of the Conduct Policy, the correspondence stated<sup>65</sup>:

***Breaches***

*You have been found to be in breach of the Qantas Group Standards of Conduct Policy in relation to the 11 substantiated allegations set out in Attachments 1 and 2 to this letter.*

*The Standards of Conduct Policy relevantly states that:*

- ***Employees are responsible for:***

- *their own behaviour and actions at all times;*
- *being aware of and complying with all Qantas Group policies;*
- *ensuring that their behaviour is, at all times, consistent with applicable Qantas Group policies, the Non-Negotiable Business Principles, the Qantas Group Beliefs and the Cardinal Rules*
- *reporting concerns regarding possible breaches of any Qantas Group policy, promptly, honestly and respectfully;*

...

- ***Employees must treat other Staff with respect and work as a team.***  
*This includes, but is not limited to, Employees:*
  - *co-operating with other Staff for the benefit of customers and the Qantas Group;*
  - *treating other Staff with trust, dignity, respect, fairness and equity;*
  - *not engaging in threatening or intimidating behaviour including verbal or written abuse, physical abuse or violence;*
  - *not engaging in conduct which constitutes Discrimination, Harassment, Bullying or Victimisation (see Sections 8 to 11 for relevant definitions);*

...

*In relation to allegation 1, you breached clause 5.4(b) of the Standards of Conduct Policy in that you failed to treat Kristian Troyak with respect when you singled him out during a toolbox talk on 20 March 2021 when discussing a maintenance error. Although you are expected to use toolbox talks as an opportunity to counsel your crew on work standards, I have found that you used the toolbox talk as an opportunity to belittle Kristian by failing to raise this with Kristian prior to the meeting and referring to the incident in the talk as an example of what not to do.*

*In relation to allegations 4 and 8, you breached clauses 5.4(b) and (d) of the Standards of Conduct Policy in that you failed to treat your colleagues with respect and/or engaged in conduct amounting to racial discrimination and/or harassment by referring to a colleague of Asian descent as “the Bali bomber” and making a comment about “Asians” who live in certain parts of Sydney as not speaking English and not following public health orders in force in response to the COVID-19 pandemic. These comments degrade and stereotype people because of their race and create a hostile working environment, and I consider this conduct to be extremely serious.*

*In relation to allegations 2, 3, 6 and 7, you breached clauses 5.4(b) and (c) of the Standards of Conduct Policy in that you failed to treat your colleagues with respect by repeatedly referring to your colleagues as “dumb c\*nts” after those employees submitted questions or referrals to you in your capacity as Supervisor. You also failed to treat Kristian Troyak, a member of your team, with respect by mocking Kristian in front of other members of your team.*



*In relation to Allegations 9,10 and 11, you breached clause 4.2(d) of the Standards of Conduct Policy by failing to promptly report concerns regarding possible breaches of the Standards of Conduct Policy by a member of your crew.*

[71] On 8 December 2021, the Applicant provided a written response to the Show Cause Letter (**Show Cause Response**) in which he stated<sup>66</sup>:

- (i) He has always endeavoured to uphold the Respondent's policies;
- (ii) He has tried to adopt a guided approach rather than a big stick approach in managing workplace behaviour for those under his supervision;
- (iii) He believes he has treated colleagues with respect and equality;
- (iv) He has reflected on his relationship with Mr Troyak and would welcome the opportunity to rebuild it;
- (v) He acknowledged the use of 'colourful' language in the workplace by himself and others but denies it has ever been used in a vulgar or malicious intent;
- (vi) In relation to his comments regarding the residents of Fairfield, they were interpreted in a way that was not intended and he would like the opportunity to apologise to Mr Victor Tam; and
- (vii) He has always exhibited a high level of commitment to the Respondent's business which has been recognised by the Respondent.

[72] On 13 December 2021, Mr Reid and Mr Clulow met with the Applicant and Mr Stewart. The purpose of the meeting was to discuss any matters arising from the findings and the Show Cause Response, as well as provide the Applicant with a further opportunity to provide any additional information to Mr Reid. During the meeting the Applicant stated that:

- (i) He did not condone poor behaviour;
- (ii) He has a diverse friendship group;
- (iii) This behaviour was commonplace in Sydney;
- (iv) The 'Bali Bomber' comment was only that Mr Castrodos 'smile' reminded him of the Bali Bomber;
- (v) His actions did not breach any policies and the language was 'banter' and 'the norm'; and
- (vi) He would like the opportunity to apologise to those impacted by his behaviour.<sup>67</sup>

[73] After giving consideration to the Applicant’s responses, Mr Reid formed the view that the only appropriate outcome was the termination of the Applicant’s employment.<sup>68</sup>

[74] On 22 December 2021, Mr Reid met with the Applicant and Mr Stewart to advise that he decided to terminate the Applicant’s employment. Mr Reid also sent a letter of termination to the Applicant.<sup>69</sup> The letter of termination stated<sup>70</sup>:

**Considerations**

*The Company has taken all relevant matters into account, including your written and verbal responses, the findings of the investigation, other relevant information obtained during the investigation, your employment history and your length of service.*

*In summary, the findings of the investigation are that you breached the Standards of Conduct Policy on 11 occasions, specifically:*

<i>Substantiated Allegations</i>		<i>Standards of Conduct Policy</i>
1.	<i>On 20 March 2021, at approximately 4:40am, you held a toolbox talk with your crew. During this toolbox talk you singled out Kristian Troyak (LAME B1/B2) when discussing a maintenance error from the previous day involving a window trim stating ‘to you AME’s this is a great experience of what not to do and you should learn from KT’s error in making sure you document everything’;</i>	<i>Clause 5.4(b)</i>
2.	<i>On 21 March 2021 you publicly mocked Kristian’s maintenance error (referred to in the above point) by sarcastically asking Reece if you both should raise a tech log for the maintenance you have done. You did this on numerous occasions, out aloud in front of people in the office. You have made this comment with the knowledge that it is a requirement to raise a tech log on each occasion you perform maintenance.</i>	<i>clauses 5.4(b) and (c)</i>
3.	<i>On 10 July 2021 you read out an email from Daniel Benincasa (LAME B1), in the email Daniel had requested a deferral from the previous shift. Following reading out this email you referred to Daniel as being a ‘fucking dumb cunt for making us look shit and stupid as a port’</i>	<i>clauses 5.4(b) and (c)</i>
4.	<i>On 12 July 2021, while in the office area, you expressed your opinion that the residents of Fairfield Council were responsible for spreading COVID-19 and that your view was that they pretend they cannot speak English and don’t follow health orders. When questioned by Victor Tam (LAME B1/B2) about your comments, you responded ‘I lived there, they’re Asians, I know what they’re like’</i>	<i>Clauses 5.4(b) and (d)</i>
5.	<i>On 13 July 2021, between approximately midnight and 4:00am, you were witnessed in the quiet room sitting on the couch interacting with your mobile phone. You were doing so while your team was performing work which included an AOG situation. At no point during this four (4) hour span did you ascertain the needs of the team or offer assistance.</i>	<i>Clause 5.4(a)</i>

6.	<i>During the period around August of 2020, Rob Clarke came in to the office with two similar parts and asked you which one was the correct part to use. You provided the answer and when Rob left the office stated ‘what a dumb cunt’ in reference to Rob Clarke.</i>	<i>Clauses 5.4(b) and (c)</i>
7.	<i>Around May of this year, Pat Bagnet sent an email to SYD ENG in reference to aircraft damage form a cargo loader and the requirement to use a hangar. You then referred to Pat in the Sign-Up Room as a “fucking dumb cunt”.</i>	<i>Clauses 5.4(b) and (c)</i>
8.	<i>Around Christmas of 2020, you referred to Shaun Castrodes as “the Bali Bomber” while in a vehicle with others present.</i>	<i>Clauses 5.4(b) and (d)</i>
9.	<i>Between mid-February 2021 and July 2021, you failed to act on reports from members of your crew that an employee regularly displays an erection whilst at work and deliberately touches his penis through his clothing in view of other crew members. You failed to report this conduct to your line manager, a People &amp; Culture / HR representative and/or Employee Relations.</i>	<i>Clause 4.2(d)</i>
10.	<i>In February 2021, you witnessed Mr Troyak make an inappropriate comment about ‘gas chambers’ to Matt Paynter, a member of your crew with Jewish heritage. You failed to report this conduct to your line manager, a People &amp; Culture / HR representative and/or Employee Relations.</i>	<i>Clause 4.2(d)</i>
11.	<i>Between mid-February 2021 and July 2021, you witnessed Mr Troyak repeatedly engage in inappropriate and anti-social behaviour in the workplace, specifically passing wind loudly and publicly, but have failed to counsel Mr Troyak about this behaviour or report the conduct to your line manager, a People &amp; Culture / HR representative and/or Employee Relations.</i>	<i>Clause 4.2(d)</i>

[75] The letter of termination further stated<sup>71</sup>:

*Nathan, I acknowledge that you are a long-serving employee and that you have fulfilled the role of Supervisor for 8 years. Although your response dated 8 December 2021 demonstrates that you now have some insight into the impact of your conduct on your colleagues and the Company, throughout the investigation you did not acknowledge the impact of your conduct on others. However, as part of this process, I have also considered:*

- *Your repeated racist comments are particularly concerning and amount to serious misconduct. Although you say that you did not intend to offend Victor, Jetstar does not tolerate discrimination or harassment of any kind and your comments about the Asian community not following public health requirements during the COVID-19 pandemic are completely unacceptable and could be regarded as inciting hatred against the people of Asian backgrounds.*
- *You have held a supervisory position for 8 years. In your role as a supervisor, it is an expectation of you to uphold and promote all Qantas Group policies, the Non-Negotiable Business Principles, the Qantas Group Beliefs, and the Cardinal Rules and provide staff with a positive role model. Most of the*

*findings involve conduct directed towards other Jetstar employees who you are responsible for supervising on a day-to-day basis.*

- *Further, as a Supervisor, you are at the front line in monitoring the standards of behaviour in the workplace. If, as you suggest, 'colourful' language was being used on a regular basis in the workplace then it was your responsibility to counsel crew members about this behaviour, or to escalate this to your line manager and/or HR to address this pattern of behaviour. Inappropriate language is not accepted at Jetstar and your particularly crude language unsurprisingly shocked and offended members of your crew.*
- *Your failure to act on or escalate the concerns raised by members of your crew in relation to Kristian Troyak is also concerning. The fact that you only raised these issues with the Company in an attempt to discredit Kristian in my view shows a lack of insight into the seriousness of your own conduct and the responsibility that all Jetstar employees have to comply with the Standards of Conduct Policy, and the additional responsibilities of Supervisors to act on potential misconduct of members of their crew.*

#### ***Outcome – termination of employment***

*In the circumstances, given the serious and repeated nature of the substantiated allegations of misconduct, the Company has decided to terminate your employment, effective immediately. Your employment will be terminated with payment in lieu of notice and as such you will be paid five weeks' wages as well as your entitlements accrued up to and including today.*

#### **Did the alleged conduct occur?**

[76] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination on the basis of the evidence in the proceedings before it.<sup>72</sup>

[77] The parties are in dispute as to whether the conduct underpinning the allegations set out in the letter of termination occurred and/or the extent to which that conduct justified the termination of the Applicant's employment. Accordingly, it is necessary to make findings in relation to each of the allegations set out in the in letter of termination.

#### **Allegation 1 – The Applicant singled out Mr Troyak during toolbox talk**

[78] The letter of termination set out Allegation 1 as follows:

*On 20 March 2021, at approximately 4:40am, you held a toolbox talk with your crew. During this toolbox talk you singled out Kristian Troyak (LAME B1/B2) when discussing a maintenance error from the previous day involving a window trim stating 'to you AME's this is a great experience of what not to do and you should learn from KT's error in making sure you document everything'.*

[79] The allegation arose out of the email sent by Mr Troyak to Mr Lawton and Mr Renfree on 21 April 2021.<sup>73</sup>

[80] The toolbox talk occurred on the morning after Mr Troyak and Mr Dale had attended to fixing a defect with a cabin window surround and were photographed by a passenger. As stated above, Mr Troyak did not log the maintenance work carried out and did not, initially, self-report the failure to log the maintenance work by completing an OSCAR.

[81] While the parties are in dispute about whether the Applicant singled out Mr Troyak by stating “to you AME’s this is a great experience of what not to do and you should learn from KT’s error in making sure you document everything”, it is not in dispute that the Applicant requested Mr Troyak to complete an OSCAR.

[82] The Applicant denied that he singled out Mr Troyak. In the First Woods Response, the Applicant described the toolbox talk as a general discussion regarding the importance of logging maintenance and reminding the crew that they could be filmed by passengers or CCTV at any time.

[83] In the Second Woods Response, the Applicant provided the following response to a follow-up question concerning this allegation:

*As previously stated in my written response 22nd July 2021, this meeting addressed the entire crew the importance of self reporting when an error is made. The purpose of the meeting was to address the importance of this requirement to everyone in line with standard toolbox meeting format. Given that the details had already been shared on the group WhatsApp chat by another staff member, it was important for us all to share (and learn) from the experience in line with standard toolbox meeting format.*

[84] In his witness statement, Mr Smith stated that the Applicant had “specifically” singled out Mr Troyak by stating Mr Troyak’s actions were a “good example... of what not to do” and that “Kristian has demonstrated a good example of bad maintenance practices”.<sup>74</sup>

[85] However, under cross examination, Mr Smith conceded that:

- The crew had been talking about the matter in the WhatsApp Group Chat;
- In the toolbox talk, the Applicant did not use Mr Troyak’s name;
- The Applicant reminded the crew of the importance to log all maintenance; and
- Where maintenance is not logged, it is appropriate for supervisors to address it.<sup>75</sup>

[86] In his witness statement, Mr Dale stated that the toolbox talk is an opportunity for a supervisor to bring up any errors or reminders. Mr Dale stated that although the Applicant did not refer to Mr Troyak by name, it was obvious who he was talking about because the entire crew had seen the photos from social media which had been posted in the crew’s WhatsApp Group Chat.<sup>76</sup>

[87] Under cross examination, Mr Dale confirmed:

- The majority, if not all, of the crew had been talking about the social media coverage;
- That in the toolbox talk, the Applicant reminded everyone of the importance of logging maintenance; and
- That the Applicant did not use Mr Troyak's name.<sup>77</sup>

[88] In his witness statement, Mr Troyak stated the Applicant referred to the matter and stated, *"to you AMEs this is a great experience and what not to do and you should learn from KT's error in making sure you document everything."*

[89] Under cross examination, Mr Troyak accepted he was aware of his obligation to log maintenance work and self-report maintenance errors and that in toolbox talk, his supervisor was advising him to do that.<sup>78</sup>

[90] For the following reasons, I am not satisfied that the Applicant stated the words, *"to you AME's this is a great experience of what not to do and you should learn from KT's error in making sure you document everything"* or that the Applicant otherwise singled out Mr Troyak or made an example of him in a manner that was in breach of clause 5.4(b) of the Conduct Policy.

[91] First, both Mr Dale and Mr Smith accepted in cross examination that the Applicant did not refer to Mr Troyak by name.

[92] Second, both Mr Dale and Mr Smith accepted, consistent with the Applicant's responses throughout the investigation, that the toolbox talk is an opportunity for supervisors to address matters such as the logging of maintenance work. This evidence is also consistent with the wording in the Show Cause Letter that the Applicant is expected to use toolbox talks to counsel the crew on work standards.<sup>79</sup> The Applicant did just that.

[93] Third, while Mr Dale stated it was obvious who the Applicant was referring to, that is to be viewed in the context that the maintenance work was photographed by a passenger and reported by the Daily Mail and was subsequently circulated and discussed by the crew through the WhatsApp Group Chat. It would have been nigh impossible for the Applicant to address the failure to log maintenance work, whether by reference to that matter or in a non-descript manner, without the crew associating it with the Daily Mail report and knowing which members of the crew were involved.

[94] Fourth, the Applicant's instruction that Mr Troyak complete an OSCAR was consistent with the Respondent's policies and the Applicant's duties as a supervisor and was not made in a manner that was contrary to the Conduct Policy.

[95] Accordingly, I am not satisfied that the conduct underpinning Allegation 1 occurred.

Allegation 2 – The Applicant mocked Mr Troyak's failure to log maintenance

[96] The letter of termination set out Allegation 2 as follows:

*On 21 March 2021 you publicly mocked Kristian's maintenance error (referred to in the above point) by sarcastically asking Reece if you both should raise a tech log for the maintenance you have done. You did this on numerous occasions, out aloud in front of people in the office. You have made this comment with the knowledge that it is a requirement to raise a tech log on each occasion you perform maintenance.*

[97] The allegation arose out of the email sent by Mr Troyak to Mr Lawton and Mr Renfree on 21 April 2021 in which Mr Troyak stated:

*I then got a phone call on the 22/03/21 from Corey Smith who was working the previous afternoon shift on the 21/03/21 that Nathan and the 2IC Reece Jemeau were publicly mocking my maintenance error by numerous times sarcastically asking one another out aloud in front of the people in the office if they should raise a tech log for the maintenance they have done. Insinuating the obvious that they know they have to but making out as if they don't know to one another to humiliate my actions.<sup>80</sup>*

[98] As part of the investigation, Mr Richardson also interviewed Mr Smith and Mr Jumeau. The investigation report states<sup>81</sup>:

*Corey Smith claims he overheard Nathan, Reece and Dave Hampton making sarcastic comments such as 'I just completed a work order, do I need to complete a tech log?'. Corey believed this was blatant and ruthless, targeted towards Kristian.*

...

*Reece Jumeau seemed to reference another conversation in his response, referring to a statement from Kristian Troyak that "he used the words along the lines that you just keep mocking me". He went on, unprompted to share his thoughts about Nathan saying "Nathan is good with his etiquette. When he talks to the crew he is very professional no matter what he is facing. A credit to Nathan really.*

[99] In the First Woods Response, the Applicant responded as follows:

*I refute that accusation that Kristian was publicly mocked. Supervisors and 2IC hold discussions from time to time on matters relating to the running of the crew and how we expect staff to conduct themselves. We operate in an open plan office and private conversation may at times be overheard by other staff members. This is in no way mocking an individual crew member and is not something that I condone.*

[100] In the Second Woods Response, in response to follow-up questions concerning this allegation, the Applicant "refuted the premise of the questions" before stating that any discussions with the 2IC or management regarding another employee were had with confidentiality in mind. In response to a specific question regarding the Applicant discussing Mr Troyak's performance on 21 March 2021, the Applicant stated:

*I refute the premise of this question.*

*Confidentiality is always in mind and I would not intentionally allow any private conversation to be listened into by another party. **To my knowledge, at the time of conversation with my 2IC, I recall that there were no other staff in the room when I began my conversation with my 2IC.***<sup>82</sup>

(emphasis added).

[101] In his witness statement, Mr Dale stated that on 21 March 2021 he heard the Applicant and Mr Jumeau making sarcastic comments to each other about “raising tech logs”, although he could not recall the exact words used.<sup>83</sup>

[102] The Applicant did not challenge Mr Dale’s evidence, nor did the Applicant challenge in his reply statement<sup>84</sup>, his supplementary statement<sup>85</sup>, or during the proceedings, the account provided by Mr Smith and relied on by the Respondent in the investigation.

[103] Furthermore, the Applicant did not directly deny the allegation. In the First Woods Response, the Applicant ‘refutes’ Mr Troyak was ‘publicly mocked’ and refers to ‘private conversations’ that may have been overheard by others. In the Second Woods Response, the Applicant ‘refutes the premise’ of the question, before stating that he conducts conversations with confidentiality in mind and to his knowledge no other staff were present when he had the conversation.

[104] While Mr Smith did not provide any direct evidence in relation to this matter, Mr Troyak’s evidence of what Mr Smith told him, and the summary of Mr Smith’s interview set out in the investigation report, was corroborated by the evidence of Mr Dale.

[105] The Applicant’s submissions that there is no evidence to support the allegation and that Mr Dale’s evidence was not tested because the allegation was devoid of any particulars<sup>86</sup> cannot be accepted.

[106] For the foregoing reasons, I am satisfied, and so find, the Applicant did make sarcastic comments in reference to Mr Troyak on 21 March 2021 in breach of clause 5.4(b) of the Conduct Policy. However, I am not satisfied that the conduct was in breach of clause 5.4(c) of the Conduct Policy.

Allegations 3, 6 and 7 – The Applicant referred to colleagues and subordinates as ‘dumb cunts’

[107] The letter of termination sets out Allegations 3, 6, and 7 as follows:

Allegation 3:

*On 10 July 2021 you read out an email from Daniel Benincasa (LAME B1), in the email Daniel had requested a deferral from the previous shift. Following reading out this email you referred to Daniel as being a ‘fucking dumb cunt for making us look shit and stupid as a port’.*

Allegation 6:



*During the period around August of 2020, Rob Clarke came into the office with two similar parts and asked you which one was the correct part to use. You provided the answer and when Rob left the office stated 'what a dumb cunt' in reference to Rob Clarke.*

Allegation 7:

*Around May of this year, Pat Bagnet sent an email to SYD ENG in reference to aircraft damage form a cargo loader and the requirement to use a hangar. You then referred to Pat in the Sign-Up Room as a "fucking dumb cunt".*

[108] Allegation 3 arose out of the email sent by Mr Smith to Mr Renfree on 13 July 2021.<sup>87</sup> Allegations 6 and 7 arose out of the investigation and were set out in the Second Letter of Allegations.<sup>88</sup>

[109] In relation to Allegation 3, Mr Smith gave evidence that the Applicant said those words in the presence of himself, Mr Clint Taylor and that they were also possibly heard by Mr Dale.

[110] Mr Taylor did not give evidence. However, the investigation report records a summary of his interview has follows:

*Clint Taylor "Yes, it rings a bell but I don't recall what was exactly said. Oh what a dickhead, something like that."*<sup>89</sup>

[111] Mr Dale did not give evidence in relation to Allegation 3, and despite the Applicant's submissions that this was 'odd'<sup>90</sup>, it was never put to Mr Dale that he heard the Applicant make that statement.

[112] In the First Woods Response, the Applicant responded to Allegation 3 as follows:

*I refute the statement 'fucking dumb cunt for making us look shit and stupid as a port'. A conversation was held between me and another crew member (Clinton Taylor, who sometimes carries out supervisor duties) about the importance of not deferring tasks early in the night when the task could be carried over to the next day (during current covid-19 operations). These tasks had been arranged between me and planning the previous day and agreed to. This is another example of the importance of direct handovers between dedicated supervisors to avoid such confusion. This topic has been well discussed between me and the Sydney management team and has been previously OSCAR with no resolution. At no point in my discussion did I refer to another supervisor in such a manner.*

[113] In his witness statement, the Applicant provided an account of his discussion with Mr Taylor, which did not include referring to Mr Benincasa, or other any other employer as a 'dumb cunt' or a 'dickhead'.<sup>91</sup>

[114] In relation to Allegation 6, this was raised by Mr Troyak during the investigation. Both Mr Smith and Mr Dale gave evidence that Mr Clarke had asked the Applicant a question about

the correct part to use for a job and after Mr Clarke left the office, the Applicant stated “what a dumb cunt.”<sup>92</sup>

[115] In relation to Allegation 7, this was raised by Mr Smith during the investigation. Both Mr Smith and Mr Dale gave evidence that the Applicant stated Mr Bagnet was a “fucking dumb cunt” in response to a request by Mr Bagnet to use a Qantas hanger.<sup>93</sup>

[116] In the Second Woods Response, the Applicant provided the following response to Allegations 6 and 7:

*Nathan Woods 13th August 2021.*

*On Thursday 5th August 2021 I responded to your Skype meeting that I would take your questions on notice and respond in writing.*

*This question was not part of the original allegations emailed to me on 20th July 2021.*

*I refute the premise of this question.*

[117] In the Applicant’s supplementary witness statement he stated that he explained to Mr Richardson in the meeting 2 September 2021 that:

- he was close friends with Mr Clarke’s father; and
- Mr Bagnet was a good engineer; and
- “refute the premise of the question” means that he disagrees with the allegation.<sup>94</sup>

[118] However, during the proceedings, both the Applicant and Mr Stewart agreed that during the meeting on 2 September 2021, the Applicant did not provide any responses. Rather, the meeting was limited to Mr Richardson reading out the findings of the investigation.<sup>95</sup> This evidence is consistent with the investigation report which records that the Applicant did not provide any further response in writing or verbally when interviewed.<sup>96</sup>

[119] The Applicant also stated that “refute the premise of question” means the question or allegation was irrelevant because it did not form part of the First Letter of Allegations<sup>97</sup> and provided the following evidence in relation to Allegations 6 and 7:

*PN659*

*I want to put to you that you did, in fact, refer to Rob Clark as a dumb cunt when he – at about August 2020. What’s your response to that?--Firstly, I do not recall saying that about a close friend of mine. As I said, I’m a friend of both Rob and his deceased father, Paul. I don’t recall ever saying that and if I ever did say something like that in regards to Rob, it wouldn’t have been in the context that you people are using it against me. It would have been an off-the-cuff statement like, ‘Oh, what a silly dumb c’, because he probably felt stupid at the time, himself. That may have been the comment but I would not have ever used that language to Paul or Rob or anyone with malicious intent. That is not who I am.*

PN660

*I want to put to you that in around July 2021 in response to Pat Bagnet, that you, after you'd left the room you'd raised your voice and very abruptly screamed, 'Pat's a fucking dumb cunt.' Do you recall that?---I do not recall saying that.*

(Emphasis added)

[120] Responding to Allegations 3, 6 and 7 in the Show Cause Response, the Applicant stated the following in relation to swearing in the workplace:

*I acknowledge that the language used in the workplace can be somewhat colourful, but I do not believe that this is any different to other similar 'blue collar' workplaces across Australia, where it sometimes arises in workplace banter, and sometimes arises during times of frustration. **Nevertheless, in my experience, the use of such language by myself and other staff members has never been done with any vulgar or malicious intent, or as a direct attack towards an individual.** If this were the case, I would not condone such behaviour if I witnessed it (or if I was made aware of it by a formal complaint) and I would take appropriate action immediately. **It is clear that my use of colourful language has been perceived by others to have been malicious, and therefore I would very much appreciate the opportunity to apologise for any offence that has been taken.** If the use of any colourful language is now deemed to be unacceptable by the QANTAS Group, then as a supervisor, I would suggest that we implement a directive that comes from senior management, that any use of language in the workplace will result in immediate sanctions.*

(Emphasis added)

[121] The Applicant was cross examined in relation to the Show Cause Response and ultimately conceded that he had referred to colleagues and subordinates as 'dumb cunts' in the following exchange<sup>98</sup>:

PN503

*In the very last paragraph on that page you say that you acknowledge that the language used in the workplace can be somewhat colourful but that you don't believe it's any different to any other similar blue collar workplace?---Yes.*

PN504

*Do you see that?---Yes.*

PN505

*You don't expressly refer to calling your subordinates, 'dumb cunts', but it looks like that's what you're responding to. Is that fair to say?---What I'm saying in that statement is that in every workplace across Australia there is swearing.*

PN506

*Do you regard it as commonplace to call your subordinates dumb cunts?---I regard it as commonplace that swearing is in the workplace.*

PN507

*What about calling your subordinates dumb cunts?---Sorry, what is the question?*

PN508

**What about calling your subordinates dumb cunts, is that commonplace as far as you're concerned?---I wouldn't say it's common but it's not uncommon either. It depends on how you contextualise the statement. If you say it with malicious intent then I wouldn't say that that's commonplace. But many workplaces use that language tongue-in-cheek, off-the-cuff, you know, with no malicious intent behind it.**

PN509

**You've used that language in the workplace to describe some of your colleagues and subordinates?---Yes.**

PN510

*You accept, don't you, that referring to someone as a dumb cunt is disrespectful?---I do now.*

PN511

*You didn't at that time?---No.*

PN512

*No and - - -?---I can see how someone could take offence to that now.*

PN513

*Do you accept that calling someone a dumb cunt behind their back might lower the views that other people have of that person?---I do now, yes.*

PN514

*But you didn't at the time?---M'mm.*

PN515

*If you call someone a dumb cunt for asking you a question behind their back, do you see there's a risk that others would be less likely to ask you a question for fear of themselves being called a dumb cunt by you behind their backs?---I do now, yes.*

PN516

*But you didn't at that time?---No.*

PN517

*At the time you thought that calling your subordinates dumb cunts behind their backs was perfectly acceptable?---I believed it was normal practice in our workplace, yes.*

PN518

*It was normal practice for you in the workplace?---That's your opinion.*

PN519

**Well, I'm asking you, Woods, was it normal practice for you in the workplace to call your colleagues and your subordinates dumb cunts?---Absolutely not. On rare occasions, yes.**

(Emphasis added)

[122] Having regard to the evidence before me, and in particular the Applicant's concessions, I am satisfied, and so find that the conduct underpinning Allegations 3, 6 and 7 occurred and was in breach of clauses 5.4(b) and 5.4(c) of the Conduct Policy.

Allegation 4 – the Applicant made racist remarks concerning the residents of Fairfield

[123] The letter of termination set out Allegation 4 as follows:

*On 12 July 2021, while in the office area, you expressed your opinion that the residents of Fairfield Council were responsible for spreading COVID-19 and that your view was that they pretend they cannot speak English and don't follow health orders. When questioned by Victor Tam (LAME B1/B2) about your comments, you responded 'I lived there, they're Asians, I know what they're like'.*

[124] The allegation arose out of the email sent by Mr Smith to Mr Renfree on 13 July 2021 in which Mr Smith stated:

*Last night at the start of night shift Nathan raised his voice in the office and expressed his opinion about the residents of Fairfield council being responsible for spreading COVID-19, pretending they can't speak English and not following health orders. Victor of Chinese background questioned what he meant, Nathan replied, 'I lived there, they're Asians, I know what they're like'. Present on shift as mentioned was victor and weng mak from China and Shaun from the Philippines.<sup>99</sup>*

[125] Later in the shift, Mr Smith had a text message exchange with Mr Tam as follows<sup>100</sup>:

12 July 2021 at 5:49pm:

Mr Smith: *"That was very racist. There are many cases in his area with white Australians."*

12 July 2021 at 5:55pm:

Mr Tam: [Laughing emoji] followed by "Its ok", "Not entirely wrong though" [Hand on mouth emoji].

12 July 2021 at 6:00pm

Mr Smith: *"You don't speak like that at work especially as a supervisor in my opinion. He's not a good guy."*

[126] Mr Tam was not called to give evidence.

[127] In the First Woods Response the Applicant provided the following response to this allegation:

*I refute that I claimed that a particular race of residents 'are spreading covid-19'. The crew were discussing the latest outbreak of covid-19 in Sydney, and I discussed with Victor Tam (who asked me a direct question) how these areas typically have large families (I know because I grew up in the area) and they do not understand the importance of not mixing in large groups to prevent the spread of covid-19. This is in no way a statement based on racial profiling, it is simply an observation from my experience of living in the area. To contextualise what I am saying Language barriers – state and federal government literature up until recently has excluded people that have English as a second language therefore, it places that community and the rest of the community at much higher risk in transmitting COVID 19.*

[128] In his witness statement, the Applicant set out his exchange with Mr Tam as follows<sup>101</sup>:

*On 12 July 2021, at approximately 1:00 pm, the crew were discussing the latest outbreak of covid-19 in Sydney and the LGA lock downs. Victor Tam asked me what I meant about a comment I had made in relation to the LGA lock downs.*

*In response I said words to the following effect:*

*Victor, these areas typically have large families living together or in the area. I know because I grew up in the area of Fairfield and went to school there.*

*They do not understand the importance of not mixing in large groups to prevent the spread of Covid-19. I don't blame them, but the government needs to work with community groups to get the message out on how important this is.*

[129] Under cross examination, the Applicant deviated between denying he said the word “Asians” and not recalling saying the word “Asians”.<sup>102</sup> Furthermore, the Applicant “could not remember” whether he stated that the residents of Fairfield spread COVID-19 because they cannot speak English.<sup>103</sup>

[130] In contrast, Mr Smith’s evidence did not waver under cross examination.<sup>104</sup>

[131] The Applicant submitted that in the absence of Mr Tam being called to give evidence, the Applicant’s evidence should be preferred, that the statement is not actually racism, rather at its highest it was a racially insensitive remark.<sup>105</sup>

[132] The Respondent submitted that the Applicant’s version of events had an ‘air of unreality’ to it and that Mr Smith’s evidence should be preferred. The Respondent submitted that the Applicant’s conduct was a breach of clauses 5.4(b) and 5.4(d) of the Conduct Policy.<sup>106</sup>

[133] For the following reasons, I am satisfied that the Applicant stated the words, “*the residents of Fairfield Council are responsible for spreading COVID-19*” and “*I lived there,*

*they're Asians, I know what they're like*" and that it was a breach of clauses 5.4(b) and 5.4(d) of the Conduct Policy.

[134] First, I prefer the evidence of Mr Smith over the evidence of the Applicant. Mr Smith's evidence was supported by the contemporaneous text message exchange with Mr Tam, and his email to Mr Renfree the very next day. Under cross examination, the Applicant's evidence wavered between denying making those statements and not recalling whether he had made those statements, while Mr Smith was firm and unbroken in his recollection of the matter.

[135] Second, the comments were clearly a breach of clause 5.4(b) of the Conduct Policy.

[136] Third, the Conduct Policy refers to harassment as including comments that degrade or stereotype people because of their race or another ground that would otherwise be covered by a discrimination law, which includes race, colour, descent, nationality or national origin.<sup>107</sup>

[137] The term "stereotype" carries more than one meaning. For relevant purposes, the Macquarie Dictionary defines the term as:

(1) (noun) a set form; convention; standardised idea or concept.

(2) (verb) (stereotyped, stereotyping)

a. to make a stereotype of.

b. to give a fixed form to.

c. to characterise according to a conventional idea or concept.

[138] The comments made by the Applicant stereotyped all persons belonging to, or characteristic of the continent of Asia, as not able to speak English based upon their race.

[139] Fourth, I am satisfied that each of the elements set out in clause 9.1 of the Conduct Policy have been made out in that the comments were unwelcome, they caused offence to Mr Smith<sup>108</sup>, that a reasonable person would have anticipated the possibility that employees would take offence to the comments, and that the comments relate to a ground covered by a discrimination law.

#### Allegation 5 – The Applicant did not cooperate with other staff for the benefit of the Respondent

[140] The letter of termination set out Allegation 5 as follows:

*On 13 July 2021, between approximately midnight and 4:00am, you were witnessed in the quiet room sitting on the couch interacting with your mobile phone. You were doing so while your team was performing work which included an AOG situation. At no point during this four (4) hour span did you ascertain the needs of the team or offer assistance.*

[141] The allegation arose out of the email sent by Mr Smith to Mr Renfree on 13 July 2021 in which Mr Smith stated:

*Furthermore at approx midnight Nathan retired to the quiet room until 4am, he was not sleeping but sitting awake on the couch looking at his phone. Work was still happening and we had an AOG situation, with victor and Shaun on afternoon shift staying back until 0330, Nathan still didn't come out, show any interest or attempt to help or take over, despite being a B2 on nightshift and the job being B2 related (eec software upgrade).*

[142] As part of the investigation, Mr Richardson interviewed Mr Smith, Mr Tam, Mr David Clarke and Mr Shaun Castrodes. The investigation report records that each of those persons other than Mr Castrodes confirmed that the Applicant was absent during the four-hour time period.<sup>109</sup> Mr Clarke and Mr Tam were not called to give evidence.

[143] In the First Woods Response, the Applicant admitted that he was fatigued and had taken a break of 90 minutes during which he was contactable on his personal and work telephones.

[144] In the Second Woods Response, in response to a further question, the Applicant explained that all crew members knew where he was and he was contactable by telephone and that he managed his fatigue in line with standard practice, and that it did not fall within the guidelines requiring the filing of an OSCAR.<sup>110</sup>

[145] The investigation report concluded that this allegation was 'partially substantiated'.

[146] Under cross examination, both Mr Reid and Mr Richardson confirmed they accepted the Applicant's explanation that he took a 90-minute break, which was acceptable in the circumstances.<sup>111</sup>

[147] Accordingly, I am not satisfied that the conduct underpinning Allegation 7 occurred.

#### Allegation 8 – The Applicant referred to Mr Castrodes as the 'Bali Bomber'

[148] The letter of termination set out Allegation 8 as follows:

*Around Christmas of 2020, you referred to Shaun Castrodes as "the Bali Bomber" while in a vehicle with others present.*

[149] The allegation arose out of the investigation and was set out in the Second Letter of Allegations.<sup>112</sup>

[150] In the Second Woods Response, the Applicant provided the following response:

*Nathan Woods 13th August 2021.*

*On Thursday 5th August 2021 I responded to your Skype meeting that I would take your questions on notice and respond in writing.*

*This question was not part of the original allegations emailed to me on 20th July 2021.*

*I refute the premise of this question.*



[151] The Applicant did not respond to this allegation until the meeting with Mr Reid on 13 December 2021. In this meeting, the Applicant denied he said “*Mr Castrodes was the Bali Bomber*” but admitted he had said that Mr Castrodes’ “*smile reminded me of the Bali Bomber*”.

[152] In his witness statement in reply, the Applicant stated that he had provided the same explanation to Mr Richardson in the meeting on 2 September 2021. However, I do not accept the Applicant did so. As stated above, the meeting on 2 September 2021 was limited to Mr Richardson reading out the findings of the investigation.<sup>113</sup> Furthermore, under cross examination, the Applicant could not recall whether it was Mr Richardson or Mr Reid (or both) that he provided the explanation to.<sup>114</sup>

[153] Having regard to the evidence before me, I am satisfied, and so find, that the Applicant stated that Mr Castrodes “*smile reminded him of the Bali Bomber*” and that this constitutes a breach of clause 5.4(b) of the Conduct Policy.

[154] The parties are in dispute as to whether the conduct also constituted discrimination, harassment, bullying or victimisation in breach of clause 5.4(d) of the Conduct Policy.

[155] It was not put to the Applicant during the proceedings, or by Mr Reid on 13 December 2021, that the Applicant made the comment because of Mr Castrodes’ race, Asian appearance or that all South-East Asian people look alike.<sup>115</sup>

[156] In cross examination, the Applicant stated that Mr Castrodes’ smile had a resemblance to the Bali Bomber’s smile.<sup>116</sup> Furthermore, Mr Reid accepted that the Applicant told him that Mr Castrodes’ smile reminded him of the Bali Bomber.<sup>117</sup>

[157] The Applicant submitted that while the comment was “unflattering and weird”, there is no basis to conclude that the Applicant engaged in racist behaviour in breach of the Conduct Policy.<sup>118</sup>

[158] The Respondent submitted that if the comment was not racially motivated or related to the obvious similarity in racial and national background, then the Applicant could have explained that.<sup>119</sup>

[159] The Applicant’s evidence was that Mr Castrodes’ smile (or appearance) reminded him of the Bali Bomber. While the comment was offensive and inappropriate, I am not satisfied on the evidence before me that Applicant’s comment was in breach of clause 5.4(d) of the Conduct Policy.

#### Allegations 9, 10 and 11 – The Applicant failed to report inappropriate conduct

[160] The letter of termination sets out Allegations 9, 10 and 11 as follows:

Allegation 9:

*Between mid-February 2021 and July 2021, you failed to act on reports from members of your crew that an employee regularly displays an erection whilst at work and*

*deliberately touches his penis through his clothing in view of other crew members. You failed to report this conduct to your line manager, a People & Culture / HR representative and/or Employee Relations.*

Allegation 10:

*In February 2021, you witnessed Mr Troyak make an inappropriate comment about 'gas chambers' to Matt Paynter, a member of your crew with Jewish heritage. You failed to report this conduct to your line manager, a People & Culture / HR representative and/or Employee Relations.*

Allegation 11:

*Between mid-February 2021 and July 2021, you witnessed Mr Troyak repeatedly engage in inappropriate and anti-social behaviour in the workplace, specifically passing wind loudly and publicly, but have failed to counsel Mr Troyak about this behaviour or report the conduct to your line manager, a People & Culture / HR representative and/or Employee Relations.*

[161] Each of these allegations arose out of the Applicant's dispute notification and subsequent investigation into the conduct of Mr Troyak. The allegations were put to the Applicant in the Third Letter of Allegations.

[162] It is not in dispute that the Applicant did not report these matters at the relevant time.

[163] In relation to allegation 9, the Applicant explained his rationale for not reporting this conduct in the Third Woods Response and an interview with the Respondent as follows:

- That three employees Mr Taylor, Mr Hampton and Mr Jumeau had told him 'stories' about Mr Troyak's conduct, but did not make a formal complaint or report about it;
- He advised these employees that he will not accept such conduct on his crew if he witnessed it; and
- He has not directly witnessed Mr Troyak's conduct but stated it 'absolutely' was a breach of the Conduct Policy.<sup>120</sup>

[164] Under cross examination, the Applicant stated that the 'reports' were not formal complaints and if the conduct had been raised as a 'concern' he would have taken the matter further.<sup>121</sup>

[165] The Applicant submitted the reason for failing to report this matter was straight forward and uncontroversial.<sup>122</sup>

[166] The Respondent submitted that the Applicant's explanation that as he did not witness Mr Troyak's behaviour, this created a barrier to reporting it, should be rejected.<sup>123</sup>

[167] It is not disputed that the Applicant was aware from other members of his crew that Mr Troyak may be engaging in conduct constituting sexual harassment in breach of the Conduct Policy.

[168] It is clear from the statements<sup>124</sup> provided by Mr Edwards, Mr Hampton and Mr Jumeau, as well as the Applicant's statement as to what that Mr Taylor had told him, that Mr Troyak's conduct in displaying his erect penis through his clothing and rubbing or petting his penis through his clothing was common knowledge.

[169] That the Applicant stayed silent and took no action because no employee had provided a report or complaint in writing misses the point. The Applicant was a supervisor. The duties of a supervisor included escalating any significant breach of policies and procedures to an LMM.<sup>125</sup> The Applicant was aware from multiple sources that Mr Troyak may be regularly engaging conduct constituting sexual harassment over a period of months. The Applicant's conduct in failing to take any steps to enquire whether this conduct was occurring and/or report it allowed that conduct to perpetuate.

[170] The Applicant's explanation for not reporting Mr Troyak's conduct is simply unacceptable. This is particularly so given the Applicant ultimately reported the conduct in the absence of receiving a written report or complaint from a crew member and for the purpose of attempting to undermine Mr Troyak's credibility.

[171] Accordingly, I am satisfied, and so find, the failure to report this matter at the time was a breach of clause 4.2(d) of the Conduct Policy.

[172] In relation to allegation 10, the Applicant stated that he chose not to report the matter as he understood that Mr Paynter resolved it directly with Mr Troyak and did not make a formal complaint. The Applicant also stated that he had used toolbox talks to remind the crew to be mindful of what they say to others and to treat each other fairly.<sup>126</sup>

[173] The Applicant's explanation for not reporting the matter at the time is inconsistent with his subsequent decision to report it.

[174] The Applicant submitted that this allegation had an 'air of retribution' by accusing the Applicant of serious misconduct for not reporting an allegation that was ultimately not sustained by the Respondent. I do not accept that submission as the obligation under the Conduct Policy is to report concerns regarding possible breaches.<sup>127</sup>

[175] Accordingly, I am satisfied, and so find, the failure to report this matter at the time was a breach of clause 4.2(d) of the Conduct Policy.

[176] In relation to allegation 11, the Applicant accepted that he has not addressed this matter with Mr Troyak from a disciplinary perspective but has directed him to leave the room when he is flatulent. The Applicant stated in his interview that while farting in the office occurs, it is different with Mr Troyak in that he will not hesitate "*to put his legs up on the table or part his butt cheeks and fart for as long as possible.*"<sup>128</sup>

[177] Having regard to the evidence before me, I am satisfied, and so find, that the Applicant failed to report this matter in breach of clause 4.2(d) of the Conduct Policy.

### **Outcome of Kristian Troyak Investigation**

[178] On 22 December 2022, Mr Reid sent correspondence to Mr Troyak advising him of the findings and outcome of the investigation into his conduct. The correspondence set out the findings as follows<sup>129</sup>:

#### ***Findings***

*In summary, the following allegations have been substantiated:*

- (i) On a number of occasions, you have rubbed and touched your penis through your clothing in front of other Jetstar employees, in a deliberate, joking manner (Allegation 1(a)).*
- (ii) You have been regularly flatulent in a room with other team members present (Allegation 2).*
- (iii) On 2 July 2021, during a toolbox talk you said to your Shift Supervisor, Nathan Woods, “I’m not going to sit here and listen to this horseshit” and walked away, in response to Nathan referring to the requirement of documenting all maintenance carried out on aircraft (Allegation 3(a)).*
- (iv) On several occasions you have stated to Nathan Woods that Nathan is “sand bagging you” (Allegation 3(b)).*

[179] The correspondence states the substantiated allegations constitute a breach of clauses 4.2 and 5.4(a) and 5.4(b) of the Conduct Policy. The Respondent proceeded to issue Mr Troyak with a final warning taking into account his unblemished service, his cooperation during the investigation, and that Mr Troyak was contrite. Mr Troyak was also directed to undertake refresher training in relation to the Conduct Policy.<sup>130</sup>

### **Summary of the Applicant’s Submissions**

[180] The Applicant submitted that the allegations, separately or together, do not constitute serious misconduct or otherwise constitute a valid reason for termination.

[181] The Applicant submitted that the manner in which the investigation was conducted was not procedurally fair. In this respect the Applicant submitted that the way the Respondent loaded the Applicant up with new allegation letter after new allegation letter was an unfair way to proceed, caused confusion to the Applicant and Mr Richardson, resulting in a seriously deficient and unfair process for the Applicant.

[182] The Applicant submitted that he has been singled out or received special, harsher treatment in contrast to his colleagues, which suggests the Applicant’s dismissal was unjust.

[183] The Applicant submitted that the extreme length of time between the allegations, the aged and minor nature of many of the allegations, and the Applicant's extensive period of service and specialised trade skills render the dismissal harsh.

[184] In support of an order for reinstatement, the Applicant submitted that the real question is whether the relationship can be restored if the Applicant is reinstated. The Applicant submitted that a bare submission that there is a loss of trust and confidence is not sufficient to find that reinstatement is not appropriate.

[185] The Applicant submitted that the only obvious obstacle to reinstatement was the prospect of further conflict between the Applicant and Mr Troyak, which has been removed as Mr Troyak no longer works at Sydney Airport.

### **Summary of the Respondent's Submissions**

[186] The Respondent submitted that there was nothing unusual or inherently unfair in the investigation process and that while there were new allegations identified and put to the Applicant as the investigation progressed, they were addressed when they came to the attention of the Respondent.

[187] The Respondent submitted the Applicant's conduct breached the Conduct Policy and constituted a valid reason for the termination of the Applicant's employment.

[188] The Respondent submitted the Applicant's dismissal was procedurally fair.

[189] The Respondent submitted that there was no differential or disproportionate treatment when comparing 'apples with apples'.

[190] The Respondent submitted that the Applicant's dismissal was not harsh, unjust or unreasonable.

[191] The Respondent submitted that reinstatement would be inappropriate taking into consideration:

- The Applicant's conduct was unbecoming of a supervisor and has the potential to impact the Respondent's aircraft maintenance activities;
- The Applicant was not honest during the investigation about making the Bali Bomber comment; and
- A loss of trust and confidence between the Applicant and the Respondent.

### **Has the Applicant been dismissed?**

[192] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[193] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

- (a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or
- (b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[194] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[195] There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

[196] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

### **Initial matters**

[197] Section 396 of the FW Act requires the Commission to decide four initial matters before considering the merits of the application.

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

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

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

[199] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

- (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

[200] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>131</sup>

[201] I set out my consideration of each below.

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

[202] In order for there to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”<sup>132</sup> and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>133</sup> However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>134</sup>

[203] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>135</sup> “The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.”<sup>136</sup>

[204] Furthermore, and as a Full Bench of the Commission has said “[a] failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. A substantial and wilful breach of a policy will often, if not usually, constitute a valid reason for dismissal.”<sup>137</sup>

[205] I have found that Allegations 2, 3, 4, 6, 7, 8, 9, 10 and 11 have been substantiated on the balance of probabilities and that each of the allegations constitute a breach of the Conduct Policy.

[206] I do not accept the Applicant’s submissions that the investigation was flawed or procedurally unfair. Complaints were raised against the Applicant. The Respondent investigated those complaints. It is not uncommon for further allegations to arise during the course of an investigation. The Respondent provided the Applicant with the details of each allegation and provided an opportunity to respond to each allegation as they arose.

[207] I also do not accept the submission that the Applicant was confused by the additional allegations, leading him to providing the response, “*I refute the premise*” of the question or allegation. It was abundantly clear that the Respondent was inviting him to provide a response to further questions and/or allegations.

[208] Turning to whether the conduct justified dismissal, in relation to Allegations 3, 6 and 7, and the use of the word ‘cunt’ in the workplace, in *Construction, Forestry, Maritime, Mining and Energy Union v BHP Coal Pty Ltd*<sup>138</sup>, Asbury DP stated<sup>139</sup>:

*At the risk of stating the obvious, the term “cunt” is vulgar slang used to describe a woman’s genitals. The use of the term “cunt” in any workplace is objectively offensive and is inexcusable, regardless of context or the nature of the workplace. If there was ever a time where the use of such a term could be justified on the basis that a workplace is male dominated, that justification should have long ceased to be invoked. The fact that the term is used indirectly in a discussion with a co-worker to describe a situation, is entirely inappropriate. **To direct that term at a co-worker, is offensive to the co-worker and to anyone who hears the exchange. It also indicates that the person using the term has little respect for women by virtue of using a vulgar reference to women’s genitals to express anger about a situation or to insult and offend other persons.***

(emphasis added)

[209] I agree with the Deputy President and note that in each of my findings, the Applicant directed the term “dumb cunt” to a colleague or subordinate in the presence of crew members.

[210] Furthermore, and in the context the Respondent’s maintenance operations, the Applicant’s conduct in referring to subordinates as ‘dumb cunts’ after they have sought his advice or guidance potentially leads to situations where junior AME’s and LAME’s will not seek guidance for fear or being labelled a ‘dumb cunt’. This was explained by Mr Reid in cross examination as follows:

*To qualify my position that here is a junior AME simply coming to his supervisor to ask what component do I put on an aircraft, A or B. When he leaves the room he’s called a dumb cunt. Now, all of these comments where that word is used are in and around maintenance activity and that is of particular concern, that we have a supervisor setting a standard where potentially this young engineer would not come to Mr Woods in the future and ask a question for fear that this vitriol would be thrown at him when he’s not in the room.<sup>140</sup>*

[211] Accordingly, I am satisfied that the Applicant’s conduct in relation to each of the Allegations 3, 6 and 7 was a valid reason for his dismissal.

[212] In relation to Allegation 9, I am also satisfied this constituted a valid reason for the Applicant’s dismissal. It was common knowledge that Mr Troyak was regularly engaging in conduct constituting sexual harassment in breach of the Conduct Policy. The Applicant failed to make any enquiry to ascertain whether that was occurring or report it to management, allowing that conduct to perpetuate.



[213] In relation to each of the remaining allegations (Allegations 2, 4, 8, 10, and 11), I am not satisfied that they would justify dismissal in isolation. However, considered collectively, I am satisfied those matters constituted a valid reason for dismissal.

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

[214] Proper consideration of s.387(b) requires a finding to be made as to whether the Applicant “was notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a).<sup>141</sup>

[215] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,<sup>142</sup> and in explicit<sup>143</sup> and plain and clear terms.<sup>144</sup>

[216] I find that the Applicant was notified of the reason for the termination of his employment prior to the decision to dismiss being made, in explicit and plain and clear terms in the Show Cause Letter and the meeting on 13 December 2021. This factor weighs in favour of the dismissal not being unfair.

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

[217] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee’s employment.<sup>145</sup>

[218] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.<sup>146</sup> Where the employee is aware of the precise nature of the employer’s concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.<sup>147</sup>

[219] The Applicant was given an opportunity to respond to the allegations, the investigation findings and the proposed termination of his employment.

[220] In all of the circumstances, I find that the Applicant was aware of the precise nature of the Respondent’s concerns and was given an opportunity to respond to the reasons for his dismissal prior to the decision to dismiss being made. This factor weighs in favour of the dismissal not being unfair.

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

[221] In all the circumstances, I find there was not any unreasonable refusal by the Respondent to allow the Applicant to have a support person present to assist in discussions relating to his dismissal. This factor weights neutrally in my consideration.

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

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

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

[223] I find that the size of the Respondent’s enterprise had no impact on the procedures followed. This factor weighs neutrally in my consideration.

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

[224] I find that the Respondent’s enterprise did not lack dedicated human resource management specialists and expertise. This factor weighs neutrally in my consideration.

**What other matters are relevant?**

[225] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[226] In relation to whether dismissal was a proportionate response to the Applicant’s conduct, I have made findings in relation to the Applicant’s conduct and whether that conduct constituted justified dismissal in respect to each of the allegations. The Applicant received payment in lieu of notice. Accordingly, I do not need to consider whether the conduct was such to justify summary dismissal, as the Applicant was not summarily dismissed.

[227] In relation to other matters:

- the Applicant submits that he was subject to differential treatment compared to Mr Troyak; and
- the Applicant gave evidence that the termination of his employment has had a significant impact upon his personal and economic situation.<sup>148</sup>

*Differential Treatment*

[228] In *John Sexton v Pacific National (ACT) Pty Ltd*<sup>149</sup> (**Sexton v Pacific National**), Lawler VP dealt with the question of differential outcomes in unfair dismissal cases as follows<sup>150</sup>:

*In my opinion the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of s.170CE(1) or in determining whether there has been a “fair go all round” within the meaning of s.170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing “apples with apples”.*

*There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made. Obviously, where, as in National Jet Systems, there is differential treatment between persons involved in the same incident the Commission can more readily conclude that the cases are properly comparable. However, even then the Commission must approach the matter with caution. Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an allegedly comparable case. For example, a worker guilty of particular misconduct justifying termination might be shown leniency because of extreme need or stress arising from the serious illness of a close dependent. Another worker guilty of the same misconduct could not necessarily rely upon the leniency shown to the first worker as a basis for demonstrating that his or her termination was harsh, unjust or unreasonable. Many other examples could be constructed.*

[229] While Mr Troyak’s conduct was inexcusable, the question before me is whether the conduct of the Applicant and Mr Troyak is truly comparable in an “apples with apples” sense.

[230] The Applicant’s conduct included referring to colleagues and subordinates as ‘dumb cunts’, making sarcastic comments/mocking subordinates, making racist comments, referring to a colleague’s smile as reminding him of the Bali Bomber, and failing to report various aspects of Mr Troyak’s conduct.

[231] While Mr Troyak’s conduct constituted sexual harassment, being excessively flatulent in the office and making some disrespectful remarks to the Applicant, Mr Troyak’s conduct was largely allowed to continue because the Applicant, as his supervisor, failed to report it despite a specific duty requiring him to do so.

[232] Furthermore, and despite the abhorrent nature of Mr Troyak’s conduct, Mr Reid took into account that Mr Troyak cooperated with the investigation, took responsibility for his conduct, and was contrite.<sup>151</sup> Conversely, the Applicant adopted an obfuscatory approach to his responses to the investigation from the time he was provided with the Second Letter of Allegations.

[233] Having regard to the conduct of the Applicant and Mr Troyak and adopting a cautious approach as required by *Sexton v Pacific National*, I am not satisfied the conduct is truly comparable.

#### *Personal Impact*

[234] I have taken into account the matters raised by the Applicant, and in particular the impact of the dismissal upon his personal circumstances. Notwithstanding this, I am satisfied that the Applicant’s dismissal was not harsh, unjust or unreasonable in the circumstances.

**Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?**

[235] I have made findings in relation to each matter specified in section 387 as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>152</sup>

[236] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable because there was a valid reason for the dismissal and no other factors weigh in favour of a finding that the dismissal was unfair.

[237] In coming to this decision, I have taken into account all of the evidence and submissions of the parties. The fact that an issue is not mentioned in this decision does not mean that it has not been taken into account. I have also had regard to the object stated at s.381(2) of the FW Act to ensure that a “fair go all round” is accorded.

### **Reinstatement**

[238] The Applicant sought reinstatement. While I have found that the Applicant was not unfairly dismissed, if in the alternative I had found the Applicant was unfairly dismissed, I would not have ordered reinstatement for the following reasons.

[239] The Applicant was found to have referred to colleagues and subordinates as ‘dumb cunts’ and has referred to another colleague as the ‘Bali Bomber’. While I accept Mr Troyak may no longer work at Sydney Airport, Mr Rob Clarke, Mr Castrodes, Mr Benincasa and Mr Bagnet continue to work at Sydney Airport.

[240] I also consider the Applicant’s responses throughout the investigation support the Respondent’s submission that the necessary trust and confidence has been lost in two aspects.

[241] First, the Applicant ‘refuted’ that he had referred to Mr Benincasa as a “*fucking dumb cunt*” and did not provide a response in relation to Allegations 6 and 7 (other than to ‘refute’ those allegations on the basis that they were not included in the First Letter of Allegations) before conceding during the proceedings that he had referred to colleagues and subordinates as “dumb cunts”.

[242] Second, the Applicant’s denial of the Allegation 8 without disclosing to the Respondent that he had said something very similar, albeit different in effect, until the show cause meeting was, in my view, disingenuous.

[243] Having carefully considered these matters, I am not satisfied that the employment relationship could be restored and therefore, conclude on balance that reinstatement would, if an alternative conclusion was reached, be inappropriate.

### **Conclusion**

[244] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

[245] The Application is dismissed. An Order to that effect will be issued with this decision.



COMMISSIONER

*Appearances:*

Mr *L Saunders*, of counsel for the Applicant.  
Ms *V Bulut* of counsel, for the Respondent.

*Final Written Submissions:*  
Applicant: 11 July, 15 August.  
Respondent: 8 August.

*Hearing details:*

Sydney (via Microsoft Teams video-link):  
2022.

3 June.17, 18 May.

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<sup>1</sup> Exhibit A1 at [1]; Exhibit R3 at [10].

<sup>2</sup> Exhibit R2 at [20].

<sup>3</sup> Exhibit R3, Annexure JR1 at cl.13.

<sup>4</sup> Exhibit R3 at [16], Annexure JR2.

<sup>5</sup> Exhibit R3, Annexure JR2 at [2].

<sup>6</sup> *Ibid* at [5].

<sup>7</sup> *Ibid* at [12].

<sup>8</sup> Exhibit R3 at [7]-[9].

<sup>9</sup> Exhibit R2 at [20].

<sup>10</sup> Exhibit R3 at [12].

<sup>11</sup> Exhibit R3 at [12]-[15].

<sup>12</sup> Exhibit A6.

<sup>13</sup> Exhibit A1 at [8]-[9].

<sup>14</sup> *Ibid* at [10].

<sup>15</sup> *Ibid* at [12]-[14].

<sup>16</sup> Exhibit A6.

<sup>17</sup> Exhibit R6 at [18]-[19]; Exhibit R5 at [17]-[18].

<sup>18</sup> Exhibit R5 at [18]-[19].

<sup>19</sup> Exhibit R6 at [19]-[21].

- <sup>20</sup> Exhibit A8.
- <sup>21</sup> Exhibit R6 at [26].
- <sup>22</sup> Exhibit R6 at [21]; Transcript at PN3167-PN3169; PN3179-PN3184; PN3193.
- <sup>23</sup> Exhibit A1 at [32]- [36].
- <sup>24</sup> Exhibit A1 at [35]; Exhibit R6 at [30].
- <sup>25</sup> Exhibit A1 at [43]; Exhibit R6 at [39]-[40]; Transcript at PN3179-PN3184.
- <sup>26</sup> Exhibit R5 at [26].
- <sup>27</sup> Exhibit R3 at [21], Annexure JR4; Exhibit R6 at [13], Annexure KT1.
- <sup>28</sup> Exhibit R3 at [23]; Exhibit A11.
- <sup>29</sup> Exhibit A11.
- <sup>30</sup> Exhibit A13.
- <sup>31</sup> Ibid.
- <sup>32</sup> Exhibit A12.
- <sup>33</sup> Exhibit A1, Annexure NW3; Exhibit R6, Annexure KT2 (Hearing book p.682).
- <sup>34</sup> Exhibit A1 at [42], Annexure NW3.
- <sup>35</sup> OSCAR is the Respondent's reporting system to report safety-related incidents (See Exhibit R6 at [30]).
- <sup>36</sup> Exhibit A9.
- <sup>37</sup> Exhibit R6, Annexure KT2 (Hearing book p.682).
- <sup>38</sup> Exhibit R6, Annexure KT2 (Hearing book p.682).
- <sup>39</sup> Exhibit R3 at [25], Annexure JR5; Exhibit R6 at [15], Annexure KT2.
- <sup>40</sup> Exhibit R1 at [10], Annexure CS1; Exhibit R3, Annexure JR7.
- <sup>41</sup> Exhibit R3 at [27], Annexure JR6.
- <sup>42</sup> Exhibit R1 at [11], Annexure CS2; Exhibit R3, Annexure JR8.
- <sup>43</sup> Exhibit R6 at [26]-[30].
- <sup>44</sup> Exhibit R2 at [19]-[22].
- <sup>45</sup> Exhibit R3 at [32]-[33], Annexure JR9; Exhibit A1 at [64], Annexure NW5.
- <sup>46</sup> Exhibit A1 at [65], Annexure NW6; Exhibit R3 at [35], Annexure JR10.
- <sup>47</sup> Exhibit R3 at [36], [38].
- <sup>48</sup> Exhibit A1 at [66]; Exhibit R3 at [37].
- <sup>49</sup> Exhibit A1 at [67], Annexure NW7; Exhibit R3 at [39]-[41], Annexure JR11.
- <sup>50</sup> Exhibit R3 at [41], Annexure JR12.
- <sup>51</sup> Exhibit A1 at [71]; Exhibit R3 at [42]-[43].
- <sup>52</sup> Exhibit A1 at [72], Annexure NW9; Exhibit R3 at [44], Annexure JR13.
- <sup>53</sup> Exhibit R3 at [45], Annexure JR14.
- <sup>54</sup> Exhibit R3 at [46].
- <sup>55</sup> Ibid.
- <sup>56</sup> Exhibit A4 at [9], Annexure BS1.
- <sup>57</sup> Exhibit R3, Annexure JR17; Transcript at PN461-PN464, PN760.
- <sup>58</sup> Transcript at PN770-PN773.
- <sup>59</sup> Exhibit R2 at [27].
- <sup>60</sup> Exhibit R3, Annexure JR23.
- <sup>61</sup> Exhibit A1 at [73], Annexure NW10; Exhibit R3 at [53]-[54], Annexure JR16.
- <sup>62</sup> Exhibit A1 at [74], Annexure NW11; Exhibit R3 at [59], Annexure JR19.
- <sup>63</sup> Exhibit R2 at [28]-[30].

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- <sup>64</sup> Exhibit A1 at [75], Annexure NW12; Exhibit R3 at [66], Annexure JR22.
- <sup>65</sup> Ibid.
- <sup>66</sup> Exhibit A1 at [76], Annexure NW13; Exhibit R2 at [32], Annexure CR6.
- <sup>67</sup> Exhibit R2 at [33]-[35].
- <sup>68</sup> Exhibit R2 at [36]-[38], [40]-[56].
- <sup>69</sup> Exhibit A1 at [77]-[78], Annexure NW14; Exhibit R2 at [39], Annexure CR7.
- <sup>70</sup> Exhibit A1, Annexure NW14; Exhibit R2, Annexure CR7.
- <sup>71</sup> Ibid.
- <sup>72</sup> Sydney Trains v Hilder [\[2020\] FWCFCB 1373](#) at [26].
- <sup>73</sup> Exhibit R6, Annexure KT1.
- <sup>74</sup> Exhibit R1 at [15]-[16].
- <sup>75</sup> Transcript at PN1020-PN1025.
- <sup>76</sup> Exhibit R5 at [23]-[24].
- <sup>77</sup> Transcript at PN2958-PN2961.
- <sup>78</sup> Transcript at PN3168-PN3170.
- <sup>79</sup> Exhibit R3, Annexure JR22 (Hearing Book p.644).
- <sup>80</sup> Exhibit R6 at [42]; Annexure KT1 (Hearing Book p.675).
- <sup>81</sup> Exhibit R3, Annexure JR23 (Hearing Book p.656).
- <sup>82</sup> Exhibit R3, Annexure JR12 (Hearing Book p.600-601).
- <sup>83</sup> Exhibit R5 at [26].
- <sup>84</sup> Exhibit A2.
- <sup>85</sup> Exhibit A3.
- <sup>86</sup> Applicant's Submissions in Reply at [60]-[62].
- <sup>87</sup> Exhibit R1, Annexure CS2.
- <sup>88</sup> Exhibit R3, Annexures JR11 and JR23.
- <sup>89</sup> Exhibit R3, Annexure JR23.
- <sup>90</sup> Applicant's Closing Submissions at [76].
- <sup>91</sup> Exhibit A1 at [48]-[49].
- <sup>92</sup> Exhibit R1 at [26]-[29]; Exhibit R5 at [12]-[14].
- <sup>93</sup> Exhibit R1 at [30]-[34]; Exhibit R5 at [10].
- <sup>94</sup> Exhibit A3 at [7].
- <sup>95</sup> Transcript at PN231-232, PN369, PN398, PN649 and PN775-PN780.
- <sup>96</sup> Exhibit R3, Annexure JR23.
- <sup>97</sup> Transcript at PN323-PN325; PN327-PN330.
- <sup>98</sup> Transcript at PN503-PN519.
- <sup>99</sup> See also Exhibit R1 at [37]-[39].
- <sup>100</sup> Exhibit R1 at [35]-[43], Annexure CS3.
- <sup>101</sup> Exhibit A1 at [50].
- <sup>102</sup> Transcript at PN537-PN538, PN550, PN662-PN663.
- <sup>103</sup> Transcript at PN535.
- <sup>104</sup> Transcript at PN1117-PN1138.
- <sup>105</sup> Applicant's Closing Submissions at [86]-[95].
- <sup>106</sup> Respondent's Closing Submissions at [24]-[29].
- <sup>107</sup> Exhibit R2, Annexure CR1 at [8]-[9].

- <sup>108</sup> Transcript at PN1124.
- <sup>109</sup> Exhibit R3, Annexure JR23 (Hearing Book p.659).
- <sup>110</sup> Exhibit R3, Annexure JR12 (Hearing Book p.603-605).
- <sup>111</sup> Transcript at PN1417-PN1418, PN2557-PN2558.
- <sup>112</sup> Exhibit R3, Annexures JR11 and JR23.
- <sup>113</sup> Transcript at PN231-232, PN369, PN398, PN649 and PN775-PN780.
- <sup>114</sup> Transcript at PN559.
- <sup>115</sup> Transcript at PN1797.
- <sup>116</sup> Transcript at PN563.
- <sup>117</sup> Transcript at PN1794.
- <sup>118</sup> Applicant's Closing Submissions at 100]-[101].
- <sup>119</sup> Respondent's Closing Submissions at [23].
- <sup>120</sup> Exhibit A16; Exhibit A17; Exhibit R3, Annexure JR15 (Hearing book p.619-620); Annexure JR19.
- <sup>121</sup> Transcript at PN421-PN426.
- <sup>122</sup> Applicant's Closing Submissions at [104].
- <sup>123</sup> Respondent's Closing Submissions at [69].
- <sup>124</sup> Exhibit R3, Annexure JR15.
- <sup>125</sup> Exhibit R3 at [13].
- <sup>126</sup> Exhibit A16; Exhibit A17; Exhibit R3, Annexure JR15 (Hearing book p.619-620); Annexure JR19.
- <sup>127</sup> Exhibit R2, Annexure CR1.
- <sup>128</sup> Exhibit A16; Exhibit A17.
- <sup>129</sup> Exhibit A10.
- <sup>130</sup> *Ibid*.
- <sup>131</sup> *Sayer v Melsteel Pty Ltd* [2011] FWA FB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [69].
- <sup>132</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- <sup>133</sup> *Ibid*.
- <sup>134</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- <sup>135</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7]; *Sydney Trains v Hilder* [2020] FWC FB 1373 at [26].
- <sup>136</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24]; *Sydney Trains v Hilder* [2020] FWC FB 1373 at [26].
- <sup>137</sup> *B, C and D v Australian Postal Corporation t/a Australia Post* [2013] FWC FB 6191, [36].
- <sup>138</sup> [2022] FWC 1699.
- <sup>139</sup> *Ibid* at [180].
- <sup>140</sup> Transcript at PN1847.
- <sup>141</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWC FB 6429 at [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWC FB 533 at [55].
- <sup>142</sup> *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151.
- <sup>143</sup> *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- <sup>144</sup> *Ibid*.
- <sup>145</sup> *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at [75].
- <sup>146</sup> *RMIT v Asher* (2010) 194 IR 1 at 14-15.
- <sup>147</sup> *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 at 7.
- <sup>148</sup> Exhibit A1 at [81]-[83].
- <sup>149</sup> [2003] AIRC 506.



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<sup>150</sup> Ibid at [36].

<sup>151</sup> Exhibit A10.

<sup>152</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357 at [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [92]; *Edwards v Justice Giudice* [1999] FCA 1836 at [6]-[7].