DECISION

Fair Work Act 2009
s.604—Appeal of decision

Low Latency Media Pty Ltd T/A Frameplay, Frameplay Holdings Corporation

v

Eric Rossi
(C2022/5655)

VICE PRESIDENT CATANZARITI
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT LAKE

SYDNEY, 6 SEPTEMBER 2023

Appeal against decision [2022] FWC 2133 of Commissioner Yilmaz at Melbourne on 12 August 2022 in matter number U2021/6369 – permission to appeal granted – appeal dismissed.

Introduction and Procedural History

[1] Low Latency Media Pty Ltd T/A Frameplay (first Appellant/Company/LLM) and Frameplay Holdings Corporation (second Appellant) (collectively, the Appellants) have lodged an appeal under s. 604 of the *Fair Work Act 2009* (the Act), for which permission is required, against a decision[1] (Merits Decision) of Commissioner Yilmaz, issued on 12 August 2022. This appeal (Merits Appeal) follows an earlier appeal against a decision of the fCommissioner dismissing a jurisdictional objection by the Appellants to the Respondent's unfair dismissal application.[2] In that decision the Commissioner found that the amount of the Respondent's annual earnings was below the high income threshold, notwithstanding that his contract of employment provided for an annual salary that was above that amount, on the basis that the Respondent's salary had been reduced in the six month period prior to his dismissal.

[2] The Commissioner proceeded to hear the Respondent's application for an unfair dismissal remedy, and in the Merits Decision, determined that he had been unfairly dismissed. In the Merits Decision, the Commissioner found that Mr Eric Rossi (Respondent) had been unfairly dismissed from his position as Chief Technology Officer (CTO) and ordered reinstatement and an amount for lost remuneration. The Commissioner based the order for lost remuneration on an amount that was calculated to reinstate the Appellant's salary to the amount he had been paid prior to the reduction in the six months prior to the termination of his employment. The Commissioner also ordered that the Respondent be reimbursed other amounts for wages deferred and not paid prior to the dismissal, the correct rate for annual leave, deductions from annual leave that the Commissioner determined were made without cause and that superannuation be paid on those amounts.

[3] The Merits Appeal was lodged on 14 August 2022. In the Notice of Appeal, the Appellants sought a stay of the orders made by the Commissioner which was granted on 17 August 2022 pending the determination of the Merits Appeal.[3] The stay was granted on the basis of an undertaking provided by the Appellants' legal representative that the Appellants would not take any steps to fill the Respondent's position pending the hearing and determination of the appeal and that interest would be paid on any amount ordered to be paid to the Respondent. In the stay application, the Appellants indicated that they had taken preliminary steps to fill the Respondent's role but would cease this action pending the hearing and determination of the Merits Appeal.

[4] On 31 August 2022, the Appellants sought to add a new ground to the Merits Appeal, to the effect that the amount determined by the Commissioner to compensate the Respondent for lost remuneration, was inconsistent with the Commissioner's finding that his annual salary was less than the high income threshold. Following an exchange with the Full Bench, the Appellant lodged an appeal against the Jurisdictional Decision (Jurisdictional Appeal) and sought an extension of time to appeal that decision.

[5] In a decision issued on 24 January 2023,[4] we extended the time to lodge the Jurisdictional Appeal and dismissed it, finding that while there were aspects of the Merits Decision associated with the awarding of backpay and compensation that were arguably erroneous, the Merits Decision did not involve a finding that was inconsistent with the Jurisdictional Decision and the Commissioner correctly decided that at the time of dismissal the Respondent's annual earnings were below the high income threshold. We also made observations about issues for the cases advanced by both parties should this matter proceed and offered to arrange a Member Assisted Conciliation conference if both parties agreed. The Respondent did not agree to participate in such a conference and the Appellants pressed the Merits Appeal, which was heard on 6 March 2023.

[6] Shortly before the hearing of the Merits Appeal, and in addition to the 19 appeal grounds, the Appellants filed a document headed: "*APPELLANTS SCHEDULE OF FACTUAL ISSUES*" setting out 15 matters said to arise from the evidence at first instance and asserting that the Commissioner failed to give adequate weight to those matters in the Merits Decision. The Respondent objected to the document. We determined that as the document referred to evidence in the first instance hearing, we would receive it. The Respondent was provided with an opportunity to file submissions in response to the document and did so on 19 March 2023. The Respondent submitted that the document raised additional grounds of appeal and should not be considered by the Full Bench. The Appellants sent a further document (with leave granted by the Full Bench) setting out the appeal grounds to which each evidentiary matter set out in the first document was said to relate. We accepted that document on the basis that it clarified the relevance of matters raised in the first document, to each of the 19 grounds set out in the Notice of Appeal.

[7] The Full Bench declined to receive further submissions and evidence from the Appellants on 2 May asserting that there had been a "*material development*" and that the undertaking not to fill the Respondent's position while a stay of the Merits Decision was in effect should be set aside. The Full Bench refused this request, on the basis that the matter said to be a material development was that the Appellants wanted to fill the Respondent's position. In our view, this was foreshadowed by the Appellants at the time the stay was granted and was

not a material development. Further, we considered that as the stay was granted on the basis of the Appellants' undertaking not to fill the position pending the outcome of the Merits Appeal, it was not appropriate to vacate the stay order prior to the Merits Appeal being determined.

The Merits Decision

[8] The Commissioner commenced by setting out the background and the submissions of the parties. In summary, the Respondent and the Appellants' CEO Mr Jonathan Troughton were business partners and co-founders when Low Latency Media Pty Ltd (the first Appellant) was incorporated in January 2018. The Respondent, a software engineer and accredited with Engineers Australia, brought to the business his software technical skills as the architect and designer of software that the first Appellant uses to embed advertisements within video games. Mr Troughton was responsible for day-to-day operations, securing funding and overall administration. The Respondent was the sole Director and an employee of the first Appellant at all relevant times. As an undischarged bankrupt when the first Appellant was formed, Mr Troughton could not be a director and held the role of Adviser. For reasons not disclosed in the proceedings, Mr Troughton was not employed by the first Appellant and was paid as a contractor by another business the Respondent owned.

[9] In July 2019, the full shareholding of the first Appellant was transferred into Frameplay Holdings Corporation (the second Appellant), a US company. Thereafter, Mr Troughton moved to the US and assumed the roles of CEO and Director of the second Appellant. This change to business structure resulted in the first Appellant becoming the Australian subsidiary of the second Appellant. The Respondent was a shareholder, director and Board member of both entities and continued in the role of Director of the first Appellant. For a period up until at least September 2020, the Respondent and Mr Troughton were joint Directors of the second Appellant. Additional directors joined the Board of the second Appellant at some point after September 2020. The Respondent was paid director fees until November 2019 and drew a salary from the business from either November or December 2019. The engineering team was employed by the first Appellant based in Melbourne and managed by the Respondent. Other employees were employed by the second Appellant and based in the US.

[10] The Respondent was notified of his dismissal for serious misconduct, by telephone and a letter dated 2 July 2021. The letter of termination, set out at paragraph [106] of the Merits Decision, summarised the Appellants' "*concerns*" about the Respondent's conduct as follows:

> "(a) serious substantiated contraventions of your Contract and Australian statutes including in relation to bullying and sexism, insubordination and dereliction of duties;
>
> (b) consistent lack of leadership around product and technology;
>
> (c) consistent lack of collaboration with executives and key business staff;
>
> (d) consistent missed product delivery deadlines and lack of KPI monitoring and poor, clarifying communication;
>
> (e) openly rejection of company culture and values, including a pattern of disrespect and inappropriate behaviour;
>
> (f) absent leadership;

(g) staff hesitancy and reluctance to be themselves due to your hostility and their fear of retribution."

[11] The termination letter also set out what were said to be examples of conduct and performance issues justifying the Respondent's dismissal. These examples were also said, in the Appellants' submissions, to constitute valid reasons for summary dismissal.

[12] The termination letter went on to state that intimidation and sexism are serious acts of misconduct and that wilful disregard to duties and insubordination are contrary to the Appellants' Handbook and HR policies and constitute breaches of the Respondent's contract of employment. The termination letter further stated that the Respondent's conduct had brought the Appellants into disrepute and exposed them to significant reputational and financial harm. In conclusion the letter stated that the Appellants had no choice but to summarily dismiss the Respondent without notice, for "*unlawful harassment, sex discrimination, wilful disobedience, wilful breach of duty, wilful breach of workplace policy, and wilful neglect of duties pursuant to clause E3 of your Contract*".[5] The Respondent's employment ended on 2 July 2021, and he was removed as a director on 7 July 2022.

[13] The Commissioner noted the Appellants' submission that item 3 of the schedule of the Respondent's employment contract provided that he reported to Mr Troughton and that it was a contractual term that he may be summarily dismissed for serious misconduct, instances of which were listed in the contract. The Appellants submitted that there were at least four occasions where the Respondent was warned that he was acting in contravention of his contract and that the Respondent cultivated a hostile work environment impacting the health and safety of other employees.

[14] According to its submissions, by around June 2021, the Appellants determined that should the Respondent not be dismissed, there was an increased risk of resignation, loss of potential investors, inadequate technical innovation and a potential lawsuit. Mr Troughton is also recorded as stating that he lost trust and confidence in the Respondent as a leader, considered that the Respondent could not deal honestly with financial matters, and that these reasons, together with demonstrated serious misconduct, justified the Respondent's summary dismissal on 2 July 2021.

[15] In relation to whether there was a valid reason for dismissal, the Respondent's conduct was said to have specifically included:

- Disparaging senior, female employees and executive staff on 28 July 2020;
- Swearing and directing offensive language towards a junior member of staff on 10 August 2020;
- Undermining executive directions on 3 March 2021;
- Intimidating staff on 31 March 2021;
- Singling out a staff member to withhold their equity on 22 April 2021;
- Admitting to lacking dedication to the role on 20 May 2021; and
- General hostility.

[16] This conduct was said to satisfy the common law meaning of serious misconduct, and Regulation 1.07 of the *Fair Work Regulations 2009*, and to have caused grief to victims and created a hostile work environment, resulting in stress, anxiety, humiliation and depressed

moods in several employees. The Respondent was also alleged to have engaged in financial misconduct concerning wages and tax obligations, with reference to evidence filed during the jurisdictional hearing said to support this allegation.

[17] Further, the Appellants contended that the Respondent was constantly on notice with respect to his conduct and capacity and that on 28 July 2020, Mr Troughton raised the misconduct directly indicating that the Respondent's employment may be terminated if the conduct continued. The Appellants contended that due to a loss of trust and confidence it would not be feasible to re-establish the employment relationship, opposed reinstatement strongly, and submitted that compensation was inappropriate.

[18] The Commissioner recounted that the Respondent denied the allegations and maintained that he did not engage in the conduct set out in the termination letter. The Respondent contended that there was no valid reason for his dismissal based on capacity or conduct, and that he was not given a clear reason for his dismissal. The Respondent said that prior to 2 July 2021, he was not aware of any reasons that would have led to dismissal, that there was no warning, and that the process was devoid of fairness within the meaning in s. 387 of the Act and was manifestly disproportionate to the circumstances said to justify his dismissal. The Respondent also said that certain incidents referred to in his termination letter predate his contract of employment and in any event, no action was taken in respect of these incidents at the time.

[19] Further, the Respondent submitted that the following circumstances are relevant to the dismissal being harsh, unjust or unreasonable:

- He was a founder of the business;
- His length of employment with the business;
- He agreed to a 30% pay reduction in February 2021 in good faith and in the best interests of the company; and
- The Appellants were aware that his wife was on maternity leave with a newborn, and he was the sole income earner for his family.

[20] The Respondent also pointed to the fact that he had personally guaranteed a loan of $100,000 to the first Appellant and had loaned money to the business at various times when it was in financial difficulty. The Respondent also submitted that as the largest shareholder of the Company he would not do anything to damage the business and sought reinstatement to his position of CTO with reimbursement for lost pay and the correction to an alleged unauthorised deduction by the Respondent of his annual leave accrual. Further, the Respondent also sought a correction to his ATO payment summary consistent with the findings in the Jurisdictional Decision, to accurately reflect earnings, instead of the incorrect figure regarding his income for the period 2019/20 financial year.

[21] The Commissioner then turned to consider the evidence of each witness, commencing with the evidence of the Respondent. In relation to the allegation that the Respondent told the engineering team on 3 March 2021, that they should disregard everything the other executives say because he is running the Company, the Commissioner found that this statement was not – as stated in the termination letter – contrary to the first Appellant's constitution. The Commissioner also noted that as the sole director of the Appellants in Australia, the Respondent was responsible for matters such as the health and safety of employees located in Australia.

Further, the Commissioner accepted the Respondent's submission that differences in the recollection of the Appellants' witnesses about what was said are inconsistent with the alleged statement being serious misconduct.

[22] The Commissioner also considered an issue the Appellants raised during the course of the proceedings that the Respondent deliberately failed to turn on his camera during on-line meetings, which constituted an act of insubordination, and undermined the CEO and overall workplace culture. The Respondent contended there were no references to cameras in the termination letter and disputed Mr Luke Austin's evidence that failure to have a camera was undermining. In cross-examination, the Respondent stated that he was working from home at the relevant time due to the COVID-19 pandemic, the computer he was using did not have a camera, LLM had no funds for additional technology to be used at home and he was not instructed to purchase a camera for his computer. In relation to warnings that Mr Troughton allegedly gave to the Respondent for publicly disparaging Mr Li Fang Wu and Ms Cary Anna-Dawson Tilds, the Commissioner found, based on the cross-examination of Mr Troughton, that his evidence about warnings was not supported by other witnesses.

[23] The Commissioner then considered the evidence of Mr Peter Morris, given on behalf of the Respondent. Mr Morris was a financial controller who had been employed on a casual basis since 8 October 2019 and had been performing duties for the first Appellant since its creation. Mr Morris' evidence was that taxation, financial and JobKeeper records were properly kept and recorded, that he spoke regularly to Mr Wu about financial matters, that Mr Troughton and Mr Wu had access to financial information in the Company's Xero system and that the Respondent made loans to the LLM when there were cashflow issues, both personally and via his separate business, RES Pty Ltd. Mr Morris also confirmed that the Respondent had borrowed $100,000 for the benefit of the first Appellant, which was personally guaranteed by him, to address cash flow issues that impacted the wages of Melbourne staff.

[24] Turning to the evidence given by Mr Troughton for the Appellants, the Commissioner found that Mr Troughton failed to provide any credible evidence to support the allegations against the Respondent and his responses while giving evidence were vague and non-committal. In relation to performance-related allegations that the Respondent lacked leadership on product and technology development, missed product delivery deadlines, failed to undertake KPI reporting and on 20 May 2021, disclosed to a staff member that he only dedicates 20% of his time to the CTO role, Mr Troughton heavily relied on an alleged "*independent*" audit report (also referred to as a "*due diligence report*") that had resulted from a meeting between the Respondent, a select number of members of the Appellant's engineering team and Mr Wise, an external adviser to the second Appellant.

[25] The Commissioner found that despite Mr Troughton not attending the meeting, Mr Troughton drafted the report rather than Mr Wise, and that Mr Troughton had not shared the draft report with anyone in the engineering team for feedback or to check its accuracy. The Commissioner also found that the Respondent was not informed of the allegations on which Mr Troughton relied to justify the dismissal and that no evidence was tendered to the contrary. It was also alleged by Mr Troughton and Mr Wu that the Respondent employed Mr Morris for 2.5 years without their knowledge. The Commissioner rejected this evidence noting that their responses raised questions of credibility and observed that Mr Troughton and Mr Wu had access to Xero and the employment pay records including the single touch payroll reports to the ATO

for each employee, and those records would have shown a wage paid to Mr Morris and the tax paid to the ATO.

[26] Mr Troughton also gave evidence as to financial matters, including the $100,000 loan that the Respondent took out on behalf of the first Appellant and personally guaranteed. The Commissioner heard from the Respondent that the loan had been agreed between him and Mr Troughton as a temporary measure to pay wages due to cash flow issues until the 2019/2020 tax return, and that it was agreed the loan would be repaid immediately to avert further costs. While the Respondent tendered in evidence emails between Mr Troughton, Mr Wu and himself about the loan, the Appellants did not tender evidence to dispute the Respondent's account.

[27] Further, the Commissioner noted Mr Troughton's evidence that it was near impossible to record events and warnings relating to the Respondent for two reasons: firstly, he was too busy seeking out investors and secondly, by recording warnings he felt it would expose the business negatively should potential investors seek to access the employment contracts and HR records. The Commissioner found it was alarming and improper that Mr Troughton had sought external advice from "*C Level*" executives of leading companies in the industry on whether he should dismiss the Respondent, based on his own perceptions and his description of alleged conduct. The Commissioner found that this advice was not independent or reliable, but instead appeared to have resulted in the Respondent being disparaged unfairly in an industry in which he operates and in circumstances where the Respondent had no capacity to defend his reputation against the allegations of serious misconduct disseminated by Mr Troughton.

[28] Additionally, the Commissioner found that there was an absence of evidence from Mr Troughton in relation to any warning or disciplinary action taken by him to address the issues that he described as so serious to warrant summary dismissal, which included allegations of sex discrimination, bullying and insubordination. In relation to the 3 March 2021 incident, the Commissioner recorded that in cross-examination, the Respondent had taken Mr Troughton through variances in the reports made by Mr Austin and Mr Clifford Gurney in relation to allegations of the Respondent undermining executive directions in a meeting with the engineering team. Mr Troughton confirmed that despite the variance between the reports, he only had regard to the report of Mr Austin, made no further inquiries of any sort and stated, "*I had no reason to believe or doubt the legitimacy of what was said.*"

[29] Further, the Commissioner noted that Mr Troughton had acted to dismiss the Respondent following a report by Ms Tilds that the Respondent had "*interrogated*" her staff member via an electronic messaging system used by the Appellants, referred to as Slack. The Commissioner noted that in his evidence, Mr Troughton struggled to explain the seriousness of this matter after reading the text of the relevant Slack discussion tendered by the Respondent, admitted to not investigating the matter and confirmed the text of the discussion does not resemble an interrogation.

[30] The Commissioner also heard that Mr Troughton had undertaken an assessment of the Respondent's performance on 31 May 2021 but there was no specific event concerning this date other than his decision that "*enough is enough*" and that he would dismiss the Respondent. Mr Troughton confirmed no evidence or information was given to the Respondent to respond to, and the delay in dismissing the Respondent was because Mr Troughton needed to obtain legal advice to assist in the dismissal process. The Commissioner found that Mr Troughton's

evidence was supported by Mr Michael William Blake who confirmed that the firm Harmers Workplace Lawyers was engaged to provide advice on the steps to dismiss, risk mitigate and keep information on an impending dismissal from the Respondent.[6]

[31] The Commissioner concluded that, on an objective analysis, Mr Troughton's evidence showed a failure to provide the Respondent with any detail regarding the allegations made against him prior to dismissal and that the Respondent was not provided with an opportunity to respond, and no efforts were made to investigate or verify any reports relating to the Respondent's alleged conduct. The Commissioner observed that Mr Troughton spoke of needing to respect individuals and to take action to make them feel safe and valued, yet no such action was afforded to the Respondent.

[32] Next, the Commissioner turned to the evidence of Mr Wu, who confirmed that he was the CFO and an executive officer, but not a member of the Board of the Second Appellant. Mr Wu confirmed that he did not record discussions at Board level concerning allegations regarding the Respondent's behaviour. Mr Wu raised concerns about the Respondent's decision-making on financial matters including allegations that the decisions were unauthorised, back payment of the Respondent's wages that were owing, payment of rent, the repayment or insistence on repayment of $100,000 borrowed by the Respondent for the benefit of the first Appellant, and that Mr Morris was appointed as an employee and paid wages and superannuation.

[33] The Commissioner found that Mr Wu was unclear about obligations in Australia for payments to employees as opposed to contractors and was unaware of the circumstances where superannuation payments are payable to contractors. The Commissioner considered that it was a simplistic view for Mr Wu to call Mr Morris a contractor because there was no contract, despite there being evidence to the contrary. In relation to the $100,000 loan to the first Appellant guaranteed by the Respondent, the Commissioner noted that if the decisions made had been "*unauthorised*" as contended, it would be a reasonable expectation that minutes could or should be produced. Instead, the Commissioner observed in relation to the witnesses for the Appellant that "*copious hours of evidence*" on these matters from each witness simply produced more conflicting evidence. The Commissioner preferred, on balance, the evidence of Mr Morris and the Respondent, finding it was clear, direct, and unwavering and that the same could not be said for the evidence of Mr Wu and Mr Troughton.

[34] The Commissioner also found it difficult, on balance, to accept the evidence of Mr Troughton and Mr Wu, that they were not aware of payments made by the Respondent, when they had access to Xero and controlled the funds deposited into LLM to cover all liabilities. Further, the Commissioner expressed concerns with a series of incident reports about the Respondent, attached to Mr Wu's statement finding that:

- The reports were not contemporaneous nor validated, there was an inconsistent approach, selective material was inserted into the reports, and the Respondent, who was the subject of the allegations, was never given any information that they existed, or given an opportunity to reply.

- The existence of the reports did not support Mr Troughton's evidence that he did not keep records because of fear that investors would access the information.

- The reports were made with Mr Troughton's knowledge and authority, and their purpose was to either support the letter of termination or as corroborating evidence.

- Mr Wu's view that the date of producing the reports was irrelevant should be rejected and that on any reasonable analysis, the date of manufacture of each report is a credibility issue which appeared to have been lost on Mr Wu.

- There was no evidence of the three purposes for the reports as suggested by Mr Wu, being to check in on employees, manage performance and HR processes and manage risk for the company and in particular, and that this process was not applied to the Respondent, suggesting that the reports were produced for the proceedings before the Commissioner.

[35] The Commissioner also pointed out that the incident report attached to Mr Gurney's witness statement, concerning the event on 28 October 2020, did not resemble the other incident reports tendered by Mr Wu, despite Mr Wu confirming that he also was the author of that report.

[36] The Commissioner then considered the evidence of Ms Tilds, who is based in the US, reported to Mr Troughton and received instructions from him including his direction that she spoke to the engineering team directly and engage on a one-on-one basis. Ms Tilds said that the Respondent was rude, talked down at staff, had a demeaning tone, and she and others felt disrespected and disregarded. Ms Tilds also stated that it was inappropriate for the Respondent to bypass her and go directly to "*my staff*", refer to her as the CMO when her title was Chief Strategy and Operations Officer and in relation to the important work contained in a strategic roadmap prepared by Ms Tilds, refer to her emails as "*noise*". Ms Tilds attached to her witness statement a sample of the emails she sent to the Respondent detailing and requesting follow-up or a response from the Respondent. The Commissioner noted that in the period 1 May to 27 June 2020, there were 96 emails sent to the Respondent by Ms Tilds over a period of some 40 working days. In respect to the allegations about the Respondent's conduct at a meeting on 31 March 2021 regarding a marketing presentation on branding, Ms Tilds said that she knew that the Respondent had a script for the meeting, but he went off script and made a comment that green and blue should not be seen together, which in Ms Tilds' view, was offensive.

[37] Mr Austin's evidence was that he worked with and reported to the Respondent for 2.5 years and although no evidence of any discussion between Mr Austin and the Respondent was tendered, the Commissioner noted that Mr Austin and the Respondent communicated with employees via Discord. Mr Austin described incidences where the Respondent could be prickly, judgemental, or negative. The Commissioner found that Mr Austin stated that the culture was negative while the Respondent was employed, but could not provide any detail regarding this, other than two events, being an incident with a "*junior*" employee and the comment the Respondent made to ignore what the CEO said because it is his company. The Commissioner also recorded that Mr Austin acknowledged the difficulty the Respondent had was with employees, and his ability to communicate different opinions suggested he lacked to skills to do so.

[38] In relation to the incident with the "*junior*" employee, Mr Austin explained that a member of the team – Mr Solarino – was reprimanded by the Respondent for failing to attend

work on a series of Fridays. The Commissioner noted that what was said was the subject of contention, and Mr Austin could not recall if the word "*cunt*" was used but said that the Respondent told Mr Solarino that his behaviour was not good enough. Further, Mr Austin, Mr Li, Mr Troughton and Mr Gurney gave evidence about the impact of the Respondent's discussion with Mr Solarino, including that the behaviour caused a significant mental health injury. The Commissioner found that their evidence was inconsistent and unreliable, and the evidence of Mr Austin that the Respondent later had a cigarette with the employee did not suggest evidence of a traumatised employee.

[39] Further, the Commissioner noted there was no evidence tendered to show that Mr Solarino took paid time off for health reasons and that Mr Austin confirmed that Mr Solarino took time off well after the Respondent was dismissed. The evidence in this regard was, in the Commissioner's view, so vague it was unclear whether it was annual leave or time off in lieu. The Commissioner also found there was no evidence that the Appellants took the Respondent's alleged behaviour seriously. Further, the Commissioner observed that Mr Austin was a friend of the employee concerned and admitted to being aware that the employee had personal issues outside of work that required him to take time off. In relation to the allegation that the Respondent would not turn on his camera during meetings, Mr Austin stated during his evidence in chief that he knew that the Respondent did not have a camera but was "*unaware why he could not find a way*".

[40] Evidence was also given by Mr Gurney, a senior member of the team located in the US. Mr Gurney stated that while working with the Respondent in Melbourne, the Respondent was defensive, prone to passive-aggressive behaviour, lacking in leadership, assertive of his dominance, narcissistic and stand-offish for failing to report to his team what he was working on. The Commissioner determined from Mr Gurney's evidence that:

- Mr Gurney did not have firsthand knowledge of the alleged incident involving the Respondent and Mr Solarino;
- While Mr Gurney alleged the Respondent engaged in discriminatory conduct, he did not provide evidence and considered that it was not intended to be of a sexist nature;
- Hardware was only purchased after the Respondent's departure to ensure that the Engineering Team could use cameras; and
- While Mr Gurney reported to the Respondent, he went directly to Mr Troughton, Ms Tilds and Mr Wu instead, sent "s*ide notes*", sidelined and undermined the Respondent.

[41] Mr Gurney attached to his witness statement an Incident Report prepared by the Respondent regarding an incident involving four employees who were investigated for attending the work premises without authority after hours to consume alcohol and drugs during Melbourne's Stage 4 lockdown. Contrary to Mr Gurney's evidence, the Commissioner determined that the Respondent's investigation process was not disproportionate to the conduct nor conducted in secret. The Commissioner noted it was not explained why the process adopted by the Respondent was underhanded and that all employees received a copy of a report to sign and verify. Further, the Commissioner expressed concern with respect to Mr Gurney's oral evidence that, despite the Respondent giving him a reasonable and lawful direction not to speak

to other employees during the investigation, he organised a team meeting to discuss the investigation. The Commissioner also recorded that Mr Gurney's witness statement included several matters that were irrelevant, lacking in evidence and accusatory without any substance. The Commissioner found that Mr Gurney's evidence showed a lack of respect for the Respondent's position and actively undermined his authority.

[42] The Commissioner next considered the evidence of Ms Kayla McCord, who prefaced her evidence with a statement that it was based on her perception, how she was feeling, and "*her personal truth*." The Commissioner was not satisfied that the evidence of Ms McCord added weight to the allegations against the Respondent. Ms McCord could not provide any evidence that the Respondent treated her as a junior, was aggressive to, or bullied Ms McCord, or that the Respondent sexually discriminated against her, other than that she was asked questions or "*micromanaged*" or was uncomfortable on the phone with the Respondent. The Commissioner noted Ms McCord's acknowledgement that the Respondent was involved in her appointment to the Holdings Corporation and the decision to grant her shares in the Company. She also revealed that weeks before the Respondent's dismissal, she was questioned about her experience with him and knew about his impending dismissal.

[43] The Director of Marketing, Ms Nicole Mancino, had worked with the Respondent for three months before he was dismissed. In the Commissioner's view, Ms Mancino's evidence was conflicting and had limited credibility. Ms Mancino alleged that the Respondent was aggressive, unprofessional and his body language was negative because, during a Marketing presentation, he laced his fingers together and held his hands to his mouth area and looked down. Ms Mancino also recalled the Respondent's statement at the meeting that blue and green should never be seen together. The Commissioner noted that Ms Mancino said that communication was filtered through Ms Tilds to protect staff from the Respondent's "*confronting style*" and that was unusual given Ms Mancino's evidence that she had limited interaction with the Respondent other than one incident. The Commissioner expressed concern that Ms Mancino indicated in her evidence that she was aware of the detail in the Respondent's termination letter and had the Incident Report before completing her witness statement. The Commissioner also noted that observations made by Ms Mancino while giving oral evidence were not in her witness statement, despite Ms Mancino's evidence that they were.

[44] The Commissioner concluded that Ms Mancino's statement provided limited credible evidence because her communication with the Respondent was in relation to one incident in the three months of employment and yet, Ms Mancino had formed a view about the relationship between the Respondent and Mr Troughton, about which she had no direct knowledge. The final witness for the Respondent was Mr Blake, an independent Director. The Commissioner noted the following matters in relation to Mr Blake's evidence:

- As Mr Troughton was the CEO, Mr Blake relied on his statements alone and at no point verified or witnessed any of the conduct that was the subject of allegations against the Respondent.

- In Mr Blake's view, Mr Troughton's role was not technical but was to secure funding and because Mr Troughton communicated with him to obtain his investment, he was the natural leader and the person in charge.

- The only other individuals Mr Blake spoke to about the Respondent's alleged conduct were Mr Wu and on one occasion, Ms Tilds.

- Mr Blake stated that despite the evidence of Mr Wu, there were no discussions about or with the Respondent in relation to any alleged conduct of concern at any Board meeting.

- At no time did Mr Blake personally counsel or warn the Respondent, nor did he observe any counselling or warnings by Mr Troughton.

- Mr Blake did not make the decision to dismiss the Respondent but as Director he accepted Mr Troughton's version of events and determined that the decision was not for the Board but was with one co-founder, Mr Troughton who held the title of CEO.

- As Chair of the Board of the Holdings Corporation, Mr Blake confirmed that there was no evidence of regular meetings or a common accepted practice regarding minutes on important decisions, and while Mr Blake stated there were minutes, at no point were any minutes produced.

- In relation to allegations of financial misconduct and concerning JobKeeper, Mr Blake relied on statements from others, did not verify any of the allegations and reasserted that he had no internal management function. Mr Blake also gave evidence that he delegated responsibility for correct payment of the Respondent's entitlements including his back pay on termination, to Mr Wu.

- Mr Blake made statements of alleged misconduct on the part of the Respondent and when he was directed to other material such as Xero statements of when actual payments were made or evidence that disputed his oral evidence, he wavered.

[45] The Commissioner found that given the contrasting evidence, it was reasonable to conclude that decisions were made by the Company "*on the go with no formality, nor formal recording of minutes and there is an absence of due diligence undertaken*".[7] The Commissioner recorded her satisfaction that the Respondent was dismissed, the dismissal was not a case of genuine redundancy and as the Appellants had withdrawn the jurisdictional matter of compliance with the Small Business Fair Dismissal Code, there were no other jurisdictional matters to be determined. The Commissioner then considered each of the matters specified in s. 387 of the Act.

[46] In relation to whether there was a valid reason for the dismissal, the Commissioner noted that the list of reasons set out in the Appellants' outline of submissions was expressed differently to the reasons given in the letter of termination of employment, in several respects. In relation to each of the reasons the Appellants contended justified the summary dismissal of the Respondent for serious misconduct, the findings of the Commissioner were, in summary, as follows:

- *Disparaging senior, female employee and executive staff on 28 July 2020* – the Commissioner was not satisfied that the evidence showed the Respondent disparaged female employees and executive staff such that he disregarded an essential term of his

contract of service or repudiated that contract, as alleged by the Appellants. In relation to an incident on 3 March 2021 where the Respondent allegedly directed staff to disregard what was said by other executives and shouted at Mr Troughton words to the effect of "*I'll speak to you however the fuck I want*", the Commissioner considered the conversation between the Respondent and Mr Troughton to be a robust disagreement with what may be inappropriate language but found it fell short of disparagement.

- *Incident on 28 July 2020* with respect to a meeting between the Respondent, Mr Wu and Ms Tilds, the Commissioner concluded that the evidence was inconsistent and, in any event, did not indicate disparagement or serious misconduct.

- *Undermining executive directions on 3 March 2021* – the Commissioner determined there was no evidence to conclude that the Respondent did not follow a direction to turn on his camera or that Mr Troughton warned him and accepted the evidence of the Respondent (and Mr Austin) that he did not have a camera on his gaming machine which he worked on at home during the COVID-19 pandemic.

- *Undermining management* – it was the Commissioner's view that it was instead Mr Austin and Mr Gurney who undermined the Respondent and without his awareness, reported incidents to Mr Wu, Mr Troughton and Ms Tilds. The Commissioner also noted that Mr Troughton and Mr Wu fuelled this insubordination by seeking information and engaging in activity to gain Mr Austin and Mr Gurney's trust.

- *Intimidating staff on 31 March 2021* – the Commissioner concluded that there was no credible evidence of intimidation from the evidence of Mr Wu, Mr Troughton, Ms Tilds nor employees reporting to her, whose evidence did not substantiate Ms Tilds' allegations. The Commissioner acknowledged that there were differences of opinion, the communication may have been coarse or may have been misconstrued and there may have been an absence of agreed processes but concluded that this behaviour could not be characterised as serious misconduct on any level.

- *Singled out a staff member to withhold their equity on 22 April 2021* – the Commissioner concluded there was a lack of evidence to support an allegation of serious misconduct on the basis there was no evidence the employee in question (Mr Solarino) was entitled to stock options and it was the Board who had discretion to issue stock options. At the time, the Board consisted of two co-founders (the Respondent and Mr Troughton), and as such, it was not the sole decision of the Respondent.

- *Admitted to lacking dedication to the role on 20 May 2021* – the Commissioner found this allegation did not constitute serious misconduct and despite the Incident Report prepared by Mr Wu and the evidence of Mr Austin, it was admitted that the Respondent was not gloating when he said he committed 20% of his time to the CTO role, but rather was discussing that he was overloaded with other responsibilities.

- *Other general misconduct* – the Commissioner was not satisfied that the Appellants substantiated that misconduct occurred and contrary to the Appellants' submissions,

found there to be unreliable "*firsthand*" accounts, described the HR records (the incident reports) as flimsy and concluded that they could not be considered reliable.

[47] After addressing the reasons above referred to in the Appellants' outline of submissions, the Commissioner identified nine other reasons alleged to demonstrate serious misconduct and poor performance on the part of the Respondent:

1. Contravention of contract and Australian statutes.

2. Lack of leadership re: product and technology.

3. Absent leadership.

4. Lack of collaboration with executive and key staff.

5. Missed product delivery deadlines, lack of KPI monitoring and poor, clarifying communication.

6. Openly rejecting company culture and values, including pattern of disrespect and inappropriate behaviour.

7. Staff hesitancy and reluctance to be themselves due to the Respondent's hostility and their fear of retribution.

8. Intimidation and sexism – serious misconduct and contravention of anti-discrimination laws.

9. Wilful disregard to duties and insubordination contrary to the company handbook, HR policies and breach of contract.

[48] The Commissioner noted that there was no evidence of a company handbook or policies in existence while the Respondent was employed. The Commissioner also found that the evidence of witnesses for the Appellants failed to demonstrate that the conduct occurred as described and that the conduct justified dismissal. In all the circumstances, the Commissioner concluded that there was no valid reason for dismissal related to the Respondent's capacity or conduct.

[49] In relation to whether the Respondent was notified of the reason for his dismissal during the telephone call with Mr Troughton on 2 July 2021, the Commissioner noted the conflicting evidence between the parties. The evidence of Mr Troughton was that there were numerous warnings, but the detail of the discussion between the Respondent and Mr Troughton, if it occurred, revealed a lack of a clear warning. The Commissioner preferred the evidence of the Respondent, which was supported by Mr Blake and Mr Wu whose accounts were more consistent with the Respondent's recollection. In any event, the Commissioner noted that if discussions were held between the Respondent and Mr Troughton, they did not satisfy the requirements of s. 387(b).

[50] In relation to s. 387(c), the Commissioner found that the Respondent had not been given an opportunity to respond to any of the reasons for dismissal. As a result, the Commissioner found that the consideration in s. 387(d) as to whether the Respondent was allowed to have a support person present during discussions relating to his conduct and capacity, was neutral. Regarding s. 387(e) the Commissioner was not satisfied that the Respondent was warned about any unsatisfactory performance, or that his employment was at risk, before the dismissal, despite the allegations about his performance and conduct. In relation to s. 397(f), the Commissioner considered that the size of the Respondent's business did not weigh in favour of the Appellant.

[51] Turning to any other relevant matters under s. 387(h), the Commissioner considered submissions of the Appellants on procedural and governance matters concerning the capacity of Mr Troughton to dismiss the Respondent. The Appellants' view was that the first Appellant's Constitution gave Mr Troughton authority to dismiss the Respondent. The Commissioner found that the Constitution provided for the removal of directors when LMM or the directors pass a resolution for the removal of a director. Despite Mr Blake giving evidence that the members voted to terminate the Respondent as director of the second Appellant, the Commissioner observed that it appeared the Respondent, as major shareholder, was not given notice of the meeting, despite being entitled to such notice. Further, the Commissioner determined that the following matters raised by the Respondent were relevant to the question of whether the Respondent's dismissal was unfair:

- The Respondent was co-founder of the business, whose technical intellectual capacity created the product, was invested heavily in the business financially and at times, went without income or took a salary reduction to ensure employees were paid their wages (including a 30% pay reduction in February 2021);

- The Respondent's actions were in the interests of the Company and were consistent with his legal obligations as sole Director;

- Despite Mr Gurney and Mr Austin's dislike of the Respondent's management of them, there was no evidence to demonstrate that he engaged in any misconduct;

- The allegations concerning capacity and conduct appeared contrived due to an absence of corroborating evidence and the unreliable evidence of Mr Troughton; and

- The Respondent experienced significant hardship because of his dismissal, effectively losing control over a business that he personally built and financially invested in, and when the Respondent carried the full weight of the financial risk, his co-founder and the executive paid no regard to him or his commitment and contribution to the Company.

[52] The Commissioner then turned to remedy. After expressing satisfaction that the requirements in s. 390(1) and (2) had been met, the Commissioner considered whether reinstatement was inappropriate, as required by s. 390(3). After setting out the competing submissions of the parties, the Commissioner set out the principles relevant to the loss of trust and confidence identified by a Full Bench of the Commission in *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter*,[8]

and the conclusion of the Full Bench in that case that "*[u]ltimately the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party*."[9]

[53] The Commissioner observed that while there would have been some loss of trust because of the dismissal, the co-founders had worked together in the past and had a constructive business relationship and despite their differences, could continue to do so. The Commissioner also observed that the Respondent and Mr Troughton reside in different countries and with proper policies and procedures it would be in both of their interests to maintain a working relationship for the benefit of the Company. The Commissioner went on to find that the Respondent had not acted against the interests of the business, there was no evidence of misconduct or potential misconduct, relations were further aggravated by the behaviour of Mr Troughton and Mr Wu undermining the Respondent and while the allegations made by the Appellants were serious, there was no credible evidence to support those allegations. The Commissioner also observed that the conduct subject of a number of those allegations occurred in 2020 and early 2021, and the Appellant provided no reason why it continued to employ the Respondent if it genuinely held concerns of serious misconduct.

[54] The Commissioner concluded her consideration about the appropriateness of reinstatement by noting that the Appellants are more financially secure, had developed since the time of the Respondent's dismissal, and that provided proper policies and procedures including governance processes are established, reinstatement of the Respondent would not be contrary to the interests of the Company. The Commissioner also considered the Appellant's evidence that it had not appointed a CTO and that the Australian Subsidiary remained with the engineering team based in Melbourne and concluded that it was open to award reinstatement to the position held by the Respondent immediately prior to his dismissal – the position of CTO based in the Australian subsidiary, the first Appellant.

[55] The Commissioner decided to make an Order for reinstatement and to maintain the continuity of the Respondent's employment and continuous service. After setting out the provisions of s. 393(4), the Commissioner noted that an order to restore lost pay does not necessarily follow an order for reinstatement and can only be made if it is considered appropriate. The terms of such an order must also be considered appropriate. The Commissioner set out two related submissions made by the Respondent in relation to financial loss. Firstly, the Appellant had made deductions from the Respondent's annual leave entitlements based on out-of-office messages in his calendar in circumstances where some days for which deductions had been made were outside normal business hours, and some were public holidays or personal leave. The Commissioner found that there were no valid reasons to conclude that the time in fact leave taken by the Respondent and ordered that the entitlements be "*reinstated*" at the full rate of pay prior to the reduction in the Respondent's salary in January 2021.

[56] The second matter concerned a reduction in the Respondent's salary in January 2021, which the Commissioner found should not have occurred. The Commissioner went on to calculate the loss for the six months that preceded the Respondent's dismissal, and to award an amount to compensate him for that loss including amounts for back pay of wages deferred and not paid, makeup pay to the correct rate for annual leave including the amount deducted without cause, and superannuation contributions on those amounts. The total amount of back pay

awarded was $60,616.39 to be taxed at the relevant tax rate, and further amounts of $4,799.72 (representing 9.5% on ordinary hours) and $1,009.31 (representing 10% on annual leave on termination).

[57] Further, the Commissioner noted that the Respondent tendered his bank statement and evidence of earnings since dismissal, and on that material, which was treated as confidential, no order for loss of pay was made, other than for a two-month period, as the Respondent had no earnings until September 2021. In relation to the two-month period, the Commissioner observed that although the Respondent's contract referred to the notice period in the NES, it is unusual to see that the NES notice period applied to a working director and in the circumstances, found that two months of wages was reasonable. The Commissioner went on to observe that eight weeks pay amounting to $26,153.85 gross, is less than the unfair dismissal cap on compensation and this was a reasonable outcome considering s. 392(5) of the Act. Finally, the Commissioner observed that while she could not order the correction of the ATO Payment Summary for the 2019/20 financial year as sought by the Respondent, it would be advisable that the Appellant correct any tax records to properly reflect actual payments made to the Respondent.

Appeal Grounds and Submissions

[58] The Appellants' Notice of Appeal contained 19 grounds and reserved its position with respect to adding additional grounds. The way the grounds of appeal were pleaded was unsatisfactory. As we have stated above, it is fundamental that an appeal can only succeed if appealable error is demonstrated. Because s. 400(2) of the Act applies to the appeal, to the extent that the appeal grounds allege error of fact, if the error is not significant, no appeal lies.[10] As will be seen, some of the appeal grounds allege specified errors of fact while others are general assertions without identification of the asserted error. The grounds of appeal are as follows:

> "1. While, by reason of the grounds set out below, no orders for relief are warranted in the matter, the Commissioner made fundamental errors of jurisdiction and discretion by:
>
> 1.1 purporting to make both orders for reinstatement under section 391 of the Act (see paragraphs 176 – 181 of the Decision) and orders for compensation under section 392 of the Act (see paragraph 188 of the Decision and the express reference to section 392(5) and the cap under section 392 of the Act). Section 392 orders for compensation are only to be made where the Commission is satisfied that reinstatement is inappropriate (see section 390(5)(a) and section 392(1) of the Act). Hence the sections 391 and 392 orders are inconsistent and mutually exclusive in jurisdiction.
>
> 1.2 Under the canopy of the error at 1.1 above, the Commissioner further erred in jurisdiction and discretion by:
>
> (a) purporting to correct an alleged pre-dismissal underpayment of salary;
>
> (b) purporting to order payment of an alleged pre dismissal deferral of pay which had allegedly not been paid;
>
> (c) purporting to make orders addressing a dispute over annual leave pay and deductions from same;

(d) purporting to make orders for compensation under section 392 in circumstances where the evidence revealed that Mr Rossi had conducted an IT consultancy through separate companies pre and post (and potentially during) his employment with the Respondent Company and had post dismissal earned via that consultancy more than twice (approximately) the income (up to the date of the submission hearing) that he would have earned at his dismissal rate of pay – thus removing any basis for "compensation" even if section 392 of the Act was within jurisdiction (there was nothing to compensate).

(see paragraphs 186 to 188 of the Decision and the Orders of the Commission)

2. Importantly, the Commission erred by failing to pay any, or any proper regard, to the evidence that the reinstatement of Mr Rossi may lead to up to four resignations across the employer's group. This included evidence on the face of a written statement by one female employee, who had witnessed Mr Rossi's bullying, that she would resign if he was to return to the business. Other employees on the evidence had represented their resignation intention to senior management. The Commission does not refer to any of this evidence in its Decision – referring only to a submission about resignations which may occur. In so doing, the Commissioner dramatically understates and misrepresents in the Decision evidence vital to the mental health and future careers of numerous employees in serious disregard of the Commission's requirement to take into account safety issues in the exercise of its discretion. See, for example, further at 10.6 below.

3. The Commission further erred by failing to have any, or any proper regard, to the evidence of the Respondent company that it took into account Mr Rossi's ability to earn high pay immediately as an IT Consultant via his ongoing companies (see 1.2(d) above) when effecting his termination as an employee (in contrast to the Commission's consideration of Mr Rossi's role as the sole income earner, and the parental leave of his wife, when assessing the dismissal as allegedly harsh, unjust and unreasonable).

4. The Commissioner erred by inaccurately portraying in its decision and confusing Mr Rossi's roles as each of an employee, director and ongoing shareholder, in the employer group.

5. The Commissioner erred by taking into account irrelevant considerations.

6. The Commissioner erred by failing to take into account relevant considerations.

7. The conclusions of the Commission on the evidence are so unreasonable that no reasonable decision maker could have come to such conclusions.

8. On the face of the Decision, the Commission has misconstrued, misinterpreted, and failed to accurately represent, the evidence of the Respondent Company's witnesses, leading to error in conclusions and discretion, and potentially leading to damaging reputation harm to the employer's business and the reputations of up to eight witnesses.

9. The Commission has failed to pay any, or any proper, regard to the evidence of the wrongdoing of Mr Rossi leading up to the dismissal.

10. The remaining grounds of appeal fall under the canopy of 5 to 9 above. As but one example of the errors, the Commission failed to pay any or any proper regard to the evidence that:

10.1 Mr Rossi's bullying conduct, the anger, tone, and aggression in the video conference referred to in the Decision as "intimidating staff on 31 March 2021" was observed by, and the subject of evidence from, Cary Tilds, Cliff Gurney and Nicole Mancino.

10.2 Mr Rossi's conduct at 10.1 led to the resignation of Gustavo, a Creative Manager and a designer employed by Frameplay Corporation, who participated in the call;

10.3 Mr Rossi subsequently approached Ms Mancino, a new employee to the business, rather than Ms Tilds, to whom Ms Mancino represented, to question as to whether his conduct had led to Gustavo's resignation;

10.4 Ms Mancino was so impacted by the incident on 31 March 2021 that measures were put in place with Ms Tilds to shoulder (sic) Ms Mancino from subsequent contact with Mr Rossi (a sensible safety measure which the Commission in its Decision chooses to misinterpret and treat with suspicion at paragraph 96 of the Decision).

10.5 Similar protective arrangements further to Mr Rossi's impact were required in convincing Gustavo to continue as a contractor to the US business.

10.6 Ms Mancino was so impacted by the 31 March 2021 incident that she indicated on the face of her witness statement that she would resign if Mr Rossi returned to the business. Ms Mancino described Mr Rossi's conduct as "very hostile", "very intimidating", "very frustrated", "mean spirited", "counterproductive", "adamant distaste for everything", "condescending and angry". She indicated in her statement that "I felt rattled by it and it wasn't even directed at me". Ms Mancino's statement noted Gustavo's resignation "the next day". Ms Mancino indicated "I would resign if Mr Rossi were reinstated … Enduring Mr Rossi's workplace behaviour is not worth the mental stress it would cause".

10.7 The Commissioner's Decision gives no proper flavour of such vital safety and mental health evidence in this, and other examples of Mr Rossi's conduct, particulars of which will be provided.

10.8 Ms Tilds and Mr Gurney were also impacted by the bullying approach of Mr Rossi in this March 2021 conference and surrounding events.

11. The Decision of the Commission fails to accurately capture the points at 10 above and presents many of the relevant incidents of conduct by Mr Rossi through an inaccurate lens. The episode at 10.1 was one of the final straws on the back of trust and confidence in the relationship, prior to a decision to remove in May/June, and delay in implementation given Mr Rossi's position and standing in the business.

12. The Commissioner in her reasoning at several points in the Decision starts to address one stream of evidence and then confusingly switches to other streams of evidence to conclude on issues in an illogical fashion.

13. The Commissioner makes observations on the creditability of witnesses by referring to often peripheral aspects of their evidence, while failing to refer to more central and material aspects of their evidence.

14. The Commissioner fails to pay any or any proper regard to evidence of warnings to Mr Rossi that arise from the statements of more than one witness in relation to the warning.

15. The Commissioner fails to understand and properly deal with evidence and legal issues surrounding Mr Rossi's attempt to dishonestly deal with the JobKeeper scheme.

16. The Commission inaccurately records the evidence and reaches an unreasonable conclusion in relation to the Incident Reports maintained by the Company which relate to Mr Rossi's conduct.

> 17. The Commissioner fails to properly record on the face of its decision, or to pay any or any properly (sic) regard, to the evidence of female witnesses as to Mr Rossi's sexism, as linked to his bullying approach.
>
> 18. The Commissioner fails to pay any, or any proper regard to the evidence that Mr Rossi was defensive, uncooperative and failed to display competence in the IT audit meeting.
>
> 19. The Commissioner fails to pay any, or any proper regard to the time composition and processes of the Board of the parent company of the Respondent company."

[59] In conclusion the grounds of appeal contained the following statement:

> "20. The Appellants have drawn up these grounds of Appeal over the weekend following 12 August 2022 given the need for an urgent stay. The Appellant companies reserve their rights to provide additional grounds and detail behind the appeal under the canopy of the above grounds."

[60] No further grounds were added. The unsatisfactory pleading of the appeal grounds is exacerbated by the Appellants' submissions and other material filed in the appeal. In the outline of submissions in relation to the appeal filed on 15 February 2023, the Appellants submitted that the grounds of appeal traverse four broad areas: the Commission's jurisdiction; reinstatement; evidentiary issues and the Appellants' dismissal process. Unhelpfully, the submission did not specify which of the numerous appeal grounds related to each of the four areas, and it appears that several of the grounds relate to more than one of the areas identified.

[61] The first area is said to be the way the Commissioner dealt with remedy. In this regard, it is contended that the Commissioner purported to grant reinstatement under s. 391 of the Act and concurrently exercise the power to award compensation under s. 392, thereby conflating two mutually exclusive remedies. In addition, the Commissioner is contended to have erred by making an order for lost pay that purported to remedy damage found to have been suffered prior to the dismissal of the Respondent. The first area appears to be the subject of appeal ground 1 (items 1.1 and 1.2). The matter raised in item 1.3 of ground 1 was dealt with and dismissed in the Jurisdictional Appeal and it is not necessary that we deal with it further.

[62] The second area encompasses the decision of the Commissioner to grant reinstatement. and appears to be encompassed in grounds 2, 8, 9 and some of the items in ground 10. It is submitted that the Commissioner erred by failing to have any regard, or proper regard, to the evidence that reinstatement was inappropriate for reasons including that it would likely result in resignations or the difficulty that the Respondent would have reestablishing working relations with colleagues he believed had lied and engaged in acts of conspiracy to have him dismissed. It was also contended that the Commissioner unreasonably discredited, disregarded or did not have proper regard to, the evidence in the matter.

[63] The third area said to involve error on the part of the Commissioner is with respect to evidentiary issues. These matters are encompassed both generally and specifically, in grounds of appeal 5 – 8, 9 and 10, items 10.1 – 10.8. Grounds 5 – 8 are general complaints regarding the Commissioner's alleged failure to consider relevant matters and consideration of irrelevant matters, reasonableness of conclusions and inaccurate representation of the evidence of the first Appellant's witnesses. Appeal grounds 5 – 7 are also said to be a "*canopy*" for appeal grounds that follow.

[64] Ground 9 asserts that the Commissioner failed to pay any, or any proper, regard to the evidence of the Respondent's wrongdoing leading up to his dismissal. In ground 10, which encompasses items 10.1 – 10.8, the Appellants contend that the Commissioner failed to pay any regard, or proper regard, to the evidence and set out numerous matters that are said to be "*but one*" example of such error. Ground 11 refers in general terms to matters in ground 10. Grounds 12 and 13 are general grounds about the Commissioner's approach to considering the evidence and the credit of witnesses.

[65] Grounds 14 – 19 also assert failure of the Commissioner to properly consider, understand or record findings on various aspects of the evidence before her, and appear to relate to the third area. Grounds 3, 14 and 16 appear to relate to the fourth area covered by the appeal grounds – the process the Appellants followed in dismissing the Respondent. While accepting that the process was not perfectly fair within the meaning in s. 387 of the Act, the Appellants contend that the Commissioner failed to have regard to factors including that the Respondent could mitigate his losses as a consultant for his Company. Instead, in the Appellants' view, the Commissioner unreasonably preferred the Respondent's submissions that he was the sole breadwinner during his wife's period of parental leave, to support a finding that the dismissal was harsh. It was also contended that the Commissioner erred by making findings about the authority of Mr Troughton to dismiss the Respondent and the Respondent's rights under extraneous corporate documents such as the second Appellant's Constitution, and the removal of the Respondent as a director, which the Appellants contend was an entirely separate process from the steps undertaken to dismiss him as an employee pursuant to a contract.

[66] The "*APPELLANTS SCHEDULE OF FACTUAL ISSUES*" filed shortly before the Merits Appeal was heard, was also unhelpful and did not indicate which of the 19 appeal grounds or the four broad areas identified in the Appellants' written submission, the factual issues related to.

[67] A common thread in the appeal grounds is a complaint that the Commissioner preferred the evidence of the Respondent and his witness Mr Morris, over the evidence of the Appellants' witnesses about which the Commissioner was critical. Given the number of appeal grounds and the lack of clarity about which area each appeal ground relates to, we have dealt with them individually. We have dealt first with the grounds particularising the asserted error, on the assumption that these are the Appellants' best points and have then considered the general grounds which do not specify error.

Consideration

Permission to appeal

[68] This appeal, having been brought against a decision made under Pt.3-2 of the Act, is one to which s. 400 applies. Section 400 provides:

> "(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact."

[69] The task of assessing whether the public interest test is met is discretionary and involves a broad value judgment.[11] The public interest might be attracted where:

- a matter raises issues of importance and general application;
- there is a diversity of decisions at first instance so that guidance from an appellate court is required;
- the decision at first instance manifests an injustice;
- the result is counter intuitive; or
- the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[12]

[70] As foreshadowed in our decision in the Jurisdictional Appeal, we have concluded that there are errors in the decision in relation to the monetary orders made by the Commissioner. Firstly, the Commissioner purported to award backpay to compensate the Respondent for a reduction in his salary, for the six-month period prior to the termination of his employment. As the Appellants correctly point out, restoration for lost pay can only be ordered for the time between the Respondent's dismissal and reinstatement. Further, the Commissioner erred by making orders for reimbursement of annual leave deducted from the Respondent's accrued entitlements prior to the ending of his employment. In making such orders, the Commissioner exceeded jurisdiction and it is in the public interest that such error be corrected on appeal.

[71] We are also of the view that the Commissioner erred by awarding amounts for lost income for an 8-week period from the date his dismissal took effect. The basis this award is not clear from the Merits Decision and in our view, the evidence before the Commissioner established that for the period between the dismissal and the date from which reinstatement was ordered, there was no loss of remuneration or likely loss because of the dismissal for the purposes of s. 391(3) of the Act. There is also no indication that the Commissioner had regard to the amount of any remuneration earned, or likely to be earned by the Respondent, from employment or other work, during the period between the dismissal and the making of the order for reinstatement. In our view, the evidence establishes that there was no loss or likelihood of loss on the part of the Respondent for this period.

[72] We do not accept that the Commissioner erred as contended in appeal ground 1.1, by purporting to make orders for both compensation and reinstatement. In paragraphs [176] – [181] of the Merits Decision, the Commissioner set out the provisions of the Act dealing with reinstatement and considered those matters in an entirely orthodox manner, including deciding to make an order to maintain the continuity of the Respondent's service. In paragraphs [182] – [188], the Commissioner dealt with the provisions of the Act dealing with orders for payment for remuneration lost or likely to be lost. The Commissioner calculated the amount of remuneration lost in the six months prior to the dismissal because the Respondent's salary was reduced. For the reasons we have set out above, this was erroneous because the Commission does not have jurisdiction to award backpay for a period prior to a dismissal.

[73] In paragraph [188], the Commissioner concluded that the Respondent had no earnings between his dismissal on 2 July until September 2021, and awarded an amount of two months wages for lost remuneration. The Commissioner then went on to observe: "*This eight weeks of pay of $26,153.85 gross is less than the unfair dismissal cap on compensation, and I consider*

it a reasonable outcome having considered s. 392(5) of the Act." As the Appellants point out, the cap in s. 392(5) applies to compensation, which can only be awarded if reinstatement is found to be inappropriate. As the Commissioner had determined that reinstatement was not inappropriate, s. 392(5) had no relevance to any amount for lost remuneration ordered by the Commissioner under s. 391 of the Act.

[74] We consider that the reference to s. 392(5) is an error, which although regrettable, is not a jurisdictional error that vitiates the decision to reinstate the Respondent. The Commissioner is simply observing that the amount awarded for lost remuneration between the time of the dismissal and the reinstatement is less than the statutory cap for compensation. An order to restore lost remuneration is discretionary – both with respect to whether to make such an order or the amount that should be ordered – and a simple observation comparing the amount awarded for lost remuneration to the amount that would be available if the statutory cap for compensation applied, does not result in the exercise of discretion miscarrying.

[75] We dismiss appeal ground 1.1. However, we have decided to grant permission to appeal in relation to ground 1.2, on the basis that the errors relating to the award of backpay that the Commissioner had no jurisdiction to make, and the award for lost remuneration, should be corrected.

[76] We turn now to deal with the remaining grounds of appeal.

The approach to determining appeals from discretionary decisions

[77] The task of determining whether the dismissal of a person who is protected from unfair dismissal was harsh, unjust or unreasonable, involves the exercise of discretion. The discretion is wide and constrained only by the requirement to take into account the matters specified in paragraphs (a) – (h) of s. 387 of the Act. Section 387(h) itself confers on the decision-maker a wide scope to take into account matters which he or she considers to be relevant.

[78] The determination of whether a dismissal is harsh, unjust or unreasonable requires the making of an evaluative judgment by the decision-maker. Accordingly, no single consideration and no combination of considerations is necessarily determinative of the result, and the decision-maker has some latitude as to the choice of decision to be made.[13] The same principle applies to a decision in relation to remedy, as to whether reinstatement is inappropriate, and compensation should instead be awarded, in respect of a dismissal which has been found to be harsh, unjust and/or unreasonable.[14] In this regard, s. 390(3) confers a wide discretion for the Commission to determine whether reinstatement is inappropriate, where a finding that a person was unfairly dismissed has been made.[15]

[79] In an appeal from a discretionary decision of this nature, an appellate tribunal is only authorised to set aside the decision if error on the part of the decision-maker has been demonstrated.[16] It is not sufficient to argue that a different result should have been reached in the exercise of the discretion,[17] and it is not the role of an appellate tribunal to consider whether it would have made a different decision on the same facts. The error must usually be of one of the types identified in *House v The King* as follows:[18]

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his

> determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[80] It follows that an appellate tribunal is not authorised to set aside a discretionary decision based on a preference for an outcome different to that determined by the first instance decision-maker. In this connection, the High Court said in *Norbis v Norbis*:[19]

> "The principles enunciated in *House v. The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."

[81] Nor is appealable error demonstrated by a contention that the decision-maker should have given more or less weight to a particular consideration. In the High Court decision in *Gronow v Gronow*, Aickin J (with whom Mason and Wilson JJ agreed) said: "*It is however a mistake to suppose that a conclusion that the trial judge has given inadequate or excessive weight to some factors is in itself a sufficient basis for an appellate court to substitute its own discretion for that of the trial judge*".[20] It is only where a relevant matter has been given no weight because it was not considered at all that error in the exercise of the discretion will be demonstrated.[21]

[82] The remaining appeal grounds in the present case concern errors of fact said to involve the way the Commissioner dealt with the evidence of the Appellants' witnesses, findings of credit, relevance and the weight placed on the evidence. The test set out in s. 400 in relation to an appeal on a question of fact has been described as "*a stringent one*".[22] To be characterised as significant, a factual error must vitiate the ultimate exercise of discretion.[23] In a misconduct case, a significant fact is foundational to a conclusion in relation to whether misconduct took place.[24]

[83] As we have earlier stated, it is necessary that an error fact be significant in the sense that it vitiates the ultimate exercise of discretion. It is apposite to the grounds of appeal in the present case, that:

> "The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach of combing through the words of the decision maker with a fine appellate tooth comb, against the prospect that a verbal slip will be found warranting the inference of error of law."[25]

Appeal grounds relating to evidence about specific matters

[84] Given the approach the Appellants have taken to framing their grounds of appeal, it is necessary to analyse the evidence before the Commissioner in some detail. We do so by commencing with the grounds of appeal dealing with specific matters in relation to which the

Appellants assert that the Commissioner erred in dealing with relevant evidence – appeal grounds 2, 3, 4, 10, 14, 15, 16, 17, 18 and 19. We then deal with the appeal grounds making general assertions – grounds 5, 6, 7, 8 and 9 – which variously assert failure to have regard to relevant evidence or having regard to irrelevant evidence without identifying particular evidence.

Ground 2 – failure to have regard to evidence that reinstatement may lead to resignations

[85] In appeal ground 2 the Appellants contend that the Commissioner failed to pay any, or any proper regard, to reinstatement being inappropriate, because, by way of one example, it would likely result in at least up to four resignations across the Appellants' group. The Respondent submits that this matter was referred to briefly at paragraph [168] of the Merits Decision with no further consideration granted afterwards. It is contended that the Commissioner dramatically understates and misrepresents evidence vital to the mental health and future careers of numerous employees. This is said to seriously disregard the requirement that the Commission consider safety issues in the exercise of its discretion.

[86] In the document headed "*SCHEDULE OF FACTUAL ISSUES*" filed in support of the appeal on 6 March 2023, the Appellants referred to the evidence of Mr Wu, Ms McCord and Ms Mancino, as being relevant to this ground. In relation to the evidence of Mr Wu, the Appellants referred to oral testimony in which Mr Wu said, with reference to paragraph 94 of his witness statement, that he had received two verbal indications from staff that they would leave if the Respondent "*continued in his capacity*" and that the two employees in question were Mr Gurney and Mr Austin, described as senior employees of the Respondent.[26] Mr Wu also said in his oral evidence that Ms Tilds and Ms Mancino had made similar statements and that he knew this because he had read those statements in the Court Book for the merits hearing.[27] This was the extent of Mr Wu's evidence-in-chief about the effect of reinstatement and unsurprisingly, the Commissioner placed little weight on it.

[87] In his witness statement Mr Gurney stated his "*concern*" if the Respondent is reinstated and said that the Respondent's desire to be reinstated is "*congruent with his narcissistic view of the world*".[28] Mr Gurney tendered a contemporaneous memo he wrote about an incident involving the Respondent that he asserted nearly led to his resignation.[29] Mr Gurney also tendered a message he sent to Mr Troughton that night and stated that he told Mr Troughton he could no longer work with the Respondent and was going to quit. The documents referred to by Mr Gurney do not support his assertions. Firstly, the document said to be a contemporaneous memo refers to the Respondent and two other persons named as Brenton and Dragos, about whom Mr Gurney also seeks to complain. The memo concludes with: "*I confirmed with Eric* [the Respondent] *in our 1on1 chat that I would in fact no longer be taking on any responsibilities outside of my Tech Lead role for Frontend. I concede, I give up, I will do as I'm told and leave it as such*." In short, the memo indicates that Mr Gurney intended to work in the manner the Respondent directed – albeit Mr Gurney was not happy with this situation. There was no indication that Mr Gurney was considering resignation.

[88] The message exchange with Mr Troughton referred to by Mr Gurney, sent at 5:15 pm on 12 August 2020, simply states: "*mate i really need to talk to you – see you at 10:30*" to which Mr Troughton replies: "*Will do all good*". Finally, there is evidence that Mr Gurney's anxiety in relation to working with the Respondent was alleviated and he felt happier at work

when his role was altered, and he was no longer reporting to the Respondent.[30] Mr Gurney states that Mr Troughton told him immediately – during their discussion on 12 August 2020 – of this alteration to his role. Mr Gurney moved to the US and no longer works in Melbourne. In Mr Gurney's oral evidence in chief, he reiterated that since being in Ms Tilds' team he had flourished and has been supported by the business to be relocated closer to the Appellants' headquarters in San Francisco.[31]

[89] In short, Mr Gurney's evidence does not support the assertion that he, or any other employee will resign if the Respondent is reinstated. If Mr Gurney's issues were so serious that he was assisted by the Appellants to move to another country to limit contact with the Respondent, it would be expected that this matter would have been discussed with the Respondent and he would have been warned or counselled about it. The Commissioner found that it was reasonable to conclude that Mr Gurney's transfer to the US was mutually agreeable and, in our view, that finding was open to her on the evidence. We also note that the Commissioner dealt with Mr Gurney's evidence in detail at paragraphs [79] – [88] of the Merits Decision. The Commissioner did not find Mr Gurney to be a compelling witness, and, in our view, this conclusion was reasonably open to the Commissioner. We deal later with issues involving Mr Gurney in relation to an incident that occurred during the Melbourne lockdowns, on 22 October 2020.

[90] Mr Wu also referred in his oral evidence to Mr Austin's evidence about the resignation issue. Mr Austin did not give direct evidence in his witness statement about the impact of the Respondent being reinstated or that it would result in any resignations. Mr Austin was initially employed in February 2018 as the lead Software Development Kit developer. Ms Tilds was officially employed by the second Appellant on or around 1 May 2020. Mr Austin changed roles and became the Appellants' Software Manager in November 2021. This date is well after the Respondent's dismissal and there is no indication that the change was driven by the need to remove Mr Austin from the Respondent's management. Mr Austin now reports to Ms Tilds and is happy with this arrangement. There is also no indication that this situation would change if the Respondent was reinstated.

[91] In relation to the reinstatement point, the Appellants also referred to the evidence of Ms McCord who said in her witness statement that "*I think that any team member required to work with him* [the Respondent] *would probably quit, including myself. The thought of Mr Rossi's reinstatement is triggering for me because he did not treat me, or others, with respect*".[32] Ms McCord's witness statement was long on emotive statements and short on substantive detail. In this regard, Ms McCord spoke of unnamed employees in the Australian part of the business confiding in her in relation to the "*emotional trauma that they felt was being inflicted*" by the Respondent.[33] Ms McCord also said that she did not feel respected by the Respondent and that her evidence was her perceptions and "*personal truth*".[34]

[92] Ms Mancino gave evidence that she would resign if the Respondent was reinstated and went on in her witness statement to say that: "*When you encounter a hostile work environment and you are forced to work with the person who created that environment, you can't help but consider other opportunities*".[35] Ms Mancino also went on to state that enduring the Respondent's workplace behaviour is not worth the mental stress it would cause. Ms Mancino works in the US and reports to Ms Tilds. How Ms Mancino would be required to interact with the Respondent if he was reinstated is not clear, given that Ms Mancino said that she did not

interact with the Respondent often when he was employed, and that typically communications or directions would filter through Ms Tilds "*so that we were protected from Mr Rossi's confronting style*".[36] Ms Mancino gave evidence about one incident – being the incident involving an employee named Gustavo. This incident is the subject of appeal ground 10 and is dealt with later in this decision.

[93] In submissions in relation to appeal ground 2, the Appellants contend that the Commissioner dramatically understates and misrepresents evidence vital to the mental health of numerous employees. In our view, when the evidence of witnesses referred to by the Appellant is considered, it is apparent that the Appellants' submission dramatically overstates the effect of evidence relating to assertions about the mental health of a few employees. There is no evidence of any witness suffering diagnosed mental health issues because of the conduct of the Respondent or who will suffer such issues if the Respondent is reinstated, other than mere assertions (for example Ms McCord's evidence that she will be "*triggered*" if the Respondent is reinstated) or hearsay evidence purporting to be on behalf of persons who are concerned at the possibility of the Respondent being reinstated.

[94] There is also no basis for the assertion that the Commissioner has understated or misrepresented evidence vital to the future careers of numerous employees. Other than the evidence purporting to establish that employees would resign if the Respondent was reinstated, we were not taken to any evidence to support this contention. In our view, the evidence indicates that during the period of the Respondent's employment any employee who took issue with him had only to complain to Mr Troughton, Ms Tilds or Mr Wu and the reporting lines for that employee's role would be altered so that he or she did not report to the Respondent. There is no indication that any employee who gave evidence against the Respondent would report to him if he was reinstated.

[95] The fact that any number of witnesses provide unconvincing evidence about their own views on the reinstatement of a person found to have been unfairly dismissed, hearsay evidence about the views of other employees, or make threats to resign if a person who has been dismissed is reinstated, is not a basis to refuse reinstatement, particularly when there is a finding that there was no valid reason for the person's dismissal. Other than taking issue with the Commissioner's assessment of the evidence and conclusions on this point, the Appellants have pointed to no errors of fact, much less significant errors, that vitiate the discretion to find that a dismissal is unfair and to award reinstatement.

[96] The submission of the Appellants that the Commissioner considered the evidence of resignation in only one paragraph of the decision is not to the point – the evidence was considered and rejected. It was reasonable for the Commissioner to take this view. The evidence was not compelling and was largely hearsay or, to the extent the witnesses described their own views, exaggerated. Before concluding that reinstatement was not inappropriate, the Commissioner assessed the evidence of each witness in turn and made findings in relation to their credit and the weight that should be placed on their evidence. The Commissioner heard and saw each witness give evidence during a lengthy hearing over five days. The hearing concluded on 26 April 2022 and the decision was handed down on 12 August. The Commissioner was well placed to assess the credit of witnesses. On our consideration of the witness statements and reading of the transcript, the Commissioner's observations about the credit of the Appellants' witnesses, generally, were reasonably open to her.

[97] We also note that all the witnesses referred to by the Appellants in support of this submission, work in the US, while the Respondent is in Australia. None of the witnesses report directly to the Respondent. We accept that they may have to interact with the Respondent if he is reinstated but we do not doubt that arrangements can be put into place to deal with this eventuality as has occurred in the past. We further note that the Appellants have hired a Director, People and Culture, with responsibility for their Human Resource Management function and who will doubtless be able to manage any issues associated with the Respondent's reinstatement.

[98] We reject this ground of appeal.

Ground 3 – failure to consider earning capacity of the Respondent

[99] Ground 3 asserts that the Commissioner failed to have regard to the evidence of the Appellants that the Respondent's ability to earn high pay immediately after the dismissal was considered by the Appellants when the Respondent was dismissed, and instead the Commissioner considered the Respondent's role as a sole income earner and his wife's parental leave. The witness statements made by Mr Troughton and Mr Wu do not contain any evidence about the Respondent's earning capacity, or that they had regard to this when deciding to dismiss him. In cross-examination, the Respondent was asked about his income from other sources and in summary, he said that he had attempted to look for other jobs but was unable to apply for a role as a CTO or a Founder. As such, he had fallen back on his "*bread and butter experience and education*" as a solution architect, which is completely different to his role with the Appellants as CTO and Co-founder. In response to questions about his earnings, the Respondent said that he earns between$1,200 and $2,000 per day and as well as working a five-day week is doing projects outside of, and in addition to, the five-day week.

[100] While there was some evidence before the Commissioner that the Respondent was able to earn income from his own company as an IT consultant, we do not accept that the Commissioner erred by having regard to the fact that the Respondent was the sole income earner at the time of his dismissal and that his wife was on parental leave. The Commissioner also referred to evidence provided by the Respondent, in respect of which confidentiality was maintained, showing the Respondent's income since his dismissal. Based on that material, the Commissioner determined to order lost pay for a two-month period following the dismissal, until September 2021, during which he had no income.[37] There is no challenge to this finding in the grounds of appeal.

[101] The Commissioner considered these matters as relevant for the purposes of s. 387(h). It is apparent from the Merits Decision that this consideration was in the context of the timing of the Respondent's dismissal and the additional impact of the loss of control by the Respondent of a business that he personally built and invested in, at the same time as his wife was on parental leave in connection with the birth of their child. In this regard, the Commissioner observed at paragraph [157] that there was a total disregard for the Respondent's commitment and contribution to the Company or his personal circumstances.

[102] In our view, it was reasonable for the Commissioner to have regard to the Respondent's personal circumstances at the time he was dismissed, and the added impact that dismissal from

a company he had co-founded would have on the Respondent at the relevant time. The Respondent's role as a co-founder of the first Appellant, a director and a shareholder were plainly relevant matters in the overall consideration of whether his dismissal was unfair. These matters were all personal circumstances relevant to the impact of the dismissal on the Respondent and the consideration of such matters under the rubric of s. 387(h) is entirely orthodox and involves no error. We reject this ground of appeal.

Ground 4 – confusion of the Respondent's roles as employee, director and shareholder

[103] No specific reference to any error in the Commissioner's reasoning or conclusions is provided in relation to this ground of appeal. There are several references in the Merits Decision to the Respondent's roles with the Appellants. There is no suggestion that the information set out in the background from paragraphs [7] – [14] is inaccurate and in our view, it was reasonable for the Commissioner to have regard to the multiple roles the Respondent had in the Appellants' business in deciding whether his dismissal was unfair.

[104] In relation to Mr Gurney's allegations about the way the Respondent dealt with a breach of Melbourne COVID-19 restrictions, given that the Respondent was the senior manager in Australia and sole director of the first Appellant, and responsible for the premises in which the first Appellant operated, the Commissioner was correct in her assessment that the Respondent would have been responsible for any breach of those restrictions. We discuss this incident in our consideration of appeal ground 16. For reasons which will be apparent, there was no error in the Commissioner's assessment of the way the Respondent dealt with this issue and Mr Gurney's inappropriate conduct in relation to it.

[105] We also note that until at least September 2020, the Respondent and Mr Troughton were joint Directors of both Appellants. Accordingly, at the time when much of the conduct the Appellants complain about occurred, the Respondent was both an employee and one of two Directors of the Respondent. Even when additional persons were appointed to the Board of the Appellants, the Respondent continued as a director. The Respondent was also a significant shareholder and a co-founder of the first Appellant and had invested his time, effort, intellectual property and money to build the Company. In this regard, many of the issues raised by the Respondent with employees of the Appellants were issues that would appear to be in the remit of a senior manager, particularly a manager who is also a director. If there was an issue with reporting lines, Mr Troughton and the Respondent should and could have worked through them. We are of the view that the Commissioner was correct to have regard to the history of the Respondent's involvement with the Appellants and Mr Troughton, and his role as a director and shareholder of the Respondent. These matters were discussed by the Commissioner as part of her consideration of other relevant matters, for the purposes of s. 387(h). The Commission has broad discretion in relation to this consideration and we see no error in the way these matters were dealt with.

[106] Appeal ground 4 is rejected.

Grounds 10 and 11 – the Gustavo incident

[107] Appeal ground 10 which contains 8 sub-grounds, relates to one incident involving a Creative Manager who, for unexplained reasons, was referred to by the Appellants' witnesses

only as "*Gustavo*". The points in appeal ground 10 assert: bullying, anger and aggression by the Respondent leading to Gustavo resigning; inappropriate questioning of Ms Mancino by the Respondent having an adverse impact on her; impacts on Ms Tilds and Mr Gurney; and a failure by the Commissioner to properly consider "*vital safety and mental health evidence*" in relation to the Appellants' employees.

[108] Appeal ground 11 also concerns this incident and asserts that the Commissioner failed to accurately capture the points pleaded in appeal ground 10. This incident is said in appeal ground 11, to have been "*one of the final straws upon the back of trust and confidence in the relationship, prior to a decision to remove* in May/June [i.e. to dismiss the Respondent] *and delay in implementation given Mr Rossi's position and standing in the business*". The significance of this incident for the Appellants' case is also illustrated by the letter notifying the Respondent of his dismissal, which relevantly states – in relation to the Gustavo incident – that on 31 March 2021, the Respondent directly contacted marketing staff to "*interrogate*" them about whether a previous staff member resigned because of the Respondent's conduct. The dismissal letter also stated that Ms Tilds and Ms Mancino had requested a support person to attend all meetings with the Respondent due to his "*aggressive and sexist behaviour*".

[109] Given the significance of this allegation and its centrality to the Appellants' case, we have examined the evidence of various witnesses that was before the Commissioner in detail. Evidence about this incident was given by Ms Mancino, Ms Tilds and Mr Gurney. According to Ms Mancino, the events took place in a "*google hangout meeting*" which we assume was conducted by video, on 31 March 2021, when Gustavo presented concepts he had been working on relating to a new brand direction for the Appellants.

[110] According to Ms Mancino, the Respondent's conduct during the meeting was mean spirited, counterproductive, and intimidating and he did not provide one piece of constructive or positive feedback. Ms Mancino also said that the Respondent interlaced his fingers, covered his mouth as if frustrated or disappointed, did not make eye contact or look up at the screen during the beginning of the meeting and spent the entire time expressing his adamant distaste for everything. The Respondent also said: "*green and blue should NEVER be together. I never want to see that again*".[38] Ms Tilds said that the meeting with Gustavo was a conference call held on around 18 March 2021 and that the Respondent "*threw a fit*", used a degrading tone and yelled that: "*the colours are green and blue – those colours should never be seen together*".[39]

[111] Mr Gurney said that Gustavo was hired for the US team on 3 March 2020, and joined the business under Ms Tilds. After expressing the view that the Respondent thought he was the "*creative genius of the Company*" and stating that the Respondent was critical of Gustavo's work, Mr Gurney recounted that Gustavo had come up with a new "*branding deck*" for the Company. According to Mr Gurney, out of concern that Gustavo would quit over the Respondent's feedback and his experience in translating the Respondent's thoughts, Mr Gurney took it upon himself to prepare some talking points for the Respondent relating to Gustavo's PowerPoint slides for the meeting.

[112] Mr Gurney tendered his talking points.[40] Mr Gurney's comments are not positive and include that the style "*presents a solution that naively captures the Company's character… and does not build on the already identified profile*" and in relation to the use by Gustavo of the term "*full-stack*" that Mr Gurney is not sure what it describes and that: "*Technical buzzwords*

can come across as try-hard or space-filling". The talking points also contain references to the gradient colours being too hard and questions the rationale for the colour choices. Mr Gurney's evidence in relation to the Respondent's conduct at the meeting was as follows:

> "For most of the meeting we stuck to the notes. However, at one point [the Respondent] went off script. I can't remember exactly what he said, but it was not useful feedback – it was emotional feedback. I just remembered thinking '*who does he think he is? Why is he speaking to the designer like this*'."[41]

[113] Ms Tilds said that Gustavo resigned on 22 March stating that he could not live up to the expectations of what the Company was looking for, and among other reasons, he needed to take care of his children because his wife had returned to work. Ms Tilds said that she begged Gustavo to stay on as a contractor, under the conditions that he would only report to her, Ms Mancino and Ms Lodkin, an Operations Specialist. Gustavo agreed to this proposal.

[114] Ms Mancino said that Gustavo resigned the following day which we take to be the day after the meeting. According to Ms Mancino, Ms Tilds "*reached out*" and told her that Gustavo had resigned due to family reasons. Ms Mancino said that the Respondent contacted her via a message on Slack, and asked whether she knew Gustavo's reason for resigning. Ms Mancino said that she found the Respondent's questions entirely inappropriate as she was not Gustavo's manager, was two weeks into her role and was learning the dynamics of the Company. Ms Mancino also said that she felt the Respondent was digging for information about a staff member who did not report to her, and she felt obligated to respond because he was in a position of power at the Company.

[115] Ms Mancino said that due to her discomfort, she told the Respondent that Gustavo left due to his family situation. Ms Mancino also said that she tried to downplay the situation, telling the Respondent that it was not his fault that Gustavo resigned, and that he handled the matter professionally. Ms Mancino also said that this was not how she actually felt but was what she was comfortable saying to the Respondent, to stop his questions. Ms Mancino said that unfortunately, she did not think to take a screenshot of this exchange.

[116] Under cross-examination, Ms Mancino agreed that she reported this Slack exchange to Ms Tilds who reported it to Mr Wu and that it was contained in an incident report appended to Mr Wu's witness statement. Ms Mancino also agreed that she was not provided with the incident report at the time it was written and had seen it for the first time appended to witness statements in the merits hearing.[42] In response to a question from the Commissioner, Ms Mancino said that she saw the relevant incident report before preparing her statement for the merits hearing. Later, in re-examination, following what can only be described as a series of leading questions from the Appellants' representative, Ms Mancino agreed that she may have seen the incident report after she prepared her statement, at the time she was provided with the court book and that if it was part of Mr Wu's statement, she would not have seen it before preparing her statement.[43]

[117] There are inconsistencies in Ms Mancino's evidence about when she saw Mr Wu's incident report and that she changed her position during re-examination. The Commissioner heard and observed Ms Mancino give her evidence and based on our reading of the transcript, the conclusions the Commissioner reached were reasonably open to her. We do not accept the Appellants' submission that the Commissioner inappropriately disregarded Ms Mancino's evidence. We note that the evidence the Commissioner disregarded included that Ms Mancino

telephoned her aunt, who works in HR, and was said by Ms Mancino to be her personal and professional mentor and discussed her concerns about the Respondent. Quite simply, while relevant to Ms Mancino, the views of Ms Mancino's aunt about the Respondent's conduct were utterly irrelevant to the matters the Commissioner was required to consider, based on what Ms Mancino reported, rather than direct knowledge, and it was entirely reasonable for the Commissioner to disregard that evidence.

[118] Ms Tilds confirmed that Ms Mancino contacted her on 23 March to discuss the exchange she had with the Respondent about Gustavo's resignation and her discomfort about the call. Ms Tilds emailed Mr Troughton and Mr Wu on 31 March describing these incidents. The message tendered by Ms Tilds states that she informed Ms Mancino that human resources issues should be discussed with the employee and the manager and if she is asked about these matters, Ms Mancino should reinforce this point. Ms Tilds stated that she did not appreciate the Respondent contacting Ms Mancino and not her, with his questions and that: "*I am willing to let this go but if it continues it needs to be addressed.*"

[119] Ms Tilds also said that Gustavo informed her on 3 March 2021 that the Respondent had called him "*out of the blue*" to feedback on his preferences regarding social media marketing and to express his concerns on Frameplay's rebranding without his input. The screenshot of the message from Gustavo appended to Ms Tilds' statement says that he had spoken to the Respondent who called to give feedback on what he liked and did not like on social media and that the Respondent expressed concerns about rebranding without his input. The email from Gustavo to Ms Tilds reporting the contact is factual and displays no concern about Gustavo's interaction with the Respondent.

[120] Mr Troughton said that Ms Tilds called him immediately following the incident on 31 March 2021 and told him that the Respondent berated Gustavo, called him a terrible designer and that the matter needed to be resolved quickly. It is notable that nowhere is there evidence that the Respondent said to Gustavo that he was a terrible designer. Mr Troughton said that he did not address this, and other issues with the Respondent directly.

[121] The conversation between Ms Mancino and the Respondent, described by Ms Tilds as an "*interrogation*", took place over Slack. A copy of the exchange between the Respondent and Ms Mancino was tendered by the Respondent during the merits hearing. The exchange starts with the Respondent asking "*btw* [by the way] *what happened with Gustavo? Is he still around to help you with your marketing requirements?*" to which Ms Mancino gave a fulsome response as follows: "*His wife works out of the house and Gustavo works from home with his kids. I think he realised it was harder for him to dedicate his time to his work while also watching his two children, so he made the decision to do more freelance so its more flexible for him. Yes! He'll still be around to help from a freelance perspective and I also know a couple of designers locally who can step in as well until we hire someone new*." The remainder of the exchange shows Ms Mancino volunteering detailed information in response to brief questions and comments from the Respondent. In that exchange the Respondent stated that he hoped it was not his feedback from the meeting that had caused Gustavo to make that decision and Ms Mancino reassured him that this was not the case.

[122] It suffices to say that the record of the conversation does not evidence anything remotely resembling an interrogation or the Respondent asking inappropriate questions of Ms Mancino.

Nor is there any indication of discomfort in Ms Mancino's responses. The text of the slack exchange does not indicate that the Respondent was digging for information and Ms Mancino's fulsome responses to benign questions asked by the Respondent are completely at odds with her evidence that she was pressured or uncomfortable during the exchange. Ms Mancino's responses provide more information than the Respondent was requesting. At best it evidences that the Respondent was concerned about Gustavo's reaction to his feedback at the meeting and was checking in on him. Contrary to the spin the Appellants' witnesses placed upon the Slack exchange between the Respondent and Ms Mancino, it evidences that the Respondent has a degree of self-awareness about the possible effect of his comments.

[123] As the Commissioner correctly recorded at paragraph [61] of the Merits Decision, the text of the Slack exchange was put to Mr Troughton in cross-examination, and Mr Troughton struggled to explain the seriousness of the alleged incident after he read that transcript. This is hardly surprising. Mr Troughton confirmed that he had not looked at the Slack exchange before the merits hearing, including when he gave the Respondent the termination letter which referred to the exchange as an interrogation. Further, Mr Troughton said that he acted solely on information relayed to him by Ms Tilds. In response to questions from the Commissioner as to whether he took further action to obtain information other than what he was told by Ms Tilds, Mr Troughton said that Gustavo had already left and putting this in front of the Respondent would have caused a severe event.[44] We take it, as did the Commissioner, that Mr Troughton did not independently investigate Ms Tilds' complaint before including it in the Respondent's termination letter.

[124] Mr Wu's incident report in relation to this matter[45] is also of little assistance to the Appellants' case. As the Commissioner points out at paragraph [68] of the Merits Decision, while the reports set out the date of each incident, they are not contemporaneous and do not specify the date on which the report was prepared. Further the incident reports were not shown to the person who allegedly raised the issue to confirm the version of events, much less the Respondent. The Commissioner placed little weight on the reports and for the reasons we set out below in relation to the appeal ground dealing with those reports, this was entirely reasonable. It is also relevant that this incident, which was serious enough to be specified in the dismissal letter and referred to in the appeal grounds as the final straw, occurred in March 2021, and the Respondent was not dismissed until July 2021.

[125] The Commissioner assessed the evidence about this incident at paragraphs [121] – [124] of the Merits Decision and concluded that it could not be characterised as misconduct on any level. We agree with that conclusion and on our review of the evidence, this entire incident was exaggerated by the Appellants, to add to the narrative of allegations against the Respondent, which on closer examination are not serious enough, either individually or collectively, to constitute a valid reason for the Respondent's dismissal. We deal further with the incident reports tendered by Mr Wu in our consideration of appeal ground 16.

[126] We accept that it is more probable than not that the Respondent was rude and pointed in the meeting and caused distress to Gustavo, Ms Tilds and Ms Mancino. However, the evidence of Mr Gurney establishes that he also had issues with the colours used by Gustavo in the package. The aphorism "*blue and green should never be seen*" is old and probably no longer relevant to modern design, but neither the comment nor the conduct described in the evidence

constitutes serious misconduct or bullying. This is a matter that could and should have been addressed with the Respondent by Mr Troughton.

[127] Gustavo became a contractor to the Appellants after this incident, and doubtless entered this arrangement because it suited his personal circumstances, which appears to be the reason for his resignation. It appears that both before and after his resignation, Gustavo was residing in Puerto Rico, and working from home. When Gustavo accepted a contractor role, he was informed that he was not required to have further contact with the Respondent, notwithstanding that there is no real evidence that such contact would have caused any concern to Gustavo. This evidence also indicates that there is little chance that the reinstatement of the Respondent would cause any issue for Gustavo.

[128] No error on the part of the Commissioner is made out in relation to appeal grounds 10 and 11 and we reject those grounds.

Ground 14 – failure to consider evidence of warnings

[129] The Appellants contend in relation to this ground that the Commissioner failed to consider evidence of warnings that arise from the statements of "*more than one witness*" to the warning. There is no reference in the Appellants' written submission to the evidence the Commissioner was said to have failed to consider. In oral submissions in the appeal, reference was made to Mr Troughton's second witness statement[46] which contained evidence in response to the Respondent's assertions that he was not given warnings or counselled about his behaviour. In summary, that evidence was that Mr Troughton constantly raised issues with the Respondent and that raising anything felt like a nuclear bomb going off. Mr Troughton also said that he did not have time to be documenting informal counselling that occurred several times per day for two years. Mr Troughton further asserted that given the infancy of the Company he was reluctant to document evidence of the Respondent's behaviour in case investors turned away due to the perception that the Respondent in his role as CTO was a liability.[47] Mr Troughton said that he gave a specific warning in relation to an incident on 28 July 2020, when Ms Tilds and Mr Wu contacted him jointly to discuss the Respondent's conduct, at a meeting in relation to marketing.

[130] Mr Troughton said that he contacted the Respondent to warn him about his conduct and directed him not to yell at people in meetings, to remain calm in meetings, that bullying was grounds for dismissal, and he needed to mend his bridges with Ms Tilds straight away. In relation to the 10 August 2020 incident involving the allegation that the Respondent bullied a junior employee [Mr Solarino], Mr Troughton said that he contacted the Respondent after three or four people reported the incident to him and issued a warning to him by telephone. According to Mr Troughton, he recounted "*in painstaking detail*" to the Respondent some of the fallout that could transpire from his conduct. Mr Troughton said that Mr Wu was also on the call. Mr Troughton also said that he could hear the Respondent "*whimper and sniffle*" when he raised the issue and assumed that the Respondent knew he had done the wrong thing. According to Mr Troughton, he directed the Respondent to apologise for the incident and the Respondent refused to do so. In his oral evidence in chief in the merits hearing, Mr Troughton said that this incident was the biggest issue for him: that Mr Solarino was traumatised and there had been "*many instances of counselling since*".[48] Mr Troughton also said that he had not asked Mr

Solarino to give evidence due to the impact the incident had on him, with such impact still being felt.

[131] In relation to his assertion that the Respondent's conduct was sex discrimination, Mr Troughton said that there was a consistent pattern of staff members needing to have a buddy system or other people present on calls and the fact that the Respondent had not hired any female staff in the Melbourne office. Mr Troughton agreed that sex discrimination is a serious allegation, and this was one of the reasons the Respondent was summarily dismissed.[49] In response to questions from the Commissioner, Mr Troughton also agreed that he did not warn the Respondent that there were issues with his conduct or that he would lose his job if he did not alter his conduct. Mr Troughton maintained that it was made clear that "*we'll have to make changes and … the words that were used; we'll have to make changes to the team structure if these sorts of things kept going.*"[50] Later Mr Troughton said:

> "…So by a summary it's confirmed that you have all these concerns and there is a number of concerns there, then you provide examples? -So I think - yes, I understand where you're getting at with (a); did we speak to every portion and directly address this with Mr Rossi in every element of (a). Very much so on the bullying, very much so on the insubordination and the sexism element there, we had to enact measures around it opposed to directly. Now, call this an understanding - I can't speak for others. I don't know if others did directly, but I personally did not ever tell him he is being sexist to employees. I said he has to stop with some of this behaviour. Personally I think the relationship between us if I said this and this is how I feel to this - if I said that, that would be a set-off moment."[51]

[132] Mr Troughton also recounted an incident on 3 March 2021, during which the Respondent directed staff to disregard other executives. Mr Troughton said he contacted the Respondent to warn him about this incident, with Mr Wu also on the call, and during that discussion, told the Respondent he should not "*dissent me or the executive leadership team like that in front of the team*". According to Mr Troughton, the Respondent screamed: "*I'll speak to you however the fuck I want*." Mr Wu did not refer to either of these conversations in his witness statement. Mr Troughton gave the following oral evidence in chief, in reply to the Respondent's evidence that he was not warned or counselled about his conduct or work performance:

> "[PN1137] And at paragraphs 9 to 10, Mr Rossi addresses warnings, or counselling? Yes, I mean - okay, so with all executives it's more like a one on one basis. Like, they do constant assessment of this. Like, you can't be leaving these sorts of things for a long time and then letting them metastasise, so one on one with all executives, like coaching on how to do things better. I mean, that's the same way, you know, even myself, if I'm doing - you know, I don't have, necessarily, the same relationship there but I perceive education and coaching on a one on one basis - you know, it's not like a scoring system when you go through and you talk about it, constantly and apply that change as you are learning it, not waiting 3 months, a quarter or whatever, 6 months, to have that effect. Like, you need to be making these changes on the fly. And now I think with the statement, it's ongoing performance appraisals. That's kind of the way we look at it. It's like, as we're doing one on ones, as Mr Rossi is aware, there was many one on ones. You know, we aim to do one on ones, twice a week. We didn't always get to do them but we aim to. And on many occasions there were some pretty heated one on ones. It's unfortunate but it is what happened.
>
> Do you say there was heat over conduct and performance issues? Yes. So, in my experience Mr Rossi is not great at receiving a comment in a negative connotation. In many instances I've had to dance around them because of this reaction that I get isn't rational, and then it's almost like deflection by anger. So, yes, there was many occasions, many more - and I realise here, as I've looked at this, going back, this would have been very helpful to document all this. When you're doing many of these every single week it's not something that you're going to document all the time, especially from the perspective of like, part of my main role is to raise capital, and I'm also not going to document exactly what the due diligence

> teams are looking for in HR matters to then say, hey, this is, you know, clearly a problem, you've got a long documented history of this. And you know, that's going to hinder raising cash, so - - -
>
> [PN1139] You're referring there to if there was HR documentation around the need to warn or counsel Mr Rossi over his conduct? Yes, well I mean, it was a constant - a constant. Like, this was happening multiple times a week, you know, to the point where as we're going back to look through these things, it's really bringing it to the forefront of thinking. Like, there's been a massive shift since this change and we're not having this internal conflict in the business since the departure of Mr Rossi. So, you know, I realise from an HR perspective it would have been more beneficial to record these every time, and then balancing that with raising capital. It would have been next to impossible. But it's generally the way I felt it was. He was unapproachable, like, for myself and many. It was unapproachable to talk to Mr Rossi about these things because it was - it just turned into him yelling at me, or yelling at anyone, and there was no sort of way to approach the actual problem. And I don't think he wanted to hear it, either.
>
> [PN1140] And when you say, 'yelling', was that part of Mr Rossi's regular communication? Unfortunately, yes. I mean, I'm not sure where in these statements but at one particular instance, and I was not alone in this phone call, we were basically going through these things and I did even say to Mr Rossi, 'You can't speak to me like this', whether as a - you know, co-workers, friends or anything. And his response was, 'I'll speak to how the fuck I want.' I mean - - -"[52]

[133] Mr Troughton's evidence on the subject of warnings is neither coherent nor credible and it is understandable that the Commissioner rejected it, as we do. In relation to the Respondent's denial of a performance assessment meeting on 31 May 2021, Mr Troughton said, under the heading "*Specific warning – performance appraisal*", that the meeting felt like he was standing in front of a firing squad and as such could not be held in a normal manner. Mr Troughton went on to allege that over the course of the 2020 – 2021 financial year, he reminded the Respondent about his treatment of people and said that something was going to have to be done to discipline him. Mr Troughton also said that the situation was tricky because he did not want to document the Respondent's behaviour for fear that investors would see the Company as "*a ticking time bomb*". The Employment Incident Report tendered by Mr Wu dated 31 May 2021, nominates Mr Troughton and Mr Austin as having reported the "*incident*". The Incident Report gives no indication that there was a meeting with the Respondent about matters set out in the Report. As with other reports tendered by Mr Lu, there is no evidence of when the report was written.

[134] Further, Mr Austin did not give evidence about a performance meeting involving the Respondent, Mr Wu and Mr Troughton on 31 May 2021. Mr Austin's evidence concerns a meeting on or around April 2021, where the engineering team leads had been brought in for annual reviews. Neither Mr Troughton nor Mr Wu were at this meeting. Mr Austin does not confirm that the Respondent was the subject of a performance assessment meeting in relation to his own performance, on 31 May 2021, or any other date.

[135] The 31 May 2021 Incident Report refers to an "*audit*" that Mr Troughton said was conducted by Mr Greg Wise, an adviser to the Appellants. The Appellants' legal representative was permitted to ask a significant number of questions to adduce oral evidence in chief in addition to the matters set out in the witness statements filed for the Appellants. Despite being given the opportunity to provide further evidence, it was of limited utility. Mr Troughton said in oral evidence in chief, in response to a series of questions from the Appellants' legal representative, that he did not actually attend the meeting between Mr Wise and members of the engineering team and that he prepared the audit report after a discussion with Mr Wise.[53] Further, Mr Troughton confirmed that he did not share the audit document with anyone in the

engineering team.[54] When Mr Troughton's oral evidence on these points is considered, his witness statement wherein he observes that "*Mr Rossi's contributions were strangely omitted from the report*"[55] appears to be somewhat disingenuous, given that Mr Troughton drafted the report and any omissions were his. Mr Troughton also confirmed in his evidence that the Report was not verified with the staff who attended the meeting[56] and was not shown to the Respondent and nor was he warned about the alleged performance issues in the Report.

[136] As the Commissioner noted, the Respondent produced documentary evidence demonstrating that the purpose of the process was for Mr Wise to provide "*feedback*". Mr Troughton confirmed that he had a discussion with the Respondent about the purpose of the audit and that he told the Respondent it would help the Appellants secure investment. As the Commissioner pointed out, the termination letter referred to an assessment by Mr Troughton of the Respondent's performance said to have been conducted on 31 May 2021, and Mr Troughton's evidence confirmed that no information about this assessment was given to the Respondent.

[137] In our view, the Commissioner considered the evidence that was before her in relation to assertions by Mr Troughton and Mr Wu that the Respondent had been warned about his conduct and did not accept that evidence. Having reviewed the evidence, we are of the view that the Commissioner's conclusions were reasonably open to her. We do not accept that the Commissioner failed to consider evidence of warnings that arise from the statements of "*more than one witness*" to the warning. Quite simply there was little or no cogent evidence of warnings, any evidence about this matter was mere assertion and we are unable to identify any error on the part of the Commissioner in this regard. Nor did the Respondent direct us to any failure to consider particular evidence.

[138] Mr Troughton sitting in his office contemplating the Respondent's conduct and work performance based on a report of an audit meeting that he wrote, even though he did not attend the meeting, does not constitute a warning to the Respondent. Neither does any discussion that Mr Troughton had with Mr Wu or Mr Austin about the matter. Other than the matters we have dealt with above, there was no evidence of warnings and the Appellants' submissions on this ground did not point to such evidence, much less evidence that was corroborated. The Commissioner concluded that Mr Troughton made assertions about the Report but failed to provide any evidence to support his allegations, and his responses were "*vague and non-committal*". We note that the Commissioner heard and observed Mr Troughton give evidence and was in a better position than us to make an assessment. Even so, on a reading of the transcript of Mr Troughton's evidence, we agree with the Commissioner's view.

[139] Appeal ground 14 is rejected.

Ground 15 – Respondent's dealings with JobKeeper scheme

[140] In appeal ground 15, the Appellants contend that the Commissioner failed to understand and properly deal with evidence and legal issues surrounding the Respondent's attempt to dishonestly deal with JobKeeper. The nature of the Commissioner's misunderstanding and the evidence the Commissioner was said to have failed to properly deal with was not identified in the ground of appeal or the Appellants' submissions.

[141] Mr Troughton's evidence about the Respondent's dealings with JobKeeper comprised his own observations and assessment of the Respondent's evidence in the jurisdictional hearing which Mr Troughton termed an "*admission*" involving how the Respondent dealt with PAYG deductions. Mr Troughton said:

> "I am not an expert in Federal Tax Law, but I suspect the substance of the admission is not in line with the expectations of the Australian Government. If you ask me, it looks like a misrepresentation."[57]

[142] That evidence is hardly convincing. Mr Wu's evidence was equally vague on this subject, and in his witness statement, Mr Wu professed to be alarmed that the Respondent implied that he defrauded the Australian Tax Office via the JobKeeper scheme. How the Appellants did this is not explained by Mr Wu. Similarly, Mr Blake said that the Respondent admitted to financial misconduct during the jurisdictional hearing without providing any particulars as to what the alleged misconduct involved.

[143] In his witness statement made on 27 February 2022, Mr Morris explained the treatment of JobKeeper and that explanation was accepted by the Commissioner, who noted that Mr Morris was extensively questioned about the matter. A significant point that emerges from the evidence is that the Respondent went without wages, and his JobKeeper payments were used to top up the wages of other staff, when the first Appellant did not have funds to pay those staff. Mr Morris agreed that this may have been irregular insofar as JobKeeper payments were to go to each employee in respect of whom they were claimed, but the Respondent diverting JobKeeper payments to which he was entitled, to other employees of the Appellants who were also entitled to those payments, can hardly be described as defrauding JobKeeper.

[144] It was reasonable for the Commissioner to accept that evidence and we discern no error in relation to this issue. We observe that this is one of the serious allegations that have been levelled against the Respondent by witnesses for the Appellants, without any detail or evidence to substantiate the alleged misconduct. It is surprising that this contention is pressed in the appeal without reference to any evidence nor identification of the significant factual error said to have been made by the Commissioner.

[145] We also note in relation to financial matters, that the Respondent and Mr Morris were found by the Commissioner to have provided full and comprehensive explanations for the allegations raised by the Appellants at first instance, including that the Respondent did not behave inappropriately by repaying a $100,000 bank loan he had secured for the Appellants. The transcript indicates that the Respondent took Mr Troughton to an email exchange in relation to the loan that he tendered, establishing that the Respondent was the sole guarantor for the loan, Mr Troughton's family did not guarantee any part of it, and that Mr Troughton was aware that the loan was to be repaid. The email exchange also indicates that the Respondent and Mr Troughton had agreed that the loan would be used to "*get the Company to July and pay everyone*".[58] Mr Troughton's response to this was to assert that he was not saying that he was unaware of the loan being paid off, but rather was asserting that it had not been paid off at the agreed time. Mr Troughton also agreed that the complaint about the loan in Mr Wu's statement was that it was paid off without consultation and that he had not responded to the Respondent's suggestion that they explore other options to raise funds whereby they split the liabilities 50/50.[59]

[146] The Commissioner also disregarded allegations that the Respondent threatened to bankrupt the first Appellant, instead finding that the Respondent was concerned as a director of the first Appellant that its trading position placed him in potential breach of his obligations. Further, the Commissioner accepted the explanation provided by Mr Morris and the Respondent in relation to the treatment of back payments for wages owed to the Respondent.

[147] Finally, we note that the Commissioner – correctly in our view – did not accept that the Appellants had no oversight or control over the Respondent's financial dealings with the accounts of the first Appellant and that they always had access to those accounts. Mr Troughton's responses to questions put to him when he gave oral evidence in chief, and in cross-examination, were entirely unconvincing and it was reasonable for the Commissioner to reject them.

[148] Ground 15 is rejected.

Ground 16 – inaccurate recording and unreasonable conclusion in relation to Incident Reports

Overview

[149] The Appellants' complaint in relation to the inaccurate recording of, and unreasonable conclusions by the Commissioner in relation to incident reports, relates to five documents appended to the witness statement of Mr Wu, and one document appended to the witness statement of Mr Gurney. Some of these documents have been referred to in this decision in relation to other appeal grounds. We deal first with the general findings about the incident reports.

[150] The incident reports were appended to Mr Wu's statement and are in identical format, headed "*Employee Incident Information*". Each document states the name and title of the employee involved in the incident, the date of the incident, who it was reported by, the location, additional persons involved and witnesses. Mr Wu stated that these reports documented the most egregious incidents relating to the Respondent's conduct and supported the termination of his employment for reasons set out in the termination letter.

[151] The Appellants contended in oral submissions that the Commissioner found the reports were fabricated, and that while Mr Wu was questioned by the Respondent and the Commissioner about time delays in relation to the preparation of these reports, it was not put to him that the reports were fabricated. It was submitted that to accuse Mr Wu of fabricating reports was a serious allegation and "*a very big call*", and that for the Commissioner to move from noting delays in preparing the reports to making a finding that they were fabricated denied procedural fairness to the Appellants and Mr Wu.

[152] In support of this assertion, reference was made to the transcript of the merits hearing where the Commissioner put to Mr Wu that he would sometimes prepare the reports a few weeks after the incident and questioned him further as to the dates on the reports. Mr Wu explained that the date of each report is the date when he was first informed about the incident and the date of the incident recorded in the report is when the incident occurred. Mr Wu confirmed that there is not a "*completed date*" on the reports and while the Appellants were ramping up in terms of processes and procedures, there was no internal policy or clear process for the reports.[60]

[153] In response to a question from the Commissioner, Mr Wu said that the incident reports were not used for the purpose of drafting the termination letter but formed part of the reason why the Appellants had to move forward with termination. Under cross-examination, Mr Wu said that he verified the contents of the reports with the supervisor of the person involved rather than directly with that person.[61] In relation to the incident report tendered by Mr Gurney, Mr Wu said that he was not aware of how Mr Gurney came to be in possession of this report. Mr Wu also agreed that it did not have a report number and looked different to other reports he had tendered.[62]

[154] Given that the contents of these reports were said by Mr Wu to be the most egregious incidents of misconduct by the Respondent, it is useful to consider each report and the evidence that was before the Commissioner about the relevant incident. This consideration is also useful given the lack of particularity in the appeal grounds about the alleged failure of the Commissioner to have regard to evidence about the Respondent's misconduct. We consider the reports chronologically.

Disparaging Mr Wu and Ms Tilds

[155] The first report is dated 28 July 2020 and states that during a call with Mr Wu and Ms Tilds, to discuss marketing and social media, the Respondent openly disparaged them regarding management of marketing and finance where he is not a subject matter expert. The report states that after the incident, Mr Troughton and Mr Wu addressed the matter directly with the Respondent who asked them to fire Ms Tilds so that she could not speak badly about him to the Board. The incident is said to have been reported by Ms Tilds on 28 July 2020, but the date on which the incident report was prepared is not identified. Remarkably, Ms Tilds was not party to the conversation between the Respondent, Mr Troughton and Mr Wu, where the remark about her was allegedly made and did not deal with this report in her evidence in chief.

[156] Mr Wu's version of the meeting with Ms Tilds and the Respondent is that the Respondent told him and Ms Tilds that they did not know what they were doing and was abrasive in his tone. Ms Tilds gave no evidence about this incident but recounted that on 28 July 2020 (the date she is said to have reported the Respondent's disparaging conduct) the Respondent set up a meeting with an external agency to discuss redesigning the Appellants' website, an area for which Ms Tilds was responsible. In support of this assertion, Ms Tilds tendered a message from Mr Troughton. That message does not refer to an external agency but states that the Respondent had asked about getting the website redesigned and Mr Troughton had40efered him to Ms Tilds as it is her "*realm*".

[157] The supporting document attached to this report is dated 20 January 2020, and consists of complaints made by the Respondent about expenditure on food by staff in the US and questioning why Mr Wu is approving such expenditure, particularly when it is not on clients. While the Respondent's communication is direct, referring to the approval of the spend being "*bullshit*", he is Director of the Appellants, and the amounts were not inconsiderable in the context of the financial position the Appellants were in.

[158] Under cross-examination, Mr Troughton said that within ten minutes of the meeting ending he was contacted jointly by Ms Tilds and Mr Wu. In his oral evidence in chief, Mr

Troughton claimed that the Respondent denied that he disparaged Ms Tilds or Mr Wu and pointed to the fact that the alleged incident occurred almost one year prior to his dismissal. The Respondent also pointed to the lack of detail about how he allegedly disparaged Mr Wu and Ms Tilds.

Solarino Incident

[159] The second report is dated 12 August 2020 and is said to have been made by Mr Austin. It is asserted in the report that during a 1-on-1 meeting between the Respondent and Mr Solarino, while addressing that Mr Solarino had missed a few team meetings, the Respondent referred to him as "*a useless cunt and waste of company money*". The report asserts that Mr Solarino raised the incident with Mr Austin and HR, and that the Respondent continued to display hostile behaviour towards Mr Solarino and repeatedly asked Mr Troughton and Mr Wu to fire Mr Solarino, prior to the discovery of the incident. The report also asserts by way of an "*Update Apr 22, 2021*" (which does not appear chronologically in the report) that the Respondent refused to grant stock options to Mr Solarino despite all other employees in the same position receiving stock option grants.

[160] In relation to this incident, the Appellants assert that the Commissioner failed to give weight to their evidence. In support of this assertion, the Appellants refer to the evidence of Mr Austin about incident between the Respondent and Mr Solarino. According to Mr Austin's evidence, as set out in his witness statement, on around 3 August 2020, the Respondent mentioned that Mr Solarino had missed a few weekly meetings and Mr Austin failed to communicate to Mr Solarino the importance of attending meetings with the Respondent. Mr Solarino missed a further meeting and the Respondent contacted Mr Austin to inform him that Mr Solarino's behaviour was not good enough. Mr Austin said that he tried to explain that he had failed to communicate with Mr Solarino but the Respondent reiterated that Mr Solarino deserved a formal warning. Mr Austin also said that he later spoke to Mr Solarino who was upset and said that the Respondent had informed him that he was not being paid to slack off, that he did not get any work done, and was useless. Further, Mr Austin said that when he told the Respondent that he was not happy about his treatment of Mr Solarino, the Respondent "*actively encouraged*" him to report the incident. Mr Austin did so, and as Mr Solarino's line manager, took on responsibilities previously undertaken by the Respondent, in relation to matters such as contract, salary and leave requests. While Mr Austin observed that communication between Mr Solarino and the Respondent stopped after the report, he also observed them going out for a cigarette together, once. Mr Austin also observed that he did not believe the incident was ever properly addressed between them.

[161] As the Commissioner observed, it is notable that Mr Austin's evidence in chief, set out in his witness statement, did not include an allegation that the Respondent called Mr Solarino "*a useless cunt and waste of company money*".

[162] Mr Wu's oral evidence about the incident confirmed that it was reported to him by Mr Austin, and that it was corroborated by Mr Troughton and Mr Solarino. Mr Wu also said that Mr Solarino remains traumatised to this day and when approached to give evidence was not able to do so. Further, Mr Wu said that he believed that he had a conversation with the Respondent that also involved Mr Troughton, and the Respondent denied that the event occurred. Later in his oral evidence in chief, Mr Wu said that Mr Solarino asked "*HR*" for a

month off, after the Respondent was dismissed, because of the events that had transpired and had referred to the events involving the Respondent.[63] Mr Wu confirmed that he had not spoken to Mr Solarino in this regard.[64] Mr Wu also confirmed that the Respondent made the decision not to grant stock options to Mr Solarino in his capacity as a director.

[163] Under cross-examination, Mr Wu agreed that the Respondent had discussed with him that prior to this incident Mr Solarino had not turned up to work on four consecutive Fridays, and after speaking with Mr Austin, this matter was not resolved, and the Respondent spoke directly to Mr Solarino and put him on a performance management plan. Mr Wu said that he did not create an incident report about Mr Solarino's attendance and that this was documented in a performance report which was not tendered. A message from the Respondent to Mr Troughton in relation to stock options for Mr Solarino was also in evidence and simply indicated that the Respondent believed Mr Solarino was too junior to receive the options and stated that he would not support the Board granting those options.

Lockdown incident

[164] The third report is dated 28 October 2020, and was tendered by Mr Gurney, in relation to an incident said to have occurred on 22 October 2020. Mr Gurney said the report was filed by Mr Wu. The description of the incident is that persons entered the office without being directed by the business for a personal event that was an infringement on local Victoria Coronavirus (COVID-19) restrictions.

[165] Mr Wu agreed that the report does not resemble other reports and does not have an incident number. He could not explain how the report was in the possession of Mr Gurney.[65] Mr Wu confirmed that he was aware that the Respondent had interviewed each of the persons about the incident. Mr Wu could not recall why the report tendered by Mr Gurney said nothing about intoxication, drugs and non-employees being in the first Appellant's office, and that these were serious issues. Mr Wu confirmed that he knew the event took place during the Stage 4 lockdowns in Victoria and put the Company at significant risk.[66]

[166] In summary, evidence establishes that Mr Gurney took issue with the Respondent's investigation of an incident where a group of employees, including Mr Gurney, were alleged to have returned to the Appellant's premises after hours, during the Melbourne lockdowns, to consume alcohol and drugs. The Respondent interviewed each of the employees involved in the incident individually, asked them not to discuss the matter during the investigation. Mr Gurney did not comply with this direction, which the Commissioner found was a lawful and reasonable direction and arranged a team meeting (which did not include the Respondent) to discuss the matter. Further, Mr Gurney raised the matter with Mr Troughton.

[167] In his witness statement, Mr Gurney described the investigation as "*underhanded*" and claimed to have been blindsided when the Respondent sent each person involved a record of their conversation requesting that they sign that record. Mr Gurney said that he took it upon himself to tell other employees not to sign the statement and notified Mr Troughton and Mr Wu as he thought they needed to know about the "*crazy thing*" the Respondent was "*trying to pull off*". It is Mr Gurney's view that the Respondent's interpretation of the WorkSafe requirements and breach was not correct. Mr Gurney's interpretation of the restrictions was that if an employee caught COVID-19 and was not reported, it would involve a fine. Mr Gurney also said

that all employees involved in the incident spoke to Mr Troughton and Mr Wu the following week, on 28 October 2020 and "*a proper company incident report was written up to which we all agreed with…in a meeting that made us feel involved and comfortable, with no underhanded scenarios.*"[67]

[168] The Commissioner concluded in relation to this issue that it was serious, the Respondent's actions in relation to it were reasonable and that Mr Gurney was undermining the Respondent. We agree with the Commissioner. As the sole director of the first Appellant, located in Australia, the Respondent was responsible for dealing with the conduct and did so in an entirely reasonable manner. Contrary to Mr Gurney's view, an incident involving employees attending a workplace, in the company of a non-employee, for the purposes of socialising outside office hours, was a serious breach of the Stage 4 lockdown requirements then in force in Melbourne under the direction of the Chief Health Officer. Mr Gurney did not deny the conduct but rather, took issue with the way the Respondent dealt with it. Employees who engage in such conduct have no right to agree to the contents of an incident report or to feel involved and comfortable with any disciplinary process which results from such misconduct. Mr Gurney's conduct and those of the other participants in the breach, rather than that of the Respondent, was inappropriate.

[169] The fact that Mr Troughton and Mr Wu allowed Mr Gurney and the other employees involved to essentially dictate the way their breach of COVID-19 restrictions was recorded, does not indicate that the Respondent's approach to this matter was unreasonable. Mr Wu and Mr Troughton should have supported the Respondent – who was the sole Director in Australia and was responsible for the staff who engaged in the breach – in his endeavours to manage the situation. Instead, Mr Troughton and Mr Wu acquiesced in Mr Gurney undermining the Respondent's appropriate responses to this matter. It is also concerning that the Appellants are using the reasonable steps the Respondent took to deal with a serious breach of COVID-19 restrictions in Melbourne, as grounds to support the proposition that the Respondent engaged in conduct that warranted dismissal and that reinstatement of the Respondent is inappropriate.

[170] We reject the Appellants' contention that the Commissioner's findings in relation to this issue involved any failure to properly consider the evidence. Nor is there a factual error, much less one of significance. To the contrary, the Commissioner did not accept the evidence of the Appellants' witnesses and in our view, this was reasonable.

Disparaging other Managers

[171] The fourth report is dated 3 March 2021 and was made by Mr Gurney and Mr Austin who stated that the Respondent had actively and openly disparaged the CEO, CFO, CSOO, SVP of business development in front of staff and at a team meeting told staff to disregard everything the other executives say, as he runs the company. As the Respondent pointed out in his evidence, Mr Gurney's witness statement supports his version of events and puts a totally different spin on these matters.

Gustavo incident

[172] The fifth report dated 31 March 2021, deals with the incident involving Gustavo which we have dealt with in detail above. The report is said to have been made by Ms Tilds. It makes

no reference to Ms Mancino being interrogated, and states that the bigger challenge is the Respondent contacting Ms Mancino rather than Ms Tilds, and bypassing management structure to address employees outside his jurisdiction. It is also stated that the Respondent has demonstrated a pattern of disrespect and inappropriate behaviour to female staff and includes the remark allegedly made by Ms McCord to the Respondent stating that he could not speak to her like that. As we have observed, Ms McCord was unable to recall what the Respondent said to her to prompt that remark. The resulting action is said to be that Ms Tilds and Ms McCord refuse to be in a meeting with the Respondent alone, unless a third party is present.

Performance assessment

[173] The sixth report is not dated and states that the incident is a performance assessment undertaken by Mr Troughton raising various issues concerning the Respondent, said to have been corroborated though a "*technology due diligence lead by Derek Wise, external technology advisor performed on May 21, 2021*." The incident report also records that "*it has been raised to Luke Austin directly from the CTO that* '*20% of time is dedicated to the CTO role*'." This report apparently deals with the audit of 31 May which we have dealt with above.

The Commissioner's conclusion in relation to the incident reports

[174] The Commissioner said in relation to the incident reports tendered by Mr Wu, that they produced significant concerns because they were not contemporaneous nor validated, there was an inconsistent approach, material was selectively entered into them and the Respondent who was the subject was not told that they existed or given an opportunity to reply. The Commissioner also noted that the existence of the reports was contrary to the evidence of Mr Troughton who went to great pains to claim that he would not keep such records for fear of investors accessing the information. The Commissioner further noted that despite Mr Wu's evidence that the purpose of the reports included performance management, the performance of the Respondent was not managed. In relation to the incident report tendered by Mr Gurney, the Commissioner noted that while Mr Wu claimed to be the author, it was in a different format to other reports said to have been prepared by Mr Wu. The Commissioner's observations in this regard are correct.

[175] After noting Mr Wu's lack of concern about the fact the reports were not contemporaneous, the Commissioner stated that a simple observation of them shows their purpose was to either support the letter of termination or they were made as corroborating evidence.

[176] We see no error in the Commissioner's observations about the incident reports. Having considered them in some detail, we are of the view that they are unconvincing as was the evidence relating to them.

[177] Appeal ground 16 is rejected.

Ground 17 – failure to record or have regard to evidence of sexism

[178] In ground 17, the Appellants allege that the Commissioner failed to record or have regard to evidence of sexist behaviour said to have been engaged in by the Respondent. In the

submissions in respect of this ground, the Appellants also referred to the Respondent's discriminatory conduct.

[179] Mr Troughton's evidence was that Ms Tilds reported to him that in a meeting on 28 July 2020, the Respondent called her stupid "*on several occasions*" and spoke down to her. Mr Troughton claimed that he contacted the Respondent to warn him and told the Respondent not to yell at people in meetings, to remain calm and that he needed to mend burned bridges because Ms Tilds was valuable to the Company. The Respondent said that he was never warned about the incident on 28 June 2020, and it occurred almost one year prior to his dismissal. We note that even on Mr Troughton's evidence, he did not warn the Respondent about sexism. Further, Mr Troughton said that he could only speculate as to what the issue concerning this complaint was, but the Respondent had recruited one female to his team in Australia and that the lack of gender balance "*is part of his issues*". Under cross-examination, Mr Troughton said that he was speculating on the underlying issues that the Respondent had with his approach to women in the workplace.[68]

[180] Under cross-examination, Ms McCord was taken to the termination letter provided to the Respondent on 2 July, and in particular a statement in that letter that Ms Tilds and another female staff member had requested a support person to attend all meetings with the Respondent due to his "*aggressive and sexist behaviour*". Ms McCord agreed that she had made such a request but was unable to provide an example of the Respondent being aggressive and said that having another person present at meetings was to make sure that she was set up for success and feeling "*comfortable*" during all calls.[69]

[181] In response to a question as to what situation occurred where the Respondent discriminated against Ms McCord on the grounds of her sex, Ms McCord gave the following response and then confirmed in response to a further question, that this was her specific example:

> "[PN3341] What situation occurred that I demonstrated that I discriminated against you on the basis of your sex? Yes, so pertaining to my - what I said previously, the call-out of, I felt my quality of work, or the detail that pertained to what I was doing, it felt like there were just a distrustment as well as lack of confidence in my ability, which I did not see magnified to the extent that it was when it came to myself and Cary, who at the time was the - for the majority she was the second woman at the company. I was the first, obviously, as you know. And so pertaining to that was what made me feel like that, because I just wasn't seeing that magnified to the same level as other employees."[70]

[182] Ms McCord was also shown an incident report prepared by Mr Wu, in relation to a report by Ms Tilds, stating that the Respondent had demonstrated a pattern of disrespect and inappropriate behaviour to female staff, that Ms McCord and Ms Tilds had been required to address directly with the Respondent, and that Ms McCord had remarked to the Respondent "*on one occasion*" that "*you cannot speak to me like that, and if you continue to do so, we will have a problem.*"[71] Ms McCord could not recall the specific meeting where this exchange occurred or what the Respondent said that caused her to respond in that way. Ms McCord agreed that she made negative comments about the Respondent to Ms Tilds as soon as Ms Tilds started working for the second Appellant and in response to a question as to whether this was appropriate, said: "*Absolutely, that was my personal truth.*"[72] In response to requests to provide a specific example of how the Respondent targeted her due to gender as she alleged, Ms McCord said that she felt subjected to micro-management, and acknowledged that a contributor to this

may have been that the Respondent was further away from the other members of the executive team.[73]

[183] Ms McCord also gave evidence of a switch in the Respondent's behaviour to her prior to his dismissal, where he was "*sickeningly nice*", and opined that this was because he knew that he was going to be dismissed. Ms McCord agreed with a proposition put to her under cross-examination that her evidence was that this switch occurred around the start of 2021, and that the Respondent was dismissed in July 2021. In response to the proposition that the Respondent was concerned about her increased workload, Ms McCord said that she would have assumed this for the majority of other employees, but it was out of character for the Respondent in relation to his dealings with her. In relation to her assertion that individuals in the engineering team told her about a toxic work culture, Ms McCord said that she was referring to Mr Austin and Mr Gurney and not to the other seven or eight engineers in that department.

[184] We have considered the evidence in detail and are unable to identify any cogent or relevant evidence that the Commissioner failed to consider. There is no error of fact in the Commissioner's consideration of this issue much less a significant error. We reject appeal ground 17.

Ground 18 – failure to have regard to Respondent's comments in relation to audit report

[185] We have dealt with the so-called audit report, and for the reasons set out above, we reject the Appellants' submissions about the report and agree with the conclusions of the Commissioner in relation to it. We reject ground 18.

Grounds 5, 6, 7. 9,11, 12 and 13

[186] The remaining grounds of appeal are superfluous and add nothing to the specific grounds raised by the Respondent. It is entirely inappropriate to assert that the Commissioner took into account irrelevant considerations and failed to take into account relevant ones, without identifying any asserted error additional to those set out in the more specific grounds. Ground 11 simply refers to ground 10 and is superfluous. For the reasons set out above, ground 10 has no merit.

[187] Ground 12 asserts that the Commissioner in her reasoning at several points in the Decision, "start*s to address one stream of evidence and then confusingly switches to other streams of evidence to conclude on issues in an illogical fashion*". In our view this ground is little more than a gratuitous comment. Indeed, the same could be said of the Appellants' case at first instance and its submissions in this appeal. For reasons we have set out above, the assertion in ground 13 that the Commissioner makes observations on the credibility of witnesses by referring to "*often peripheral aspects of their evidence*" while failing to refer to more material aspects, is without merit.

[188] Considered in detail, the grounds of appeal are little more than the Appellants contending that a different conclusion should have been reached on the evidence, without identifying error, much less significant error, on the part of the Commissioner.

Reinstatement

[189] In relation to the decision to award reinstatement, we do not accept the Appellant's submissions that the Respondent is motivated by corporate issues rather than his continued employment.[74] We accept that the Commission has no jurisdiction in relation to the dealings of corporations *vis-à-vis* their shareholders,[75] but do not accept the Appellants' submissions that the Commissioner failed to understand this distinction. The Respondent has always fully understood that shareholder rights are not within the jurisdiction of the Fair Work Commission and are a separate issue entirely. The Appellants' assertion that the Respondent is motivated by corporate issues is without basis.

[190] The Appellants caused a raft of serious allegations to be made against the Respondent and failed to substantiate the allegations or to establish that any of the conduct about which witnesses gave evidence warranted the summary dismissal of the Respondent. Loss of trust and confidence must be soundly and rationally based. As a Full Bench of the Commission observed in *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter*:[76]

> "The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged and destroyed. The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee … are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate."[77]

[191] We also note the Commissioner's observation that relations between the Respondent and the Appellants were further aggravated by the behaviours of Mr Troughton and Mr Wu, who sought to undermine the Respondent,[78] and in our view, this conclusion was reasonably open to the Commissioner on the evidence. We also agree with the Commissioner's conclusion that: "*while there would have been some loss of trust largely because of the dismissal, I am mindful that the co-founders have worked together in the past and have had a productive business relationship therefore in my opinion, despite their differences, they could continue to do so. They reside in different countries and with proper policies and procedures regarding lines of authority, acceptable conduct… it is in their best interests to maintain a working relationship for the benefit of the Company.*"[79]

[192] We reject the Appellants' submission that the Respondent holds a toxic view of his former colleagues or that he believes they betrayed him. There is no suggestion of this in the evidence of the Respondent notwithstanding that he was self-represented and dealt with a sustained attack by some of those colleagues and the Appellants' legal representatives.

[193] Further, we agree with the Commissioner's conclusion that many of the allegations occurred in 2020 and early 2021 but the Appellants provided no cogent reasons why the Appellant continued to be employed if the concerns of serious misconduct were legitimate.[80] We note that the Commissioner concluded that: "*having observed the behaviour of Mr Rossi with the witnesses over many days during the proceedings, it can be reasonably found that the combination of an absence of policies and procedures together with pressures of a start-up may have contributed to inadequate communication.*"[81] The Commissioner also recorded the Respondent's statement that he could focus solely on his role as the CTO if he was reinstated, and because he would no longer be a director of the Appellants, he would not have to worry about duties as a director or finances of the company. The Respondent pointed out that the

Appellant company raised funding in December 2021 and the second Appellant is now financially secure.[82]

[194] In addition, we accept, as did the Commissioner, that: the role of CTO has not been filled; the Appellants have now hired a qualified HR manager for issues to be addressed correctly; the Respondent cannot simply find another CTO role of a company he created – the role does not exist; and the decision to terminate the Respondent's employment was made by Mr Troughton but the executive of the second Appellant has changed since the termination with at least 2 new Board members.

[195] There were also no issues raised by any of the engineering team who reside in Australia and who would work with the Respondent in Melbourne. As we have noted, those who provided witness statements for the Appellants reside in the US, report to either Mr Troughton or Ms Tilds, and would have little to no involvement with the Respondent on a day-to-day basis, as he is no longer a director. Reinstatement should not be prevented because the Appellants would be embarrassed, or it would be inconvenient for some members of the executive.[83] Further, we are of the view that if the Appellants wish to restructure the business, including by relocating the position of CTO, they can do so having regard to the rights of the Respondent as the person in that position, as they would have been required to do, had the Respondent not been unfairly dismissed.

[196] We agree with the Commissioner's conclusion that the Respondent did not work against the interests of the Appellants.[84] We also accept that the Respondent is seeking reinstatement to ensure that the business succeeds as it is also in his best interests as an employee of the first Appellant and shareholder of the second Appellant. Further we accept that the Respondent has demonstrated his commitment to the Appellants by:

- Lowering his salary when the company had limited funding;[85]
- Going without wages for extended periods of time to ensure staff were paid first;[86]
- Personally securing a $100,000 business loan to ensure the first Appellant could continue to operate during the COVID-19 pandemic;[87] and
- Loaning the Appellants $24,000 from his personal savings to ensure continued operations.[88]

[197] While the Respondent is able to earn a higher income working in his own business, we accept that the role as CTO of a company he created is important for the Respondent and he should not be penalised for having mitigated his lost earnings, by undertaking work that he does not value as highly as he values contributing to a business he co-founded. We are also of the view that this is a case where the professional reputation of the Respondent has likely been damaged by the wilful and unfair conduct of Mr Troughton. In this regard we note that while Mr Troughton afforded the Respondent no procedural fairness, he had no difficulty making extremely serious allegations about the Respondent's conduct to C Level executives in other companies. Mr Troughton, Mr Wu and Mr Blake pressed their allegations before the Commissioner and in the appeal, including asserting that the Respondent had defrauded the Australian Taxation Office. Not only were the Appellants unable to substantiate any of its allegations against the Respondent, but the conduct of those persons was entirely at odds with the evidence that Mr Troughton and Mr Wu did not record the alleged misconduct because they wished to avoid reputational damage for the Appellants by minimising records of disharmony,

so that potential investors would not be discouraged. In our view, if the Appellants' reputation has been damaged, or there has been internal disharmony, then it is substantially due to the conduct of Mr Troughton and Mr Wu, rather than the conduct of the Respondent.

[198] We are also of the view that reinstatement is the most effective remedy to right the wrong that has been committed against the Respondent. Accordingly, we see no error in the ultimate exercise of the Commissioner's discretion to award the remedy of reinstatement.

Conclusion and disposition of the Appeal

[199] For the reasons set out above, we Order that:

1. Permission to appeal is granted.

2. Items C and D of the Order[89] of the Commissioner in relation to payment of entitlements said to have been lost in the six months prior to the Respondent's dismissal and compensation for loss of income are set aside.

3. The appeal in C2022/5655 is dismissed.

4. The Appellants will comply with Items A and B of the Order on 12 August 2022 by reinstating Mr Eric Rossi to the position of Chief Technology Officer of Low Latency Media Pty Ltd T/A Frameplay and maintaining continuity of service and employment for Mr Rossi from the date of the termination of his employment – 2 July 2021.

VICE PRESIDENT

Appearances:

M Harmer of Harmers Workplace Lawyers for the Appellants.
E Rossi, Respondent.

Hearing details:

2023.
By Microsoft Teams:
March 6.

Final written submissions:

Appellant, 2 May 2023
Respondent, 5 May 2023

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[1] *Eric Rossi v Low Latency Media Pty Ltd T/A Frameplay* [2022] FWC 2133 ('*Merits Decision*').

[2] *Eric Rossi v Low Latency Media Pty Ltd T/A Frameplay* [2021] FWC 6152 ('*Jurisdictional Decision*').

[3] [2022] FWC 2473; PR744901.

[4] [2023] FWCFB 14.

[5] Merits Decision at [106].

[6] Merits Decision at [62].

[7] Merits Decision at [42].

[8] [2014] FWCFB 7198.

[9] Ibid at [28].

[10] *Ulan Coal Mines Ltd v Honeysett* [2010] FWAFB 7578 at [20]-[24].

[11] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46].

[12] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24]-[27].

[13] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 at [19] per Gleeson CJ, Gaudron and Hayne JJ.

[14] *Anderson v Thiess Pty Ltd* [2015] FWCFB 478.

[15] *Moszko v Simplot Australia Pty Ltd* [2021] at [45] FWCFB 6046; (2021) 310 IR 373 at 389.

[16] Ibid at [21].

[17] *Cotton On Group Services Pty Ltd v National Union of Workers* [2014] FWCFB 8899 at [5].

[18] [1936] HCA 40; (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

[19] [1986] HCA 17; (1986) 161 CLR 513 at 518-9 per Mason and Deane JJ.

[20] [1979] HCA 63; (1979) 144 CLR 513 at 537.

[21] See *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 at [58] and the authorities cited there.

[22] *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [43], Buchanan J (with whom Marshall and Cowdroy JJ agreed).

[23] *Gelagotis v Esso Australia Pty Ltd T/A Esso* [2018] FWCFB 6092 at [43].

[24] Ibid at [43].

[25] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and others* (1996) 185 CLR 259 at 291 per Kirby J.

[26] Transcript of Proceedings in U2021/6369 on 4 March 2022 at PN2079.

[27] Transcript of Proceedings in U2021/6369 on 4 March 2022 at PN2079 – PN2085

[28] Exhibit R7 – Witness Statement of Clifford Gurney dated 6 February 2022 at paragraph 25.

[29] Ibid at Annexure E.

[30] Ibid at [42].

[31] Transcript of Proceedings in U2021/6369 on 8 March 2022 at PN3006.

[32] Exhibit R8 – Witness Statement of Kayla McCord dated 6 February 2022 at paragraph 19.

[33] Transcript of Proceedings in U2021/6369 on 8 March 2022 at PN3302.

[34] Ibid at PN3304 and PN3369.

[35] Exhibit R9 – Witness Statement of Nicole Mancino dated 6 February 2022 at paragraphs 39 – 40.

[36] Exhibit R9 – Witness Statement of Nicole Mancino dated 6 February 2022 at paragraph 12.

[37] Merits Decision at [188].

[38] Exhibit R9 – Witness Statement of Nicole Mancino dated 6 February 2022 at paragraph 25.

[39] Exhibit R5 – Witness Statement of Cary Tilds dated 7 February 2022 at paragraph 24.

[40] Exhibit R7 – Witness Statement of Clifford Gurney dated 6 February 2022 at Annexure C.

[41] Exhibit R7 – Witness Statement of Clifford Gurney dated 6 February 2022 at paragraph 32.

[42] Transcript of Proceedings in U2021/6369 on 8 March 2023 at PN3514 – PN3517.

[43] Ibid at PN3556 – PN3577.

[44] Transcript of Proceedings in U2021/6369 on 3 March 2022 at PN1786 - PN1789.

[45] Exhibit R4 – Witness Statement of Li Fang Wu dated 5 February 2022 at Annexure C.

[46] Exhibit R2 – Witness Statement of Jonathan Troughton dated 6 February 2022.

[47] Ibid at paragraphs 50 to 55.

[48] Transcript of Proceedings in U2021/6369 on 3 March 2022 at PN1180.

[49] Ibid at PN1487 – PN1497.

[50] Ibid at PN1505.

[51] Transcript of Proceedings in U2021/6369 on 3 March 2022 at PN1515.

[52] Transcript of Proceedings in U2021/6369 on 3 March 2022 at PN1137 – PN1140.

[53] Ibid at PN1101 – PN1106.

[54] Ibid at PN1108.

[55] Exhibit R2 – Witness Statement of Jonathan Troughton dated 6 February 2022.

[56] Ibid PN1108.

[57] Exhibit R2 – Witness Statement of Jonathan Troughton dated 6 February 2022 at paragraph 99.

[58] Exhibit A4 – Witness Statement of Eric Rossi dated 27 February 2022.

[59] Transcript of Proceedings in U2021/6369 on 3 March 2022 at PN1839 – PN1842.

[60] Transcript of Proceedings in U2021/6369 on 4 March 2022 at PN2543 – PN2454.

[61] Ibid PN2310.

[62] Ibid PN2319 – 2323.

[63] Transcript of Proceedings in U2021/6369 on 4 March 2022 at PN2157.

[64] Ibid at PN2158.

[65] Transcript of Proceedings in U2021/6369 on 4 March 2022 at PN2322 – PN2323.

[66] PN2330 – PN2335.

[67] Ibid at paragraphs 54, 59 and 60.

[68] Transcript of Proceedings in U2021/6369 on 3 March 2022 at PN1485.

[69] Transcript of Proceedings in U2021/6369 on 8 March 2022 at PN3339.

[70] Transcript of Proceedings in U2021/6369 on 8 March 2022 at PN3341.

[71] Exhibit R4 – Witness Statement of Li Fang Wu dated 5 February 2022 at Annexure C.

[72] Transcript of Proceedings in U2021/6369 on 8 March 2022 at PN3369.

[73] Ibid at PN3372 – PN3373.

[74] *Low Latency Media Pty Ltd T/A Frameplay, Frameplay Holdings Corporation v Eric Rossi* [2022] FWC 2473 at [11].

[75] Merits Decision at [39], [148], [150] and [151].

[76] [2014] FWCFB 7198.

[77] Ibid at [28].

[78] Merits Decision at [172].

[79] Merits Decision at [171].

[80] Merits Decision at [173].

[81] Merits Decision at [172].

[82] Merits Decision at [174].

[83] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 (Ross J, Gostencnik DP, Wilson C, 21 October 2014) at [27]; *citing Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186.

[84] Merits Decision at [172].

[85] Transcript of Proceedings in U2021/6369 at PN293.

[86] Ibid.

[87] Merits Decision at [49], [66].

[88] Merits Decision at [12].

[89] PR744753.