DECISION

Fair Work Act 2009
s.604—Appeal of decision

Nsw Trains T/A Nsw Trainlink

v

Wael Al-Buseri
(C2023/4773)

DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT CROSS
DEPUTY PRESIDENT GRAYSON

SYDNEY, 21 SEPTEMBER 2023

Appeal against decision [2023] FWC 1517 of Deputy President Boyce at Sydney on 24 July 2023 in matter number U2023/2213 – unfair dismissal application – self-defence – permission to appeal granted – appeal upheld – decision quashed.

Introduction

[1] NSW Trains seeks permission to appeal a decision by Deputy President Boyce in which he found that Mr Al-Buseri was unfairly dismissed (***Decision***)[1] and ordered that Mr Al-Buseri be reinstated, together with orders for lost remuneration and continuity of employment (***Orders***).[2]

[2] By consent, the Decision and Orders were stayed pending hearing and determination of this appeal.[3]

Deputy President's Decision

[3] Mr Al-Buseri was employed by NSW Trains as an Intercity Train Driver.

[4] NSW Trains dismissed Mr Al-Buseri as a result of his violent interaction with a member of the public at Bankstown Railway Station, on his way to work, on 29 July 2022.

[5] The Deputy President found that Mr Al-Buseri was tripped from behind by a member of the public as he entered the concourse at Bankstown Railway Station.[4] The act of tripping Mr Al-Buseri was not caught on CCTV but the remainder of the interaction between Mr Al-Buseri and the member of the public was so caught. The CCTV footage was admitted into evidence before the Deputy President.

[6] The Deputy President relied on the CCTV footage and the evidence given by Mr Al-Buseri to make factual findings as to what occurred at Bankstown Railway Station on 29 July 2022.[5]

[7] Having found that Mr Al-Buseri had squarely raised the issue of self-defence in connection with his violent interaction with the member of the public on 29 July 2022, the Deputy President addressed in some detail the "law of self-defence". For reasons which will soon become apparent, it is relevant to set out in full the Deputy President's reasons in relation to this issue:

> "**The Law of Self-Defence**
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> [35] The Respondent's reasons, for its decision to dismiss the Applicant, do not extend to an express allegation of assault. Rather, the Respondent frames its reasons for dismissal as the Applicant acting inappropriately in a physical altercation with a member of the public on 29 July 2022, and, in doing so, breaching the Transport Code of Conduct (see paragraph [57] of this decision).
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> [36] In my view, whilst the Applicant was not expressly dismissed for "assault", or the use of excessive force beyond the realms of self-defence, the fundamental issues underlying the Respondent's reasons for dismissal are intertwined with same (i.e. whether the Applicant was entitled to believe he was faced with a threat, whether the Applicant's actions in responding to that threat were necessary, and whether the Applicant's actions in dealing with that threat were proportional and appropriate (the latter also by reference to workplace policies and training)). Further, it is apparent from the CCTV video footage of the interaction between the Applicant and the Offender (putting aside defences) that they both engaged in assault.
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> [37] In these proceedings, the Applicant squarely raises the issue of self-defence in asserting that he was not dismissed for a valid reason, and that his dismissal was harsh, unjust and unreasonable. The issue of self-defence was also raised by the Applicant in his written responses to the Respondent prior to his dismissal, and in his Form F2 Unfair Dismissal Application.
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> [38] In the circumstances set out in paragraphs [35] to [37] above, I consider it appropriate in these proceedings to gauge or measure the issue of whether the Respondent had a valid reason to dismiss the Applicant by reference to the law of self-defence. In other words, these proceedings are not criminal proceedings, and the Respondent is not prosecuting the Applicant for the crime of assault. But the issues for resolution in these proceedings going to whether the Applicant:
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> > a) acted inappropriately and breached the Transport Code of Conduct (as claimed by the Respondent); or
> >
> > b) acted appropriately notwithstanding the terms of the Transport Code of Conduct, or any other of the Respondent's policies or training (as asserted by the Applicant),
> >
> > call for an analysis of all of the circumstances of the case, including, in my view, whether the Applicant was indeed acting in "self-defence" (i.e. as that term (or defence) has been applied in case law, including by reference to statute).

[39] Case law in Australia on the issue of self-defence (as it concerns, for example, crimes such as murder and/or assault) reflects or articulates the principles contained in British and United States criminal jurisprudence. In *Palmer v R*, the basic principle of self-defence was stated:

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary."

[40] Sections 418 and 419 of the *Crimes Act 1900 (NSW)* codify the law in New South Wales with respect to self-defence.34 They read:

> "418 Self-defence – when available
>
> (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
>
> (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
>
> (a) to defend himself or herself or another person, or
>
> (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
>
> (c) to protect property from unlawful taking, destruction, damage or interference, or
>
> (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,
>
> and the conduct is a reasonable response in the circumstances as he or she perceives them.
>
> 419 Self-defence - onus of proof
>
> In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence."

[41] A person need not wait to be struck first before they may engage in actions to defend themselves (i.e. simply because a person strikes first does not mean that they cannot thereafter rely upon self-defence). Further, a person need not show that he or she walked away from an interaction to prove that he or she did not want to engage in violence. A failure to retreat, when it is possible to do so, is not conclusive evidence that a person was not acting in self-defence (i.e. a failure to retreat is but one factor to be taken into account in the context of the overall interaction being considered having regard to questions of necessity and proportionality).

[42] The Criminal Trials Courts Bench Book (NSW), contains the following commentary on the law as to self-defence in New South Wales:

> "Section 418(1) provides that a person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence. Section 418(2) sets out the circumstances where self-defence is available. The questions to be asked by the jury under s.418(2) are succinctly set out in *R v Katarzynski* [2002] NSWSC 613 at [22]–[23] which was approved in *Abdallah v R* [2016] NSWCCA 34, at [61]. Section 419 provides that the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.
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> [6-452] Raising/leaving self-defence
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> In order for self-defence to be raised or left to the jury there must be evidence capable of supporting a reasonable doubt in the mind of the tribunal of fact as to whether the prosecution has excluded self-defence: *Colosimo v DPP* [2006] NSWCA 293, at [19]. It is not essential that there be evidence from the accused as to the accused's beliefs and perceptions: *Colosimo v DPP*, at [19]; but it must be raised fairly on the evidence: *Mencarious v R* (2008) 189 A Crim R 219, at [61], [78], [90]; *Douglas v R* [2005] NSWCCA 419, at [99]–[101]. A tactical decision not to raise self-defence does not of itself foreclose the obligation of the trial judge, in appropriate circumstances, to leave the issue to the jury: *Flanagan v R* (2013) 236 A Crim R 255, at [76].
>
> [6-455] Essential components of self-defence direction
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> A direction for self-defence in cases other than murder must contain the following essential components:
>
> 1. The law recognises the right of a person to act in self-defence from an attack or threatened attack.
>
> 2. It is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that the accused's act was not done in self-defence.
>
> 3. The Crown may do this by proving beyond reasonable doubt either:
>
> (a) the accused did not believe at the time of the act that it was necessary to do what he or she did in order to defend himself or herself; or
>
> (b) the accused's act was not a reasonable response in the circumstances as he or she perceived them.
>
> 4. In determining the issue of whether the accused personally believed that his or her conduct was necessary for self-defence, the jury must

> consider the circumstances as the accused perceived them to be at the time.
>
> 5. If the jury is not satisfied beyond reasonable doubt that the accused did not personally believe that his or her conduct was necessary for self-defence, it must then decide whether the Crown has proved beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as perceived by him or her. If the Crown fails to do so it will have failed to eliminate self-defence.
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> 6. If the Crown fails to prove both numbers 3(a) or (b) [above], it will have failed to eliminate self-defence. If it proves one or the other, it will have succeeded."

[43] In *Doran v Director of Public Prosecutions*; *Brunton v Director of Public Prosecutions*, Simpson AJA, stated:

> "3. Where an issue under s.418 is raised, two questions arise for determination. They are:
>
> > (i) has the prosecution proved beyond reasonable doubt that the accused did not believe that the conduct said to constitute the offence was necessary for one (or more) of the four purposes specified in subss [418](2)(a)-(d)? and
> >
> > (ii) has the prosecution proved beyond reasonable doubt that the conduct was not a reasonable response in the circumstances as perceived by the accused?
>
> 4. Proof by the Crown beyond reasonable doubt of one or the other will defeat any defence of self-defence. That is, an affirmative answer to either question will be sufficient for the Crown to have proved that the conduct was not carried out in self-defence.
>
> 5. An alternative way of framing the questions, avoiding the awkwardness of requiring proof of a negative, is that proposed by Howie J in *R v Katarzynski* [2002] NSWSC 613, at [22]:
>
> > "(i) is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and, (2) if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them."
> >
> > A negative answer to either question will be sufficient for the prosecution to have proved that the conduct was not carried out in self-defence."

[44] The following additional points are worth highlighting:

a) What is "necessary" to defend oneself is based not upon the facts as a trier of fact finds them to be, but on the facts as that the trier of fact finds the accused to have reasonably believed them to be at the 'time' of the relevant interaction or altercation. In other words, the test is not based upon the facts as they actually were, but the facts as the accused "reasonably" believed them to be at the time of the relevant interaction or altercation. For example, if an accused reasonably believed an offender or assailant to have a gun, and took what he or she considered to be necessary self-defensive action based upon that belief, the fact (or reality) that the offender or assailant did not have a gun is not the measure by which "necessity" is to be judged.

b) What force is necessary or proportional in a case of self-defence cannot be expected to be measured by mathematical exactitude, or detached reflection. A "person under attack is not required to measure the force necessary to protect himself 'with as much exactness as an apothecary would drugs on his scales'. The measure is what in the exercise of a reasonable judgement under the circumstances [as the accused reasonably believed them to be] is required to avert the danger."

c) The case law is clear that once a real issue of self-defence is raised (by way of justification), it is for the prosecution (or in this case, the Respondent) to establish or prove that the accused was not acting in self-defence at all, or exceeded the limits of what was reasonably necessary as regards to the means or force used. In other words, a mere joinder of issue by a prosecutor (or respondent in a civil case, for example, in respect of tortious conduct) is not sufficient. The legal burden of proof does not ever change from a prosecutor, and despite an accused (immediately after the legal onus is first discharged) carrying an evidential burden in support of their defence, the legal burden of proof on the ultimate issue (or conviction) at all times lays with the prosecutor (or in this case, the Respondent). In short, the prosecutor (or in this case the Respondent) carries the legal burden of proving the elements of the relevant offence, and the legal burden of proving the absence of a defence to same.

d) In the ordinary course, the party that carries the legal burden also carries the evidential burden. If a decision-maker is not satisfied on the evidence as to any issue, the issue must be determined against the party carrying the legal burden of proof. There is no ability to achieve 'justice' by adopting some form of half-way approach.

e) In civil cases where an issue of self-defence arises, the level of proof required to be met by a prosecutor (or plaintiff) is on the balance of probabilities, at a reasonable level of satisfaction. The Briginshaw standard does not create an intermediate standard of proof between the civil and criminal standards of proof.

f) In a civil case it is for the prosecutor (or plaintiff) to establish that the preponderance of evidence clearly establishes that self-defence does not arise, or is not available in the circumstances of the particular case. A defendant need

only show that there was a 'real possibility' that they were acting in self-defence for the prosecution to fail.

g) Injuries sustained from a physical interaction between persons are relevant, but not determinative. The fact that severe injuries resulted from a physical interaction said to arise in self-defence does not mean that the relevant force used was unreasonable. Equally, the fact that no, or only minor, injuries arose from an interaction may well be relevant (but not determinative) to an analysis as to whether the force used was reasonable and/or proportionate.

[45] Finally, to the extent that the decision of McCarthy DP in *John Whittaker v EDI RailBombardier Transport (Maintenance) Pty Ltd* might be said to suggest that there is a legal onus upon an employee to prove that he or she was acting in self-defence, I do not consider it correct as matter of law, and respectfully decline to follow it in that respect." [Footnotes omitted]

[8] The Deputy President then considered whether there was a valid reason for Mr Al-Buseri's dismissal[6] and made the following findings:

"[73] On the evidence before me, and having regard to the submissions of the parties, I find that:

a) the Applicant was entitled (as a matter of law) to defend himself from the Offender on 29 July 2022;

b) the Respondent has failed to satisfy me on the evidence, on the balance of probabilities, that the actions of the Applicant (in his interaction with the Offender) were not undertaken in self-defence, in that the Respondent has failed to exclude the reasonable possibility that:

i. the Applicant believed (at the time) his conduct was necessary in order to defend himself from the Offender; and

ii. the actions of the Applicant were a reasonable response by the Applicant in the circumstances as he perceived them to be (at the time).

c) the actions of the Applicant in respect of his interaction with the Offender on 29 July 2022 were:

i. believed by the Applicant to be necessary in the circumstances confronting him at the time; and

ii. a reasonable response in the circumstances as the Applicant perceived such circumstances to be.

[74] Having made the foregoing findings, I equally find that there was no valid reason for the dismissal of the Applicant by the Respondent, in that the Respondent's reasons

> for dismissal (as set out at paragraph [59] of this decision) are not sound, defensible or well founded. In this regard, the Respondent's reasons:
>
> > a) rely upon a blanket rule that violence is never to be tolerated;
> >
> > b) do not properly take into account all of the circumstances, including that the Applicant was (or may have been) acting in self-defence; and
> >
> > c) wrongly conclude that the Applicant:
> >
> > > i. acted inappropriately when he sought to lawfully defend himself from the Offender; and
> > >
> > > ii. breached the Transport Code of Conduct (in circumstances where the Applicant was entitled to lawfully defend himself from the Offender, and did no more than he was lawfully entitled to do in protecting himself).
>
> [75] The absence of a valid reason in this case, leans strongly towards a finding that the Applicant's dismissal was harsh, unjust and unreasonable."

[9] After considering the balance of the statutory criteria in s 387(b) to (h) of the *Fair Work Act 2009* (Cth) (***Act***), the Deputy President concluded that Mr Al-Buseri's dismissal was harsh, unjust and unreasonable.[7] On the question of remedy, the Deputy President's evaluative assessment was that reinstatement was the appropriate remedy, together with orders for lost remuneration and continuity of employment.[8]

Permission to appeal

[10] An appeal under s 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[9] There is no right to appeal and an appeal may only be made with the permission of the Commission.

[11] This appeal is one to which s 400 of the Act 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."

[12] In the decision of the Full Court of the Federal Court in *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s 400 as "a stringent one".[10] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[11] In

GlaxoSmithKline Australia Pty Ltd v Makin a Full Bench of the Commission identified some of the considerations that may attract the public interest:

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

[13] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of an appealable error.[13] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[14]

Appeal grounds and submissions

[14] NSW Trains relies on five separate grounds of appeal. However, we only need to address grounds two, three and four:

> "2. The Deputy President erred (PJ[73(b)]) in finding that the Appellant had either an onus or legal burden to persuade the Commission that the Respondent was not acting in self-defence:
>
> a. when the Appellant had no such onus or burden in the proceedings; or alternatively
>
> b. if there was such an onus or burden in the proceedings, it was that of the Respondent; further and alternatively
>
> c. by declining (PJ[45]) to follow the decision in *Whittaker v EDI Rail Bombardier Transport (Maintenance) Pty Limited* [2013] FWC 7908 when that decision was consistent with the Full Bench decision in *Heading v ACT Government* [2020] FWCFB 3660.
>
> 3. The Deputy President erred (PJ[73(c)]) in:
>
> a. finding that the Respondent's actions were a reasonable response in the circumstances; and
>
> b. failing to find that the Respondent's conduct was out of proportion to the circumstances he was confronted.
>
> 4. The Deputy President erred in finding that:
>
> a. the Respondent's conduct was justified in the circumstances; or
>
> b. the Respondent was acting in self-defence."

[15] NSW Trains contends that the Deputy President made an error of law by finding that it had an onus or legal burden to persuade him that Mr Al-Buseri was not acting in self-defence during the incident on 29 July 2022.

[16] NSW Trains submits that the extent to which the legal concept of onus or burden of proof arises in relation to matters considered by the Commission is a vexed one. However, in proceedings such as those before the Deputy President, to the extent that there is a legal onus (or something analogous thereto) it rests with an applicant. As to an evidentiary onus, NSW Trains submits that the party seeking to establishing a fact bears an onus of adducing evidence necessary to establish that fact. It follows, so NSW Trains contends, that Mr Al-Buseri alleged that he was acting in self-defence and he therefore bore the evidentiary onus of establishing that he was acting in self-defence.

[17] NSW Trains submits that decisions of intermediate appellate courts in Australia in civil cases support the proposition that the party that asserts self-defence has the legal onus or burden of establishing that the conduct was taken in self-defence. It is submitted that those decisions are consistent with *Whittaker v EDI Rail Bombardier Transport (Maintenance) Pty Limited*[15] (***Whittaker***) and *Heading v ACT Government* (***Heading***).[16]

[18] On a fair reading of the Decision, NSW Trains submits that the Deputy President reasoned that *because* NSW Trains did not discharge its onus or burden, *it* failed to exclude that Mr Al-Buseri was acting in self-defence. In other words, the finding made at [73(c)] of the Decision flowed from the finding in paragraph [73(b)] and was not independent of it. In the alternative, NSW Trains contends that if the finding in paragraph [73(c)] of the Decision was an independent finding, then it was erroneous because the Deputy President did not apply the applicable test for self-defence in civil cases.[17] NSW Trains submits that the Deputy President's erroneous findings in relation to self-defence were essential to the conclusion that it did not have a valid reason to dismiss Mr Al-Buseri.

[19] Mr Al-Buseri contends that the decision of the Full Bench in *Heading* and the decision of Deputy President McCarthy in *Whittaker,* on the question of onus in relation to self-defence, are wrong. Mr Al-Buseri submits that the common law does not establish any hard rule in relation to the onus of establishing self-defence. Mr Al-Buseri submits that NSW Trains had the evidentiary onus to establish a valid reason within the meaning of s 387(a) of the Act.[18] In addition, when considering an incident involving fighting in the context of a valid reason, Mr Al-Buseri submits that one must consider all of the circumstances of the incident, including matters of self-defence. It follows, so Mr Al-Buseri contends, that NSW Trains was required to prove the absence of self-defence as part of its obligation to establish a valid reason for his dismissal.

[20] It is submitted by Mr Al-Buseri that the finding by the Deputy President in paragraph [73(c)] of the Decision is independent from the finding in paragraph [73(b)]. He also contends that the Deputy President applied the correct test in making his finding in paragraph [73(c)]. Mr Al-Buseri submits that there is no error in relation to the Deputy President's finding that he acted in self-defence and NSW Trains did not have a valid reason to dismiss him.

Consideration

[21] The extent to which the legal concept of onus or burden of proof applies to matters before an administrative tribunal such as the Commission is somewhat vexed.[19] In *Advanced Health Invest Pty Ltd T/A Mastery Dental Clinic v Mei Chan*,[20] a Full Bench of the Commission explained the issue in the following way:

> "… in the context of the question of whether a dismissal is unfair, to the extent that there is a legal onus or something analogous to it, the onus rests on the applicant in the sense that it is the applicant who bears the risk of failure if the satisfaction required by s.385 including s.385(c) is not reached. As to evidentiary onus, plainly a party seeking to establish a fact bears onus of adducing evidence necessary to establish that fact. In a practical sense, in most cases the question of where an evidentiary onus resides will be answered by asking: in relation to each matter about which the Commission must be satisfied, which party will fail if no evidence or no further evidence about the matter were given?"

[22] Applying these principles, it has been observed on many occasions at the Full Bench level that an employer has, for practical purposes, what may best be described as an evidentiary onus to call evidence to establish the misconduct on which it relies.[21] There is no doubt that NSW Trains met its evidentiary onus in the present case when it tendered the CCTV footage which showed the violent interaction between Mr Al-Buseri and a member of the public at Bankstown Railway Station. However, it was Mr Al-Buseri who raised the contention, or defence, that he acted in self-defence throughout his interaction with the member of the public. One of the main questions before us is whether the Deputy President was correct in determining that NSW Trains had an onus to establish that Mr Al-Buseri's actions were not undertaken in self-defence.

[23] In *Whittaker*, Deputy President McCarthy considered the issue of self-defence in an unfair dismissal case and made the following observations:

> "[7] The Full Bench in *Culpepper* found that approaches to self defence, who the aggressor was is not the determinative factor. Once the fact is established that the Applicant hit the other employee it is up to the Applicant to establish that the act or acts were in self-defence. In order to establish whether the act or acts were in self-defence in this matter it is necessary to address (i) the holding of the belief, (ii) whether there were reasonable grounds to hold the belief, (iii) whether a means of escape was available, (iv) the type of force used and whether it was excessive and not out of proportion to the danger seeking to be avoided, and (v) the circumstances giving rise to the incident."

[24] *Heading* was a case in which an employee argued that there was no valid reason for his dismissal because he acted in self-defence in response to a threat of imminent harm from a detainee in a correctional facility. On appeal before the Full Bench, Mr Heading argued that the law of self-defence was not applied because it was not proven beyond reasonable doubt that Mr Heading did not believe at the time of the conduct that it was necessary for him to do what he did to defend himself. The Full Bench observed that:

> "[22] It is of course not the case, as suggested in appeal ground 1, that the respondent had the onus of proving beyond reasonable doubt that Mr Heading did not act in self defence. The burden of persuasion (on the balance of probabilities) in this respect lay with Mr Heading."

[25] We do not agree with the submission advanced on behalf of Mr Al-Buseri that the decisions in *Heading* and *Whittaker* are wrong insofar as they concern the question of onus in cases involving self-defence. If an employer adduces evidence before the Commission to establish misconduct on the part of an employee and the employee's response is to assert that they used self-defence and thereby had a lawful reason to act in the way that they did, then the employee bears the onus of adducing evidence necessary to establish that they acted in self-defence. That reasoning involves a direct application of the approach described in paragraph [21] above. Further, such an approach is consistent with the way in which arguments of self-defence are considered in other civil law contexts.[22]

[26] There can be no doubt that the Deputy President considered that NSW Trains had the onus to establish that Mr Al-Buseri was not acting in self-defence during his violent interaction with a member of the public on 29 July 2022. So much is clear from paragraphs [42], [43]-[45], and [73(b)] of the Decision. For the reasons explained above, such an approach was erroneous.

[27] We now turn to the Deputy President's finding in paragraph [73(c)]. The chapeau to paragraph [73] of the Decision refers to the findings in paragraphs (a), (b) and (c) being made "On the evidence before me". This supports Mr Al-Buseri's contention that the finding in paragraph [73(c)] is a stand-alone finding. Similarly, the reference in paragraph [74(b)] that "the Applicant <u>was</u> (or may have been) acting in self defence" [emphasis added] points in the same direction. However, on a fair reading of the Decision as a whole, we consider that the finding made by the Deputy President in paragraph [73(c)] was not an independent finding and instead was considered by the Deputy President to flow automatically from his finding in paragraph [73(b)]. We have reached that view for three reasons. First, the Deputy President went to great lengths in paragraphs [35] to [44] of the Decision to explain the law in relation to self-defence, including by reference to the Criminal Trials Courts Bench Book (NSW).[23] In those paragraphs, the point is repeatedly made that if the prosecutor (or in this case (as the Deputy President viewed it), NSW Trains) did not establish or prove any of the elements of self-defence, then the issue "must be determined against the party carrying the legal burden of proof".[24] Secondly, the Deputy President's reasoning in paragraph [73] appears to be largely based on the 'essential components' of a direction to a jury in a criminal trial on the question of self-defence, as described in paragraph [42] of the Decision. In particular, the reference in paragraph [73(a)] of the Decision to Mr Al-Buseri being "entitled (as a matter of law) to defend himself from the Offender" is very similar to the first paragraph of the direction extracted in paragraph [42]: "The law recognises the right of a person to act in self-defence from an attack or threatened attack." Paragraph [73(b)] of the Decision appears to be a combination of directions 2 to 5 extracted in paragraph [42] (with alterations to the standard of proof being on the balance of probabilities) and the alternative way of framing the relevant questions in a criminal trial, as set out in point 5 in paragraph [43] of the Decision. Paragraph [73(c)] of the Decision is the conclusion which must follow if the prosecution in a criminal case fails to prove any of the elements of self-defence, as explained in directions 5 and 6 of the direction extracted in paragraph [42]. Thirdly, if the finding in paragraph [73(c)] of the Decision was independent of the finding in paragraph [73(b)], it could reasonably be expected that the Deputy President

would have explained *why* he was satisfied that (i) Mr Al-Buseri believed his actions to be necessary in the circumstances and (ii) Mr Al-Buseri's actions were a reasonable response to the circumstances. No such reasons are provided in the Decision.

[28] In any event, we agree with NSW Trains that the finding in paragraph [73(c)(ii)] of the Decision is erroneous because it applies the wrong test in relation to self-defence in a civil law context. There is no issue between the parties, and we agree, that the common law test to be applied in cases involving self-defence is whether a person believes on reasonable grounds that it was necessary in self-defence to do what they did.[25] This test is applicable in civil matters.[26] There is both a subjective and an objective element to the test. The subjective element concerns the belief that the conduct was necessary in the circumstances. The objective element goes to whether there were reasonable grounds for the belief.

[29] In *Doran v Director of Public Prosecutions*,[27] Simpson AJA considered the difference between the requirement under the common law of self-defence to examine whether there were reasonable grounds for a person's belief with the requirement under s 418(2) of the *Crimes Act 1900* (NSW) to examine whether the "conduct is a reasonable response in the circumstances as he or she perceives them" [emphasis added]:

> "[42] … The notable difference is that *Katarzynski* was decided under the law of self-defence as stated in Pt 11 Div 3 of the *Crimes Act*. The statutory provision is a significant departure from the common law. Where the second part of the test at common law was whether the prosecution had proved that the defendant's belief was not based on reasonable grounds, under s 418 the second question is whether there is a reasonable possibility that what the defendant did was a reasonable response to the circumstances *as the defendant perceived them.* That is an important difference. It necessarily imports into the assessment of reasonableness the state of mind – that is, the perception – of the defendant. But, as will be seen, the assessment of the reasonableness of the response remains an objective one."

[30] We agree with Simpson AJA that there are important differences between the common law test and the test under the *Crimes Act* for self-defence.

[31] Assuming the finding in paragraph [73(c)] of the Decision was independent of the finding in paragraph [73(b)], the Deputy President applied the *Crimes Act* test in paragraph [73(c)(ii)] of the Decision because he considered whether Mr Al-Buseri's response was reasonable "in the circumstances as the Applicant perceived such circumstances to be" [emphasis added]. With respect, that was the wrong test to be applied. The common law test should have been applied. It required the Deputy President to consider whether there were reasonable grounds for the belief held by Mr Al-Buseri.

[32] The Deputy President's findings in relation to self-defence were central to his conclusion that there was no valid reason for Mr Al-Buseri's dismissal.[28] In light of the errors we have identified in the Decision concerning the issue of self-defence, we agree with the submission put on behalf of NSW Trains that the Decision must be quashed and the matter reheard.

Conclusion

[33] We consider that it is in the public interest to grant permission to appeal because this appeal raises issues of general importance concerning the test to be applied when an employee makes an allegation of self-defence in response to allegations of misconduct.

[34] For the reasons given above, we order that:

1. Permission to appeal is granted.

2. The appeal is upheld.

3. The Decision and Orders are quashed.

4. The matter is to be reheard by Deputy President Cross.

[35] We also direct the parties to let the Associate to Deputy President Saunders know, within seven days of this decision being published, whether they consent to participating in conciliation before Deputy President Grayson. If both parties so consent, Deputy President Grayson will conduct a conciliation conference prior to the rehearing before Deputy President Cross. We see considerable merit and benefits to both parties in a member assisted conciliation taking place prior to a rehearing.

DEPUTY PRESIDENT

Appearances:

Mr J. Darams, Counsel, appeared for NSW Trains
Mr P. Matthews, Legal Officer of the Rail, Tram & Bus Union, appeared for Mr Al-Buseri

Hearing details:

2023.
Sydney:
18 September.

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[1] [2023] FWC 1517

[2] PR764512

[3] PR765402

[4] Decision at [16]

[5] Decision at [22]-[26]

[6] Decision at [53]-[72]

[7] Decision at [76]-[95]

[8] Decision at [106]

[9] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ

[10] (2011) 192 FCR 78 at [43]

[11] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 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] [2010] FWAFB 5343, 197 IR 266 at [27]

[13] *Wan v AIRC* (2001) 116 FCR 481 at [30]

[14] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 at [28]

[15] [2013] FWC 7908

[16] [2020] FWCFB 3660

[17] *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645

[18] *Hinchey v North Goonyella Coal Mines Pty Ltd* [2009] AIRCFB 94 at [35]

[19] *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 at [81]

[20] [2019] FWCFB 5104 at [43]. See also *Adaszko v Mitford Investments Pty Ltd ATF The JJG Trust* [2021] FWCFB 719 at [28]

[21] *Hinchey v North Goonyella Coal Mines Pty Ltd* (2009) 178 IR 252 at [35]

[22] *Miller v Sotiropoulos* [1997] NSWCA 204 at page 6, lines 35-42 (Powell JA); at page 8, lines 3-7 (Mason P); *Watkins v State of Victoria* (2010) 27 VR 543 (Watkins) at [74] (Ashley JA and Beach AJA, Mandie JA agreeing at [166]); *May v Thomas* [2014] WASCA 176 at [39] (Martin CJ, Buss JA, at [159], and Chaney J (at [160]) agreeing);

[23] Decision at [42]

[24] Decision at [44(d)]. See also Decision at [42]: "6. If the Crown fails to prove both numbers 3(a) or (b) [above], it will have failed to eliminate self defence").

[25] *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 at 661

[26] *State of NSW v McMaster* (2015) 91 NSWLR 666 at [166] & [358]-[359]

[27] [2019] NSWSC 1191

[28] Decision at [74]