DECISION

Fair Work Act 2009
s.604—Appeal of decision

Ventia Australia Pty Ltd

v

Martin Pelly
(C2023/2498)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
COMMISSIONER BISSETT

BRISBANE, 1 NOVEMBER 2023

Appeal against decision [2023] FWC 907 of Commissioner Riordan at Sydney on 18 April 2023 in matter number U2022/9654.

Overview

[1] Ventia Australia Pty Ltd (Appellant/Ventia) has lodged an appeal under s. 604 of the *Fair Work Act 2009* (the Act), for which permission is required, against a Decision[1] of Commissioner Riordan issued on 18 April 2023 (Decision). The Decision concerned an application for an unfair dismissal remedy made by Mr Martin Pelly (Mr Pelly/Respondent). Ventia dismissed the Respondent following an investigation into allegations that the Respondent had accessed and engaged in posting and sharing offensive and inappropriate content within private Facebook groups involving current and former Ventia employees. In the Decision, the Commissioner determined that the Respondent had been unfairly dismissed.

[2] Notwithstanding that the Commissioner found that there was a valid reason for the dismissal, he concluded that the dismissal was unjust and unreasonable as it was based on Ventia's misunderstanding of the evidence and inaccurate information, and the Respondent was treated in a manner that was substantially different to the way another Qualified Leading Firefighter was dealt with, for similar conduct. The Commissioner concluded that reinstatement was appropriate as he was satisfied the employment relationship between the Respondent and the Appellant could be re-established and ordered that the continuity of the Respondent's service be maintained. The Commissioner found that it was appropriate to make an order for lost remuneration because of the dismissal and backpay to the date of his termination. The Commissioner deducted the amount of one months' pay for the Respondent's breaches of the Appellant's policy and monies earned by the Respondent since the termination of his employment.

[3] On 5 May 2023, the Appellant lodged a Notice of Appeal against the Decision. The appeal was listed for hearing before the Full Bench on 9 June 2023 in relation to both permission to appeal and the merits of the appeal. The Appellant and the Respondent sought, and were

granted, permission to be legally represented, on the basis that we were satisfied the appeal raised issues of complexity and that legal representation would enable the matter to be dealt with more efficiently. The Appellant was represented by Mr C O'Grady of Senior Counsel and Mr B Avallone of Counsel. The Respondent was represented by Mr J McKenna of Counsel.

Permission to Appeal

[4] The appeal is made under s. 604 of the FW Act. There is no right of appeal and an appeal may only be made with permission of the Commission. If permission is granted, the appeal is by way of rehearing. The Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[2] 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 appealable error.[3] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

[5] The decision under appeal is of a discretionary nature. As the majority of the High Court held in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*:[4]

> "'Discretion' is a notion that 'signifies a number of different legal concepts. In general terms, it refers to a decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result.' Rather, the decision maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision maker is required to make a particular decision if he or she forms a particular opinion or value judgement."[5] (citations omitted).

[6] The majority in that decision also held that a decision maker charged with making a discretionary decision has some latitude as to the decision to be made, and given this, the correctness of the decision can only be challenged by showing error in the decision-making process.[6] Such error has also been described as the discretion not being exercised correctly.[7] It is not open to an appeal bench to substitute its view on the matters that fell for determination before the Member at first instance in the absence of appealable error. The classic statement as to the approach to be taken in relation to whether there is error in a discretionary decision, and which is applied in appeals against such decisions under s. 604 of the FW Act, was stated by the High Court in *House v The King* as follows:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. 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."[8]

[7] The Decision subject to appeal was made under Part 3-2 – Unfair Dismissal of the Act. Section 400(1) of the Act provides that permission to appeal must not be granted from a decision

made under Part 3-2 unless the Commission considers that it is in the public interest to do so. The public interest test in s.400(1) is not satisfied simply by the identification of error or a preference for a different result. The task of assessing whether the public interest test is met is discretionary and involves a broad value judgment.[9] 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.[10]

[8] Further, in unfair dismissal matters, appeals on a question of fact can only be made on the ground that the decision involved a "*significant error of fact.*"[11] Section 400(2) of the Act manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than the threshold pertaining to appeals generally. The test has been described as "*a stringent one*".[12] As a Full Bench of the Commission observed in *Dafallah v Melbourne Health*"[13]

> "Section 400(2) modifies the *House v The King* principles by limiting any review based on mistake of fact to a significant error of fact. Section 400 clearly evinces an intention of the legislature that appeals in unfair dismissal matters are more limited than appeals with respect to other matters under the Act."[14]

[9] To be characterised as significant, a factual error must vitiate the ultimate exercise of discretion.[15] In a misconduct case, a significant fact is foundational to a conclusion in relation to whether misconduct took place.[16]

[10] For the reasons that follow we have decided to grant permission to appeal on the basis that the appeal raises issues of importance and general application in relation to the approach to determining whether, and in what circumstances, out of hours conduct on social media that has been consensually engaged in by a group of persons who are employed by the same employer, is sufficiently connected to employment, to constitute a valid reason for dismissal.

The Decision under Appeal

[11] The Respondent's application for an unfair dismissal remedy was heard concurrently with the application of another employee, Mr Adam Thompson, who gave evidence in support of the Applicant's case. The Commissioner stated at paragraph [10] of the Decision that while the applications were heard concurrently, they were determined separately. At paragraphs [4] to [8] of the Decision, the Commissioner set out the background to the dispute including the alleged conduct that led to Ventia terminating Mr Pelly's employment. The allegations against Mr Pelly were raised with him in a meeting on 6 September 2022 and a show cause letter sent on 12 September 2022 seeking his response to matters that had caused the Respondent to form a preliminary view that his employment should be terminated. The allegations in the show cause letter were set out by the Commissioner at paragraph [4] of the Decision, and detailed instances of the Respondent: "Accessing, posting and sharing offensive content within a private Facebook

group named Sickos Video Sharing Group (Facebook Group 1) and Punters Events Only (Facebook Group 2)" using an alias "*Keithy George*".

[12] The show cause letter stated that the allegations had been substantiated on the balance of probabilities and represented an ongoing concern about the Respondent's behaviour. The show cause letter also stated that the conduct was considered to breach the Appellant's policies in relation to Bullying and Harassment, the Code of Conduct, the Social Media Standard and the Respondent's Contract of Employment. The Respondent was suspended from his employment and requested to attend a meeting on 14 September 2022. The Respondent was also invited to provide a written response for consideration at that meeting if he wished to do so.

[13] The Respondent provided a written response to the show cause letter, which was set out by the Commissioner at [5] of the Decision. In summary, the Respondent apologised for his actions and stated that he had not intended to offend or harass anyone in or outside of the private group. The Respondent stated his understanding of the position he had put the Appellant in and that he had not intended to harm or potentially harm the Appellant's brand. The Respondent set out his love of his role and that he had moved his family to commit to it. The Respondent expressed his gratitude for opportunities he had been offered, his personal financial contribution to his training and development, his five years of unblemished service, his progression in that time to his current rank of Qualified Leading Firefighter and other contributions he had made in the workplace including volunteer work and secondary employment with the Fire Rescue New South Wales. Further, the Respondent expressed that he is shattered and embarrassed and that he hopes to be given a second chance to show the Respondent how much he values being an employee and "*to do whatever it takes to right this wrong*".

[14] Following an investigation and consideration of the Respondent's written response to the show cause letter, the Appellant issued the Respondent with a letter on 20 September 2022, terminating his employment with immediate effect. The letter set out the substantiated allegations and the policies said to have been breached by the Respondent and stated that having considered the response, length of service, work record and personal circumstances of the Respondent, the Appellant had decided to terminate his employment based on performance and misconduct.

[15] After setting out the legislative provisions in relation to unfair dismissal, the Commissioner summarised the submissions of the parties. The Respondent contended before the Commissioner that Ventia had failed to particularise how his alleged conduct related to "*workplace conduct*" for the purpose of the Bullying and Harassment Policy; how it involved the use of company assets or technology or otherwise contravened any specific requirement of the Code of Conduct; and how it amounted to a breach of the Social Media Standard which apparently commenced in November 2021 and generally did not apply at the relevant time. Further, the Respondent submitted that Ventia had provided little or no training about the application of these policies.

[16] The Respondent acknowledged that some of the material should not have been shared, and accepted that he had shared the images, memes and comments in a private group of friends and did so on the understanding that it was a personal and private forum. It was the Respondent's submission that there was no valid reason for the dismissal because:

- His conduct was not within the scope of his employment and was not "*workplace conduct*" as identified in various policies;

- His conduct did not meet the threshold of a "*sound, defensible, or well-founded*" reason for dismissal;

- Dismissal was a disproportionate response to his conduct; and

- His conduct did not breach Ventia's policies.

[17] With respect to whether he had been notified of the reason for his dismissal and given an opportunity to respond, the Respondent accepted that he had an opportunity to respond to certain factual allegations but submitted that it was not made clear to him how those matters amounted to a breach of the Appellant's policies or his employment contract. Particularly, the Respondent submitted that he had faced procedural fairness obstacles when responding to the allegations in good faith as the Appellant refused to provide the "*complaint*" which triggered the investigation into the Respondent's behaviour. Further, the Respondent contended that the Appellant denied the existence of a dispute he had raised under clause 12.2 of the *Ventia and UFU VIC and NSW Fire and Rescue Enterprise Agreement 2022* (the Agreement) and had proceeded with determining its investigation of the Respondent. The Commissioner did not consider this matter and concluded that this was a matter for a Court.

[18] The Commissioner recorded that the Respondent made no submissions on whether he was unreasonably denied a support person. In relation to unsatisfactory performance, the Respondent said that he had not been warned about any unsatisfactory performance whatsoever during his approximately five years of employment. Further, the Respondent submitted that as Ventia is a large employer and has a dedicated human resources management, its procedures should be of a high standard.

[19] The Commissioner then considered the Respondent's submissions on other matters that he asserted went to the harshness of the dismissal. The Respondent submitted that his employment ought not to be terminated as he:

> "(a) Has worked for the Respondent for 5 years.
> (b) Uprooted his family to move from Melbourne to Nowra to work for the Respondent.
> (c) Always went above and beyond in the service of the Respondent.
> (d) Had enjoyed a great professional working relationship with the Respondent's management.
> (e) Had an impeccable work record prior to this matter. He has never had any disciplinary action taken against him by the Respondent.
> (f) Planned to continue working with the Respondent through to his retirement;
> (g) Was a committed, hard-working and high achieving employee of the Respondent.
> (h) Has not been the subject of any complaints from the Respondent's employees.
> (i) Has devoted himself to a career in the firefighting industry."[17]

[20] Further, the Respondent submitted that the Appellant had failed to provide sufficient training to allow him to clearly understand the Appellant's expectations in relation to private social media communications and how they may be perceived to be conduct that is relevant to the employment relationship. To this end, the Respondent submitted that he did not have the benefit of clearly articulated policies and expectations at the time of the alleged misconduct. The Commissioner highlighted this aspect of the Respondent's submission.

[21] The Respondent also submitted in the proceedings before the Commissioner that there were other disciplinary options available to the Appellant, such as warnings and targeted training requirements. With respect to remedy, the Respondent submitted that reinstatement and backpay is the appropriate remedy in the circumstances.

[22] The Appellant's submissions in the hearing before the Commissioner were that the application for unfair dismissal remedy should be dismissed and there should not be an order for reinstatement, backpay or any payment in lieu of reinstatement. The Appellant also contended that the Commissioner should consider the Respondent's submissions in the context of the matters including that:

> "(a) Mr Pelly participated in the "Sickos Video Sharing Group", which consisted of 15 current or former employees employed by Ventia at HMAS Albatross, and a handful of others (Sickos Video Sharing Group);
>
> (b) the membership of the Sickos Video Sharing Group is to be considered in the context of the workplace culture amongst firefighters employed on Defence bases, which is described as "cliquey", and one is either part of the clique, or excluded;
>
> (c) in the Sickos Video Sharing Group, Mr Pelly posted content related to work-related matters, including:
>
> i. Pelly (who posted under the pseudonym "Keithy George") posting comments about the ordering of firefighting equipment by Ventia's NSW Regional Manager, Mitchell Pakes;
>
> ii. Pelly posting a photo taken on base at HMAS Albatross of a fellow Ventia employee returning from a period of leave;
>
> (d) when a fellow firefighter employed by Ventia at HMAS Albatross … withdrew from the Sickos Video Sharing Group:
>
> In response to posts by Mr Thompson calling former members of the Sickos Video Sharing Group "soft", "powder puff" and "soft cocks":-
>
> i. Pelly responded to Thompson's posts about … and other members of C platoon choosing to leave the Sickos Video Sharing Group with a meme which reads "Typical"; and
>
> (e) objectively construed, the cumulative effect of Mr Thompson and Mr Pelly's posts would be to discourage his workmates from leaving the Sickos Video Sharing Group, lest they also be called "Soft as butter", "powder puff", "Fuckin C platoon soft cocks" or "pussies" by their work colleagues behind their backs;
>
> (f) firefighting is historically a male-dominated industry, with particular challenges in relation to the recruitment and retention of female firefighters, made more difficult by a "boys club" culture;
>
> (g) Mr Pelly, while holding a substantive position as a Firefighter, was qualified to act as a Leading Firefighter, and was (until dismissed) a potential future leader of Ventia's firefighting operations at HMAS Albatross;
>
> (h) Mr Pelly posted to the Sickos Video Sharing Group explicit content including:
>
> i. On 28 August 2020, Pelly posted a photo of the naked rear ends of three women, with the comment "The difference between new, used and worn shock absorbers"."[18]

[23] The Appellant submitted that the Respondent's conduct:

- was capable of contributing to a hostile environment for women, which exacerbates barriers to entry for females into firefighting;
- amounted to bullying of work colleagues, which itself is a work related matter;
- impacted employees who were excluded from the Sickos Video Sharing Group as they became aware of it and, in one case, made a complaint about its content to Ventia; and
- occurred while he was on shift including on 15 February 2021, when the Respondent accessed and posted in the Sickos Video Sharing Group in relation to the purchase of a new Panther S by the Regional Manager.

[24] In response to the Respondent's submission that based on his training, he was not aware that sharing sexually explicit content with work colleagues could be considered to be work-related, the Appellant submitted that the Respondent's professed subjective state of mind is irrelevant. The Appellant contended before the Commissioner that what is to be assessed is whether, in all the circumstances, there was a valid reason for the Respondent's dismissal and whether the dismissal was harsh, unjust or unreasonable. In the Appellant's view, taking into account all of the circumstances, there was a valid reason to terminate the Respondent's employment.

[25] In relation to the process followed by the Appellant to dismiss the Respondent, the Commissioner set out submissions at paragraph [48] indicating that the process commenced when the Appellant became aware of the Sickos Video Sharing Group in the context of dealing with disciplinary issues involving a female employee. In this regard, the Appellant said that it received a complaint from that employee containing a "*series of screen shots and a video*". That employee was not a member of the Sickos Video Sharing Group, but her father, another ex-employee of the Appellant was a member. The Appellant also outlined that it had limited information on the basis that it received "*only a few screenshots*" and based on information provided by the employee who complained about the matter, there were over 100 media files posted in the Group, "*the majority of which appear to be pornographic*".

[26] In relation to whether the Respondent's conduct was work related, the Appellant submitted that, viewed objectively, the Respondent's conduct caused serious damage to the relationship between the employer and the employee, damaged the Appellant's interests, and was incompatible with the Respondent's duties as an employee. The Appellant also contended that "*at least some of the* [Respondent]*'s conduct was engaged in while at work*".[19] As Ventia's firefighters provide 24/7 coverage, the Respondent submitted that it stood to reason that even if the Respondent posted material outside of his own working hours, the recipients could include firefighters who were on shift at work. Moreover, the Appellant highlighted that the Respondent was engaged with an online medium that was predominantly made up of work colleagues, and the members discussed work issues and posted other work-related content (such as a photo of a roster).

[27] In response to the Respondent's contention that the dismissal was a disproportionate response to his conduct, the Appellant submitted that dismissal was within the range of available outcomes which Ventia could reasonably have fixed upon, and it is not the place of the Commission to say that some lesser, but also available, remedy should have been preferred. The Appellant also asserted that the Respondent's submissions failed to acknowledge the importance of providing a safe working environment for all employees including women and that "*female firefighters are entitled to work in an environment where their colleagues are not sharing photos of three naked women from behind comparing them to new, used and worn shock absorbers*".[20] The Commissioner also recorded the Appellant's submission that it is an important matter to take firm action to improve the culture of workplaces, and to take strong action when such inappropriate behaviour is detected, so as to make the workplace safe and welcoming for all. The Appellant asserted that in all the circumstances, and when the Respondent's posts are objectively construed and considered in their context, the conduct of the Respondent constituted "*sound, defensible or well-founded*" reasons for dismissal within the meaning of *Selvachandran v Peteron Plastics Pty Ltd*.[21]

[28] In relation to s. 387(b) of the Act, the Appellant rejected the Respondent's assertions that he was not notified of the reasons for his dismissal and that he should have been provided with the complaint. The Appellant submitted that the Respondent had received on multiple occasions notice (and copies) of the posts that Venita relied upon in deciding whether to terminate his employment.

[29] With respect to whether the Respondent had an opportunity to respond and have a support person present, the Appellant asserted that the Respondent was given opportunities to respond in both writing and at meetings. The Respondent was permitted to have his union and legal representatives present through the process leading to his termination. As such, the Appellant contended there were no failings of procedural fairness.

[30] In addressing s. 387(f) and s. 387(g), the Appellant contended that they should be neutral considerations as Ventia's size and existence of a people and culture team did not impact upon the procedures followed in effecting the dismissal.

[31] In relation to other matters, the Appellant acknowledged the factors raised by the Respondent (summarised at [19] of this decision) and took them into account when terminating his employment. However, the Appellant submitted to the Commissioner that weighed against those factors is the seriousness of the Respondent's misconduct, the fact that it went on undetected for so long, the impact that conduct of the kind engaged in by him has on workplace culture (particularly due to his leadership and influence at HMAS Albatross), and the importance of providing a safe workplace – free of sexism, racism, discrimination and misogyny – for all employees.

[32] The Appellant also submitted that the following reasons weighed in favour of the application being dismissed:

- The Respondent had attended Mandatory Annual Awareness Training and Code of Business Conduct training, and had access to Ventia's policies on its intranet;

- The Respondent had received a "*fair go all round*" in the multiple opportunities that he was given to respond to Ventia's concerns about his conduct and the proposed dismissal;

- The Respondent's work colleagues should not have been exposed to his misconduct, and those colleagues deserve protection by the taking of strong action to ensure that it does not happen again;

- The Respondent was not prevented by his dismissal from pursuing a career as a firefighter elsewhere, whether in private or government-run services. Although the Appellant acknowledged the Respondent may need to move elsewhere in order to do so, this was a consequence of his conduct, and of the choices that he made to expose his work colleagues at Ventia to offensive and inappropriate material.

[33] In relation to remedy, the Appellant submitted that if the Commissioner found that the Respondent's dismissal was unfair, reinstatement was inappropriate and should not be ordered due to the nature of the Respondent's conduct and the destructive impact it has on the culture of the workplace. The Appellant also submitted that no payment should be made in lieu of reinstatement, noting that any deductions of 100% should be made under s. 392(3) of the Act.

[34] At paragraphs [78] to [104] of the Decision, the Commissioner summarised the Respondent's submissions in reply. Contrary to the Appellant's reliance on *Rose v Telstra*[22] to support its submission that the Respondent's conduct was work related, the Respondent submitted that his conduct was not of such gravity or importance as to indicate a rejection or repudiation of his employment contract with the Appellant. The Respondent sought to distinguish his conduct from other Commission proceedings where publishing social media posts were found to support a valid reason for termination. He contended that he did not make public posts or public comments. It was also the Respondent's assertion that the Appellant's submissions did not elaborate upon how his conduct was said to have "*caused serious damage to the relationship between the employer and employee*" nor how it had damaged the employer's interests.[23]

[35] In relation to the Appellant's Bullying and Harassment Policy, the Respondent submitted that to amount to "*harassment*", conduct must be directed towards a person, and it is necessary to apply the reasonable person test in the context in which the conduct occurred. In the Respondent's view, the context was a private group of consenting men and there was no evidence that any of the people in the group found it to be unwelcomed, humiliating or intimidating.

[36] In relation to Ventia's Code of Conduct, the Respondent asserts that the nature of the online Code of Conduct training has not been put before the Commission by the Appellant, and nevertheless, it operated at a high level of generality and said nothing directly relevant to the acts of the case. In relation to Ventia's Social Media Standard and Policy, the Respondent contended that the policy did not address the type of conduct involved in this proceeding and highlighted that this matter stood in stark contrast to previous cases where an employer made sustained efforts over a number of years to make employees aware of its policies and the consequences of breaching those policies.

[37] In relation to the Respondent's contract of employment, the Respondent submitted that the Appellant's contention that he breached his employment contract cannot rise higher than the alleged breaches of policies to the extent that Ventia relied upon his contractual obligation to comply with its policies and procedures.

[38] Further, in relation to the alleged conduct occurring while the Respondent was on shift, he contended that it was for the Appellant to make good that assertion and that he nevertheless did not use Ventia's equipment to access the private Facebook groups. In the Respondent's view, the alleged accessing of the Sickos Video Sharing Group and posting the "*Panther S Post*" (a post about the new fire truck being procured by the Regional Manager, Mr Pakes) on 15 February 2021 could not, on any reasonable measure, amount to misconduct.

[39] The Respondent also asserted that, in the alternative, if the Commission found there was a valid reason for dismissal, the dismissal was nevertheless harsh, unjust or unreasonable. This is because, in the Respondent's view, the Appellant's treatment of him was inconsistent with the treatment of two other employees, Mr Matthew Oldham and Mr Stuart Gregory who engaged in similar misdemeanours. It was pointed out by the Respondent that Mr Anderson's evidence identified the nature of the investigation process undertaken with respect to Mr Oldham, and the Respondent received differential treatment (being dismissed) compared to Mr Oldham (who received a warning).

[40] Lastly, the Respondent submitted that while the Commission is not bound by the rules of evidence, significant aspects of the Appellant's evidence did not comply with those rules and/or were irrelevant. As such, the Respondent submitted that the evidence canvassed in paragraph [103] of the Decision should be given no weight.

[41] The Commissioner also set out the Respondent's submissions in reply that the existence of the Group was raised by another employee in the apparent context of her response to an allegation that "*she sent a cake in the shape of male genitalia together with the photo of* [a male] *to an employee of the Appellant*".[24] The Respondent submitted that while this was described as a "*complaint*" by Mr Anderson, the nature of that complaint appeared to be the different treatment by the Appellant of employees involved in the Group chat. Further, the Respondent submitted that in circumstances where the father of the employee concerned had also been employed by the Respondent and had been a member of the relevant private messenger groups, it may be inferred that she obtained the images and video from her father, and it is not clear whether this material was obtained by consent.

[42] The Commissioner recorded the Respondent's submission that the training records produced by Mr Anderson do not establish that he undertook training with respect to the Bullying and Harassment Policy. Further, the Respondent submitted that the Code of Conduct training was conducted annually online and he did not recall the training including anything about use of social media; the Appellant had not provided evidence about the content of that training; there is no evidence that he undertook training with respect to the Social Media Policy or Standard; there was no evidence of efforts by the Appellant to make employees aware of this policy or the consequence of breaches; and the Social Media Standard and Policy did not address the type of conduct in the proceedings before the Commissioner. In relation to the alleged breaches of his contract of employment, the Respondent submitted that this ground rose no higher than the alleged breaches of the Policies referred to above.[25]

[43] In relation to workplace culture, the Respondent pointed to evidence that the Appellant was on notice about the private messenger Groups through a senior manager – Mr Pakes – who was for a short time, a member of both Groups. The Respondent submitted that despite this, the Appellant took no steps to inform relevant employees that this should not continue or to provide training on the use of social media and/or workplace equality, prior to the relevant events occurring.[26]

[44] Having addressed the submissions and evidence before him, the Commissioner then turned to consider the matters in s. 387. The Commissioner acknowledged that it was not the role of the Commission to make judgement or provide commentary on the morality of the Respondent's conduct and that he had not been charged by the Police and nor had there been a suggestion by the Appellant that the conduct was illegal. Having regard to *Rose v Telstra* and *Sydney Trains v Bobrenitsky*, the Commissioner determined that the Respondent had been a member of the Sickos Video Sharing Group and the material posted including pornographic videos, racist memes and idle chat, some of which was related to work. The Commissioner recorded that under cross-examination, the Respondent accepted that the Nude "*Shock Absorbers*" Graphic was inappropriate and in breach of the Appellant's policies; he also accepted that the posting of the pornographic video was inappropriate; and that he did not need training to know that it was inappropriate to publish that post.

[45] While the Commissioner accepted that employees are entitled to an after-hours private life, he agreed with the comments of Mr Anderson that the "*Panther S Post*" could be regarded as being disrespectful and offensive to management and the hard work being undertaken by Mr Pakes in obtaining a new vehicle, in breach of Ventia's Bullying and Harassment Policy. The Commissioner also found that the photo of a colleague taken in the carpark of HMAS Albatross, was in breach of Ventia's policy that clearly states that photos of the base cannot be published without approval of Defence (*Oldham Post*). Based on those breaches, the Commissioner concluded that the Appellant had a valid reason to terminate the Respondent.

[46] In relation to whether the Respondent had been notified of the reason for his dismissal, the Commissioner found that the process was haphazard and unsatisfactory despite the Respondent eventually receiving all necessary information. The Commissioner considered that the Respondent should have been provided with the content of the offending material when requested, and with the specific provisions of Ventia's policies and the training records associated with those policies.

[47] The Commissioner also considered that the Respondent was provided with opportunities to respond to the reasons for dismissal, was allowed a support person at relevant meetings and that the Appellant is a large employer with dedicated human resource management specialists or expertise. The Commissioner acknowledged that the Respondent had not been dismissed for unsatisfactory performance and did not find it to be a relevant factor.

[48] At paragraphs [127]-[131] of the Decision, the Commissioner reproduced parts of the transcript with respect to how the Respondent perceived that the members of the Sickos Video Sharing Group viewed some of the alleged conduct. The Commissioner took into account the Respondent's observation that calling each other "*soft cocks and pussies*" was just banter and a joke and that none of his colleagues would take offence. Further, the Commissioner

considered that the Respondent had been a model employee who had been fast tracked through the classification structure due to his exceptional work ethic and the additional training he had undertaken.

[49] The Commissioner also considered that there had been substantial changes to the witness statement made by Mr Anderson for the Appellant at the start of his testimony, resulting in the allegations against the Respondent being modified.[27] In the Commissioner's view, the Appellant handed out differential treatment to the Respondent in comparison to the treatment of another employee involved in the private messenger groups and had made significant errors in attributing the posts between the two. In this regard, the Commissioner noted that Mr Anderson had changed his evidence about a post made by the other employee. The Commissioner also concluded that the other employee was not the subject of an investigation because of understaffing in the HR Department and also because Mr Anderson did not identify his post as being offensive. The Commissioner expressed his opinion that the posts made by the other employee were similar to the refined list of posts attributed to the Respondent and that the posts made by the other employee were equally offensive to those made by the Respondent.

[50] The Commissioner acknowledged that the carpark photograph should not have been posted but was satisfied that such a misdemeanour did not warrant dismissal. The Commissioner was also satisfied that Mr Pakes did not take offence to the "*Panthers S Post*" and noted that he struggled to see how Mr Anderson could take offence on Mr Pakes' behalf. Read fairly, the Commissioner's conclusions in relation to these matters are based on weighing the consideration of whether there was a valid reason for dismissal in s. 387(a) against other relevant considerations in s. 387. The Commissioner also took into account that Mr Anderson had misunderstood the Respondent's use of a "*Homer Simpson*" meme when responding to a comment about another employee and considered that the meme indicated that the Respondent was trying to remove himself from the bullying conversation. The Commissioner also noted that the Respondent had not been trained in the Respondent's social media policy and determined that training delivered via online learning did not deliver the same educational outcomes as face-to-face tuition.

[51] At paragraph [138] of the Decision, the Commissioner summarised his findings with respect to *Rose v Telstra* as follows:

> "**[138]** In relation to the test in *Rose v Telstra*, I am satisfied that the conduct of the Applicant does not cause serious or irretrievable damage to the employment relationship. The Applicant's actions do not damage the Respondent's interests except for some possible minor embarrassment with Defence. I do not regard participation in a private chat, amongst friends and almost exclusively out of hours, to indicate a repudiation by the Applicant of his contract of employment. I have taken this into account."[28]

[52] The Commissioner concluded that while he found that the Appellant had a valid reason to terminate the Respondent based on its investigation and the application of the policies, Mr Anderson's decision was based on his misunderstanding of the evidence, resulting in the Respondent being attributed with more posts than he was actually involved in. As the Respondent was dismissed on the basis of inaccurate information and dealt with substantially differently to Mr Gregory for similar misdemeanours, the Commissioner found that the dismissal was unjust and unreasonable. The Commissioner also noted that the Appellant had not established the nexus between the out of hours posts of the Respondent and his employment. The Commissioner did not accept that the occasional post about a work situation in the Sickos

Video Sharing Group, where 39% of its participants were non-Ventia employees, created sufficient connection to the workplace for the Respondent to sustain an argument that the Group was work-related. Further, the Commissioner observed that the Appellant had no control over when the other employees in the Group would view his posts.

[53] The Commissioner reiterated that the Respondent was entitled to a private life and that the majority of the posts were made outside of work hours. Moreover, Mr Pakes had not taken offense to the post related to him and in any event, that post did not warrant the penalty of termination; nor the did the post taken in the carpark or the photo of a bike.

[54] After concluding that the Respondent's termination was harsh, unjust and unreasonable, and noting that he had taken into account all of the submissions and evidence, the Commissioner turned to consider the appropriate remedy. The Commissioner also noted Mr Pakes' evidence given under cross-examination, that if the Respondent were reinstated, he "*would be very professional*".[29] Further, the Commissioner considered that the Respondent had relocated his family from Victoria five years ago to work for the Appellant, and that the unfairness between the Respondent and Mr Gregory would be exacerbated if the Respondent was not reinstated. The Commissioner expressed his satisfaction that the employment relationship could be re-established between the Appellant and the Respondent and as such, the Commissioner made orders for the Respondent to be reinstated and his continuity of service maintained from the date of his dismissal.

[55] The Commissioner acknowledged that the Respondent had breached two of the Appellant's policies and considered it appropriate to order that the Respondent be back paid to the date of his termination, minus one months' pay for the breaches of policies and any monies earned by the Respondent since his termination.

Appeal Grounds

[56] The Appellant's grounds of appeal are set out in its Notice of Appeal as follows:

> "1. The Commissioner erred by acting upon a wrong principle, namely by failing to consider the "entire factual matrix" in determining that, to the extent that the posts sent by Mr Pelly were sent after hours, they lacked sufficient connection with his employment to constitute a valid reason for his dismissal.
>
> 2. Further to ground 1 the Commissioner failed to have regard or sufficient regard to:
>
> a. The composition of the Sickos Video Sharing Group including that the majority of members (83%) were current and former employees of the Appellant with 11 members (including an employee who left the group, after which he and others who had also left were referred to as "soft cocks" and "pussies") being current employees;
>
> b. The topics that were the subjects of posts on the Sickos Video Sharing Group including criticism of management and of other current and former employees of the Appellant;
>
> c. The pornographic and sexist nature of a number of posts on the Sickos Video Sharing Group in circumstances where:
>
> i. the Appellant employs both male and female Firefighters who are required to work together as part of platoons;

ii. Firefighting is perceived as having a blokey culture hostile to the recruitment of female Firefighters;

iii. the Appellant is actively trying to increase the diversity of its workforce including by encouraging the recruitment of female Firefighters;

iv. a number of the posts made to the Sickos Video Sharing Group were directly disparaging of women;

v. the Sickos Video Sharing Group had no female members.

d. The fact that members of the Sickos Video Sharing Group who were current employees of the Appellant could (and did) access posts on the Sickos Video Sharing Group whilst they were at work and on duty. A matter of which Mr Pelly was aware.

e. The use of the Sickos Video Sharing Group to disparage employees of the Appellant who left the Sickos Video Sharing Group (which disparagement Mr Pelly endorsed) and in so doing discourage other employees of the Appellant from leaving the Sickos Video Sharing Group.

f. The potential of the posts made on the Sickos Video Sharing Group to damage the interests of the Appellant (by damaging its reputation), including by reference to the fact that the client that to which Mr Pelly was providing firefighting services was the Australian Defence Force and the sensitivities of that client in respect of sexist or bullying behaviour.

g. The relative seniority of Mr Pelly among the members of the Sickos Video Sharing Group employed by the Appellant.

h. The failure of Mr Pelly to clearly and unequivocally admonish members of the Sickos Video Sharing Group employed by the Appellant who posted pornographic and sexist posts and/or posts disparaging employees of the Appellant and instead remain a member of the Sickos Video Sharing Group.

3. The Commissioner erred by acting upon wrong principle, namely that the defects he found in the process applied by the decision maker, Mr Anderson, impacted upon whether there was a valid reason for the dismissal or whether the termination of Mr Pelly was disproportionate to the treatment of other employees, including Mr Gregory (at [130] – [133] and [142]), which were matters that the Commission needed to assess on the evidence before it.

4. Further to 3, the Commissioner erred by failing to assess the conduct of Mr Pelly by reference to the evidence before him, including that the video he described as "a screenshot of a video of a woman in a bikini top which the Applicant admitted was a pornographic video" and "a video of a woman in a bikini top" (Decision at [118] and [133]) was a video that Mr Pelly had admitted in cross-examination he had posted, being a video of 4 minutes 12 seconds, from the from OnlyFans website of a woman engaged in sexual acts, with four minutes of sexual acts performed by her (the Pornographic OnlyFans Video) ([Transcript, PN203-209]).

Significant Errors of Fact

5. The Commissioner erred by mistaking the facts, and such errors were significant errors of fact, being that:

- one post of Mr Pelly to the Sickos Video Sharing Group showing three nude female bottoms of different apparent ages together with the words "the difference between new, used and worn shock absorbers" (the Nude "Shock Absorbers" Graphic):

a. was inappropriate only because it was potentially pornographic when it was inherently sexist and demeaning of women; and

b. was an image "that can be seen on any beach around the world except for a thin piece of fabric approximately 1cm in width" (Decision at 133));

- another post of Mr Pelly to the Sickos Video Sharing Group:

a. was "a screenshot of a video of a woman in a bikini top which the Applicant admitted was a pornographic video" and "a video of a woman in a bikini top" (Decision at [118] and [133]), when Mr Pelly had admitted in cross-examination that what he had posted was the Pornographic OnlyFans Video [Transcript, PN203-209]).

- posts of Mr Pelly to the Sickos Video Sharing Group were "equally offensive" to posts by another employee whose employment was not terminated (Decision at [133]) when there was no evidence to support a conclusion that the other employee had posted a video of a woman engaged in sexual acts (whether of 4 minutes 12 seconds from the OnlyFans website, or otherwise) or a picture of three nude female bottoms of different apparent ages with a comment that was inherently sexist and demeaning of women.

6. In addition:

- the finding that the Mr Pelly had no control over when the other employees in the Sickos Video Sharing Group would view his posts (Decision at [144]) failed to have regard to the fact that:

a. he was aware that members of the Sickos Video Sharing Group who were current employees of the Appellant could (and did) access posts on the Sickos Video Sharing Group whilst they were at work and on duty; and

b. he was not required to remain a member of in the Sickos Video Sharing Group or make posts to the Sickos Video Sharing Group.

It was contrary to the overwhelming weight of the evidence and a significant error of fact.

- the failure to draw the inference, in the absence of evidence from the remaining members of the Sickos Video Sharing Group, that the use of the terms "soft cocks" and "pussies" applied to members leaving the group, influenced them to remain in the Sickos Video Sharing Group to avoid being the subject of similar criticism (Decision at [127]-[128]) was contrary to the overwhelming weight of the evidence and a significant error of fact.

- the failure to draw the inference, in the absence of evidence from those employees who left the Sickos Video Sharing Group, that the use of the terms "soft cocks" and "pussies" applied to them, without their knowledge, was offensive to them (Decision at [127]-[128]) was contrary to the overwhelming weight of the evidence and a significant error of fact.

- for the reasons set out in grounds 1 and 2, the confining of the valid reasons for termination to the post about the new truck being an old bicycle and the photo of Mr Oldham, was contrary to the overwhelming weight of the evidence and a significant error of fact.

Conclusions

7. The Commissioner erred in his conclusion that the following conduct was not a valid reason for the dismissal (Decision at 120):

- The Pornographic OnlyFans Video;
- The Nude "Shock Absorbers" Graphic;
- Mr Pelly's post "Typical" (the "Typical" Post) in support of the application of the terms "soft cocks" and "pussies" to members leaving or seeking to leave the Sickos Video Sharing Group.

8. The Commissioner erred in his conclusion that the dismissal was harsh, unjust or unreasonable.

9. The decision that the dismissal was harsh, unjust or unreasonable, is unreasonable or plainly unjust."

Appellant's Submissions

[57] In the Appellant's view, the appeal concerns three key issues:

- *First*, what is the proper approach for determining whether conduct has a sufficient connection with employment to warrant disciplinary action including dismissal. In particular, does the fact that a social media post was made whilst not on duty mean that there is not such a connection even where:
    - The bulk of the group to whom the posts were sent were current or former employees of the Appellant (Ventia);
    - The subject of some of the posts included work related matters including comments disparaging of Ventia and a number of its employees (both as individuals and because of their gender);
    - The content of some of the posts were pornographic, disparaging of women and/or objectified them, in the context of an integrated workforce where women and men are required to work alongside each other as part of a firefighting platoon;
    - The likelihood that the posts would be read by employees of Ventia whilst they were on duty and potentially working alongside those who were the subject of the disparagement and/or objectification contained in the posts (Grounds 1 and 2).
- *Second*, does the fact that there were arguably deficiencies in the process adopted by the person who decided to terminate the Respondent's employment (Mr Anderson), impact upon the issue of differential treatment as between employees, rendering the dismissal harsh unjust or unreasonable. It was incumbent upon the Commissioner to make his own assessment of whether there was differential treatment on the material adduced before him at the hearing (Grounds 3 and 4).
- *Third*, did the Commissioner make a number of errors of fact that were significant errors of fact giving rise to appealable error (Grounds 5 and 6).
- Grounds 7 to 9 summarise the effect of the errors alleged in the preceding grounds.

[58] Appeal grounds 1 and 2 relate to the Commissioner acting on the wrong principle by failing to consider the entire factual matrix. In assessing whether there was a valid reason for the dismissal, the Commissioner observed at [145] of the Decision that:

> "Relevantly, the majority of the Applicant's posts were made outside of work hours. The Applicant is entitled to a private life and the Commission does not sit in moral judgement of the Applicant's conduct in his private life."[30]

[59] The Appellant submits that this appears to be the reasoning for the Commissioner concluding that only the "*Panther S Post*" and the "*Oldham Post*" [the Carpark Post] provided a valid reason for the dismissal,[31] and that the dismissal was harsh, unjust or unreasonable.[32] The Appellant did not dispute the first sentence of paragraph [145]. It contended however, that the Commissioner was in error, to the extent he relied upon the proposition in the second sentence as a basis for not having regard to the other posts sent by the Respondent in assessing whether there was a valid reason for dismissal or whether the dismissal was otherwise harsh, unjust or unreasonable. The Appellant relied on the relevant principles set out in *Sydney Trains v Bobrenitsky*[33] as distilled from *Rose v Telstra*[34] and *Newton v Toll Transport Pty Ltd*[35] in relation to when out of work conduct may constitute a valid reason for dismissal. The Appellant submitted that the Commissioner's failure to properly consider the entire factual material constituted an error of principle of the kind identified in *House v The King*. It would also mean that the finding in relation to valid reason was contrary to the overwhelming weight of the evidence resulting in an error of fact satisfying the test in s. 400(2).[36]

[60] The Appellant contended that the following circumstances meant the meme with the comment "*Typical*" in relation to comments about colleagues who left the Group, a Pornographic OnlyFans Video and the photo of three nude female bottoms of different apparent ages together with the words "*the difference between new, used and worn shock absorbers*" posted by the Respondent gave rise to a sufficient connection with his employment to constitute a valid reason for dismissal:

- the composition of the Sickos Video Sharing Group including that the majority of members (83%) were current and former employees of Ventia, with 11 members being current employees;

- the topics that were the subjects of posts on the Sickos Video Sharing Group including criticism of management and of other current and former employees of Ventia;

- the pornographic and sexist nature of a number of posts on the Sickos Video Sharing Group in circumstances where:

    - Ventia employs both male and female Firefighters who are required to work together as part of platoons;

    - Firefighting is perceived as having a blokey culture hostile to the recruitment of female Firefighters;

- Ventia is actively trying to increase the diversity of its workforce including by encouraging the recruitment of female Firefighters;

- a number of the posts made to the Sickos Video Sharing Group were directly disparaging of women;[37] and

- the Sickos Video Sharing Group had no female members;[38]

- the fact that members of the Sickos Video Sharing Group who were current Ventia employees could (and did) access posts on the Sickos Video Sharing Group whilst they were at work and on duty[39] – which was a matter of which the Respondent was aware;[40]

- the use of the Sickos Video Sharing Group to disparage the Appellant's employees who left the Sickos Video Sharing Group (which disparagement the Respondent endorsed) and in so doing discourage other employees of the Appellant from leaving the Sickos Video Sharing Group;

- the potential of the posts made on the Sickos Video Sharing Group to damage the interests of the Appellant (by damaging its reputation),[41] including by reference to the fact that the client to which the Respondent was providing firefighting services was the Australian Defence Force and the express public position of that client in respect of sexist or bullying behaviour;[42]

- the relative seniority of the Respondent among the members of the Sickos Video Sharing Group employed by the Appellant;[43]

- the failure of the Respondent to clearly and unequivocally admonish members of the Sickos Video Sharing Group employed by the Appellant who posted pornographic and sexist posts and/or posts disparaging employees and instead remain a member of the Sickos Video Sharing Group;

- the potential of the posts made on the Sickos Video Sharing Group to create a hostile work environment particularly for female employees or male employees of the Appellant who objected to the circulation of pornographic and other material that was disparaging of women.[44]

[61] The Appellant submits that the failure of the Commissioner to have regard to these matters when determining whether the dismissal was otherwise harsh unjust or unreasonable was an error of principle of the kind identified in *House v The King*.

[62] Appeal grounds 3 and 4 relate to the Commissioner's findings about the differential treatment between Mr Pelly and other employees. At paragraph [132] of the Decision, the Commissioner set out a passage from *Sexton v Pacific National (ACT) Pty Ltd*,[45] that in the Appellant's view, makes clear it is for the Commission to be satisfied that it is dealing with comparable conduct in order to assess whether the dismissal was harsh unjust or unreasonable on account of differential treatment. The Appellant asserted that this was not the

Commissioner's focus and he was influenced by his criticisms of the Appellant's process that led to the Respondent's dismissal.

[63] The Appellant submitted that the Commissioner erred by repeatedly saying to Mr Anderson, "*I need to find out about your state of mind at the time that you've made the decision to terminate Mr Pelly and Mr Thompson*".[46] It is the Appellant's submission that the existence, or otherwise, of differential treatment as a basis for supporting a finding that a dismissal was harsh, unjust or unreasonable is to be determined by the Commission on the basis of the evidence put before it. Further, the Appellant contended that whether or not the dismissal of the Respondent was disproportionate to the treatment of Mr Gregory required the Commission to examine the evidence before it as to how the Respondent's conduct compared to Mr Gregory's conduct. Mr Anderson's "*state of mind at the time*" as to what he understood each man had done was not relevant to that task. The Appellant submitted that, to the extent the Commissioner purported to engage in such an assessment, he made a number of significant errors of fact.

[64] Appeal ground 5 relates to the Commissioner's findings in relation to the Appellant's posts. At [133] of the Decision, the Commissioner took into account what he considered was the differential treatment handed out between the Appellant and Mr Gregory. This concerned the consideration of and comparison between, the Nude "*Shock Absorbers*" Graphic and the Pornographic OnlyFans Video posted by the Appellant with the "*elephant*" meme and a video posted by Mr Gregory of which the only evidence was a screenshot.

[65] The Appellant noted that the Respondent admitted himself that the Nude "*Shock Absorbers*" Graphic was disrespectful of women, treats women like objects, and denigrates women. In the Appellant's view, those were appropriate concessions. The post was not just a photo of three nude female bottoms of different apparent ages. It included words which, in combination with the photo, on any reasonable view, were inherently sexist and demeaning of women. The Appellant asserted that the Commissioner erred by ignoring the inherently sexist and denigrating commentary posted by the Respondent, and because of that error, the Commissioner thought the "*elephant*" meme was more offensive than the Nude "*Shock Absorbers"* Graphic.

[66] In relation to the Pornographic OnlyFans Video, the Appellant emphasised that a conclusion cannot be drawn as to whether the 52 second video posted by Mr Gregory (described by the Commissioner at paragraph [133] of the Decision) was pornographic because the only evidence presented to the Appellant and the Commission, was a screenshot. The Appellant highlighted the contrast with the evidence of the Respondent who, during cross-examination, admitted that he posted the Pornographic OnlyFans Video to the Sickos Video Sharing Group. Notwithstanding the Respondent's admission, the Appellant submitted that the Commissioner's description of the Pornographic OnlyFans Video at paragraphs [118], [119] and [133] of the Decision was wrong and represented a failure by the Commissioner to properly regard the Respondent's evidence.

[67] In the Appellant's view the Commissioner's focus appeared to be on what he considered were deficiencies in the process adopted by Mr Anderson. The Appellant contended that the Commissioner failed to assess the issue of differential treatment as between the Respondent and Mr Gregory by referencing the Respondent's admission when no such evidence existed in regard to Mr Gregory's post. It is the Appellant's submission that these errors of fact affected

the Commissioner's assessment of s. 387(h) of the Act and the ultimate conclusion as to whether the dismissal was harsh, unjust or unreasonable.

[68] Appeal ground 6 relates to other serious errors of fact that the Appellant contends impacted on the finding of valid reason. The Appellant submitted that the Commissioner erred in finding that the Respondent had no control over when the other employees in the Sickos Video Sharing Group would view his posts (at paragraph [144] of the Decision) as:

- the Respondent was aware that members of the Sickos Video Sharing Group who were current employees of the Appellant could (and did) access posts on the Sickos Video Sharing Group whilst they were at work and on duty; and

- the Respondent was not required to remain a member of the Sickos Video Sharing Group or make posts to the Sickos Video Sharing Group.

[69] The Appellant contended that the Commissioner's finding was contrary to the overwhelming weight of the evidence and was a significant error of fact. The failure to draw the inference, in the absence of evidence from the remaining members of the Sickos Video Sharing Group, that the use of the terms "*soft cocks*" and "*pussies*" applied to members leaving the Sickos Video Sharing Group, influenced them to remain in the Group to avoid being the subject of similar criticism, was contrary to the overwhelming weight of the evidence and a significant error of fact. Similarly, the failure to draw the inference, in the absence of evidence from those employees who left the Sickos Video Sharing Group, that the use of the terms "*soft cocks*" and "*pussies*" applied to them, without their knowledge, was offensive to them, contrary to the overwhelming weight of the evidence and a significant error of fact. Finally, the Appellant asserted that for the reasons set out in grounds 1 and 2, the confining of the valid reasons for termination to the post about the "*Panther S Post*" and the "*Oldham Post*", was contrary to the overwhelming weight of the evidence and a significant error of fact.

[70] The Appellant contended in appeal grounds 7 to 9 that the Commissioner erred in his conclusion that the posting of the Pornographic OnlyFans Video, the Nude "*Shock Absorbers*" Graphic and the "*Typical*" Post was not a valid reason for the dismissal. Each of those posts were sufficiently connected to the Respondent's employment as to warrant disciplinary action by the Appellant. Further, the Appellant submitted that each constituted "*sound, defensible or well-founded reasons*" for dismissal within the meaning of *Selvachandran v Peteron Plastics Pty Ltd*.[47] The Appellant further relied upon its written submissions at first instance (so far as they relate to the Respondent) at paragraphs [13]-[20], and its oral closing submissions at PN2623 - PN2826 (again in so far as they relate to the Respondent).

Respondent's Submissions

[71] The Respondent made the following observations with respect to the Decision and the Respondent's Notice of Appeal:

- *First*, while the Commissioner found there to be a valid reason for the Respondent's termination arising from the "*Panther S Post*" and the "*Oldham Post*" [Carpark Post], the Commissioner also found the "*Panther S Post*" to be humorous and unoffensive,[48] and noted that Mr Pakes (the Regional Manager, the subject of the post) did not take

offense to it.[49] Also, with respect to the "*Oldham Post*", the Commissioner found that the photo was unidentifiable as to the location.[50] The Respondent noted that the Commissioner went on to find that neither of these misdemeanours warranted dismissal and these findings are not challenged by Appellant's Notice of Appeal.

- *Second*, the "*Panther S Post*" was the only one of the Respondent's posts found to have been made during work hours (that is, whilst on shift). The Respondent's involvement with the Sickos Video Sharing Group, aside from the "*Panther S Post*" and the "*Oldham Post*", was found not to give rise to a valid reason for dismissal. In relation to the Appellant's appeal grounds, the Respondent considered that whilst it may be accepted that "*entire factual matrix*" will be relevant, this does not justify adopting a narrow approach to the Decision, combing through the words of the decision maker with a fine appellate tooth-comb.

- *Third*, the Appellant relied upon a meme posted to the Sickos Video Sharing Group by the Respondent showing Homer Simpson sliding back into a hedge. However, this post was found by the Commissioner as indicating the Respondent sought to remove himself from the discussion at hand, and not found to amount to misconduct by the Respondent or to give rise to a valid reason for dismissal. Further, the grounds of appeal do not allege any error in the Commissioner's approach to this post.

- *Fourth*, the Commissioner took into account the differential treatment handed out as between the Respondent and Mr Gregory as a consideration arising under s. 387(h). Mr Gregory was also a participant in the Sickos Video Sharing Group but was not subject to an investigation. The Respondent noted that the Commission ultimately found that the Respondent was dismissed on inaccurate information and dealt with substantially differently than Mr Gregory for similar misdemeanours, and this provided the basis for a finding that the Respondent's termination was unjust and unreasonable. That finding was independent of the Commissioner's application of the test in *Rose v Telstra* and provided an alternate basis for the Commissioner to conclude that the Respondent's dismissal was unfair.

- *Fifth*, for the Appellant to make good appeal grounds 5 or 6, it must establish that any significant error of fact acted to vitiate the ultimate exercise of discretion.[51] The Respondent noted that on appeal in the Commission, findings of fact made by a member at first instance should stand unless it can be shown that the member "*has failed to use or has palpably misused his advantage*" or has acted on evidence which was "*inconsistent with facts incontrovertibly established by the evidence*" or which was "*glaringly improbable*".[52]

[72] In relation to appeal grounds 1 and 2, the Respondent contended that the Commissioner properly identified the authorities and test to be applied for determining whether conduct has a sufficient connection with employment to warrant disciplinary action including dismissal.[53] The Respondent also submitted that the list of matters raised in appeal ground 2 and paragraphs [3.7] of the Appellant's Outline of Submissions do not support a finding that the Commissioner erred in his approach to determining whether a sufficient connection existed between the three posts and the employment, such that the posts may constitute a valid reason for dismissal.

[73] The Respondent submitted that the Commissioner did have regard to the matters identified in appeal grounds 2(a) and (b) as:

- At paragraph [117], the Commissioner identified that 11 of the Respondent's colleagues were also members of the Sickos Video Sharing Group, along with 3 individuals who were former employees of the Appellant and 3 individuals who were not associated with the Respondent.

- At paragraph [55], the Commissioner considered the submission by the Appellant that the Respondent's conduct engaged in outside working hours was in an online medium which was predominantly made up of work colleagues, in which they discussed work issues and posted other work-related content.

- At paragraph [114], having considered these matters the Commissioner found that the occasional post about a work situation in the Sickos Video Sharing Group, where 39% (i.e. 7 of 18) of its participants were not employed by the Appellant at the time, did not create sufficient connection to the workplace to sustain the Appellant's argument that the Sickos Video Sharing Group was work-related.

[74] Further, the Respondent asserted that the Commissioner did have regard to the submission that the recipients of posts by the Respondent to the Sickos Video Sharing Group would include firefighters who were on shift at work as raised by appeal ground 2(d). Having considered those matters, the Commissioner found these to be insufficient to establish the requisite connection between the Respondent's out of hours conduct and his employment. The Respondent also noted that the Commissioner's findings on the application of *Rose v Telstra* were also made in the context of the unchallenged evidence of another employee, Mr Andrew Thompson that the people he invited to be part of the Sickos Video Sharing Group were his personal friends, all but three of whom had attended his wedding. Mr Thompson gave further unchallenged evidence that a large part of his friendship group worked as firefighters at the HMAS Albatross facility. The fact that the Sickos Video Sharing Group included a large number of Ventia employees was reflective of his broader friendship group.

[75] In response to appeal ground 2(c) which suggests that the pornographic and sexist nature of posts, in and of themselves, is capable of establishing the requisite connection with the Respondent's employment, the Respondent submits that the Appellant failed to establish any nexus between the content of a Sickos Video Sharing Group and the Appellant's failure to recruit female employees to work at HMAS Albatross. In the Respondent's view, it was open to the Commissioner not to accept the opinion evidence of Ms Pretorius, General Manager People and Capability for the Defence and Social Infrastructure Sector who gave evidence for Ventia about its commitment to increase female representation in its workforce.

[76] It is the Respondent's submission that the Commissioner did have regard to the Appellant's submission regarding the apparently disparaging comments made by members of the Sickos Video Sharing Group about other persons, including employees of Ventia, and that this may discourage a participant from leaving the group. The Respondent asserted that, in finding that the test in *Rose v Telstra* was not satisfied, the Commissioner took into account evidence from the Respondent that the dialogue between members of the Sickos Video Sharing Group amounted to banter and jokes. The evidence of the Respondent that it was commonplace

to "*take the piss*" out of work colleagues and of the Regional Manager, Mr Pakes, was supported by that of Mr Thompson. The Respondent submitted that the Commissioner did not fail to have regard to these matters and, did not err in the weight given to these matters as asserted in appeal ground 2(e).

[77] The Respondent also contended that the Commissioner was satisfied that the Respondent's conduct did not cause serious or irretrievable damage to the employment relationship and that his actions did not damage the Appellant's interests, except for some possible minor embarrassment with Defence. In the Respondent's view, this is consistent with the fact that the Appellant led no evidence of actual damage to its interests by reason of the Respondent's conduct. As such, the Respondent submitted that the error alleged at appeal ground 2(f) cannot be made out.

[78] Further, the Respondent noted that the Commissioner did consider the Appellant's submission that he was qualified to act as a Leading Firefighter and was a potential future leader of the Appellant's firefighting operations at HMAS Albatross and may also fill in for the Leading Fire Fighter when they were absent or performing higher duties. However, the Respondent contended that no aspect of that role or the Respondent's employment created a positive obligation for him to admonish other members of the Sickos Video Sharing Group, or otherwise created the requisite nexus to his employment, as suggested by appeal grounds 2(g) and (h).

[79] In summation the Respondent submitted that appeal grounds 1 and 2 do not identify any error by the Commissioner in his application of the test in *Rose v Telstra* nor that the Commission's discretion miscarried. As such, none of the limbs of that test are made out.

[80] In relation to grounds 3 and 4, the Respondent asserted that differential or inconsistent treatment of employees in comparable cases may be relevant in determining whether the sanction of dismissal in respect to a particular employee is unfair. The basis for the jurisprudence relating to "*inconsistent treatment*" in the unfair dismissal jurisdiction is the objective of ensuring a "*fair go all round*" is accorded to both the employer and employee concerned as provided in s. 381(2) of the Act. The Respondent pointed out that the Commissioner found that Mr Anderson made the decision to terminate the Respondent's employment based on the full list of posts attributed to the Respondent in his original witness statement. The Commissioner also took into account the substantial changes that Mr Anderson made to his witness statement at the start of his testimony including the following amendments:

- Deleted reference to a video shared by Mr Gregory which he had described as "*pornographic*" and "*highly offensive and inappropriate*";

- Amended an error, having wrongly attributed what he described to be "*racist and sexist posts*" to the Respondent (the relevant post having been made by Mr Thompson);

- Wrongly having attributed to the Respondent the sharing of a photograph said by Mr Anderson to have been in breach of the Appellant's working with Defence requirements.

[81] In the Respondent's view it was apparent that the Commissioner held concerns with respect to the reliability of Mr Anderson's evidence. The Respondent noted that it had been put to Mr Anderson that he had changed and crafted his evidence because he believed this would assist Ventia to defend its case before the Commission.[54] Further, the Respondent contended that the Appellant failed to cite any authorities that would support its proposition that the Commissioner erred in having regard to Mr Anderson's subjective state of mind and that the principle of inconsistent treatment is to be limited to a comparison of treatment based on an objective analysis of the entirety of the evidence before the Commission. As such, the principle should not be so limited.

[82] In respect of appeal ground 4, the Respondent submitted that on a fair reading of the Decision (not one involving nit-picking or the application of a fine appellate toothcomb), the Commissioner did properly understand and assess the conduct of the Respondent by reference to the evidence before him. The Respondent asserted that the Commission did address the evidence before him, as:

- the Commissioner had in evidence a screenshot of a video posted by the Respondent to the Sickos Video Sharing Group;
- the Respondent was cross-examined about the screenshot and accepted that it related to a pornographic video posted by him;
- at paragraph [118], the Commissioner referred to the screenshot and the Respondent's admission that this was a pornographic video;
- at paragraph [119], the Commissioner referred to the Respondent accepting under cross-examination that he posted the screenshot of the pornographic video.

[83] The Respondent submitted that the Commissioner plainly understood that he had posted a pornographic video to the Sickos Video Sharing Group. It is noted by the Respondent that the video itself was not received into evidence and the screenshot of this was not put to the Respondent prior to the Appellant filing its evidence in the proceeding. With respect to [133] of the Decision, the Respondent further contended that the Commissioner's consideration of differential treatment handed out between Mr Pelly and Mr Gregory and the finding that "*Mr Anderson did not know if the Applicant's or Mr Gregory's videos were pornographic from these screenshots*", discloses no error.

[84] In relation to appeal ground 5, the Respondent contended that when properly construed, the sub-grounds of appeal do not relate to errors (or alleged errors) of fact but rather to the Commission's assessment of those posts. It is the Respondent's submission that ground 5 does not identify the finding by which the Commissioner "*palpably misused his advantage*" or acted on evidence which was "*inconsistent with facts incontrovertibly established by the evidence*" or which was "*glaringly improbable*".

[85] The Respondent submitted that the role of the Commissioner was to determine whether the posts had the requisite nexus to the employment such that they might provide a valid reason for dismissal, and that was the approach adopted by the Commissioner. As such, no error of fact (significant or otherwise) arose by reason of the Commissioner's consideration of the video

posted by the Respondent. The Respondent also submitted that the Commissioner plainly understood that this was a video with pornographic content posted by the Respondent.

[86] With respect to appeal ground 6, the Respondent asserted that the Commissioner's finding that the Respondent had no control over when other employees viewed his posts is uncontroversial. If a person was a member of the Sickos Video Sharing Group and an employee of Ventia, it was a matter for them as to when and where they accessed the Sickos Video Sharing Group. In response to the Appellant's allegation that the Commissioner failed to draw certain inferences at paragraphs [127] – [128] of the Decision, said to be contrary to the overwhelming weight of the evidence, the Respondent contended that the Commissioner did consider evidence from the Respondent about "*banter*" between participants of the Sickos Video Sharing Group and as between work colleagues, and this was open for him to do so. It is the Respondent's view that this evidence is consistent with the evidence from Mr Thompson and Mr Pakes, and also consistent with the evidence before the Commission (albeit hearsay) relating to another Ventia firefighter, Mr Mitch Evans.

[87] To the extent that it is said the Commissioner erred by failing to draw a *Jones v Dunkel* inference by reason of the Respondent's failure to adduce evidence from the employees who left or who remained in the Sickos Video Sharing Group, the Respondent submitted the following three points:

- *Firstly*, those persons were, and remain, employed by the Appellant. Mr Evans was issued a final warning by reason of his involvement in the Sickos Video Sharing Group. It is not the case that those persons are properly in the Respondent's "*camp*" such that they would be expected to be called by him.

- *Secondly*, (and alternatively) for these same reasons a ready inference exists as to the absence of evidence, especially from Mr Evans.

- *Thirdly*, when the requirements of the principle in *Jones v Dunkel* are satisfied, the Commission has a discretion to:

    - draw an inference that the evidence of a witness would not have helped a party's case; and

    - draw some other inference with greater confidence.

- The Respondent considers that without more, the Commission is not entitled to draw an inference that comments in the Sickos Video Sharing Group influenced certain persons to remain in the group or were offensive to others.

[88] If the Commission finds there is a basis to quash the Decision, the Respondent contended that the question of whether the dismissal was harsh, unjust or unreasonable will remain to be determined. In the Respondent's view, that question must be determined in light of all the facts including:

- The Respondent's unchallenged evidence that he had received no training with respect to the Appellant's social media policy or standard, the Appellant's decision

not to put the nature of the Code of Conduct training before the Commission and the failure by the Appellant to make sustained efforts to make employees aware of these policies and the consequences of breaching the policy;

- The absence of evidence or a finding of actual damage to the relationship between the employer and employee or to the Appellant's interests by reason of the Respondent's involvement in the Sickos Video Sharing Group;

- The Respondent's unchallenged evidence that he did not use any of the Appellant's equipment for accessing or posting to the Sickos Video Sharing Group;

- That the Appellant's management had some awareness of the existence of the Sickos Video Sharing Group through Mr Pakes, the Regional Manager, prior to the relevant conduct occurring;

- The failure by the Appellant to particularise how the Respondent's conduct is said to have amounted to a breach of the Appellant's policies;

- The genuine remorse expressed by the Respondent;

- Other relevant factors, including the Respondent's five years of service with the Appellant and his impeccable employment record, that he had uprooted his family to move from Melbourne to Nowra to work for the Appellant; his excellent working relationship with the Appellant's management; and his intention to continue working with the Appellant through to his retirement.

[89] It is the Respondent's submission that bias or apprehended bias forms no part of the Notice of Appeal. In the event that the Decision is quashed by the Full Bench, the Respondent contended that it would be appropriate to remit the matter to the Commissioner for him to deal with the subject matter of the Decision.

Consideration

Out of hours conduct as a valid reason for dismissal

[90] A central issue in this appeal is the approach the Commissioner took to considering whether conduct engaged in by the Respondent outside his working hours, had a sufficient connection to his employment to constitute a valid reason for his dismissal. The approach to considering whether out of hours conduct is a valid reason for dismissal is set out in *Rose v Telstra*,[55] and has been extensively applied in decisions of the Commission dealing with dismissal for those reasons. That approach was restated by a Full Bench of the Commission more recently in *Newton v Toll Transport Pty Ltd*.[56] In *Rose v Telstra*, the authorities in relation to dismissal of an employee based on out of hours conduct were extensively considered. The principles to be distilled from those authorities were set out by a Full Bench in *Sydney Trains v Bobrenitsky*[57] and can be summarised as follows.

[91] While an employee's employment may be validly terminated because of out of hours conduct, the circumstances are limited to cases where:

- the conduct is such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or

- the conduct damages the employer's interests; or

- the conduct is incompatible with the employee's duty as an employee.

[92] It is not necessary that the conduct said to constitute a valid reason for dismissal is repudiatory of the employment contract, but in essence, it must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.

[93] It is axiomatic that to indicate a rejection or repudiation of the employment contract, the out of hours conduct must be sufficiently connected to the employee's employment. Not every connection between out of hours conduct and employment, will constitute a valid reason for dismissal, and the necessary connection has been described as follows:

- To constitute a valid reason for dismissal, the out of hours conduct must touch the employment,[58] or touch the duties or the abilities of the employee in relation to the duties.[59]

- To determine whether conduct engaged in privately, out of hours or outside work has a relevant connection with employment to constitute a valid reason for dismissal, it is necessary to consider the entire factual matrix including:
  - the nature of the out of hours conduct and what it involved;
  - where the out of hours conduct occurred;
  - the circumstances in which the out of hours conduct occurred;
  - the nature of the employment;
  - the role and duties of the employee concerned;
  - the principal purpose of the employee's employment;
  - the nature of the employer's business; express and implied terms of the contract of employment; and
  - the effect of the conduct on the employer's business; and
  - the effect of the conduct on other employees of the employer.

[94] Out of hours conduct may be relevantly connected to employment so that it provides a valid reason for dismissal because the conduct occurs in a facility (such as a crib room) or accommodation provided by the employer or by a third party under an arrangement with the employer.[60] However, more may be required to establish the relevant connection than the geographical location at which the conduct occurs. Cases where an employee engages in conduct out of working hours, in a mess or camp style accommodation where rules of occupation are promulgated to all employees may be distinguishable from purely private conduct engaged in by an employee travelling on the employer's business where that conduct is not observed by other employees.[61]

[95] The requisite connection between out of hours conduct and employment may be because the results of the conduct directly impact the employee's ability to perform work, in a practical sense. For example, because of criminal conduct engaged in out of working hours an employee

may be unable to perform the duties the employee was employed to perform because the employee is imprisoned for an extensive period, so that the contract of employment is frustrated.[62] Similarly, a connection may be established where a sanction imposed on the employee because of out of hours conduct prevents the employee from carrying out duties which are the principal purpose for which the employee was employed – for example, an employee employed as a chauffeur who loses their drivers' licence and is legally unable to drive a motor vehicle and who cannot reasonably be employed on alternative duties.[63]

[96] The connection between the out of hours conduct and the employment may be because the role the employee is employed to perform, has inherent requirements, duties or obligations, with which the out of hours conduct is directly inconsistent. This may be because the employee holds a special position such as police officer, university academic, solicitor, or public servant, and engages in conduct out of work which is directly inconsistent with the inherent requirements of his or her position. In such cases, the expectations that the employer may reasonably have about perceptions of the employee on the part of persons external to the employer, such as customers or members of the community, may be sufficient to establish the connection.[64]

[97] There may be a connection between the employment of a person convicted of a crime outside work where that person is employed in a role which requires them to perform the same duties, or duties in the same context, in which the crime was committed.[65] An example of such a connection is found in *Hussein v Westpac Banking Corporation*[66] where an employee of a bank, who engaged in credit card fraud on another bank, outside work, was validly dismissed for such conduct. The relevant connection was that the employee was required to assist persons whose first language was not English with a range of financial transactions, including, on occasions, handling cash. The employee held a position of responsibility and trust, and the employer was therefore entitled to expect that he was trustworthy, honest in the carrying out of his duties and could be relied on. That the employee engaged in criminal conduct involving fraud against a bank, was sufficient connection to justify dismissal on the basis that the employer no longer trusted the employee and could not rely on his honesty, in respect of his dealings with its customers and/or the bank which employed him.

[98] However, if the employee had been employed in an administrative role in which he was not dealing with customers of the bank, or a role which did not involve financial transactions, the requisite connection may not have been found. While employers generally expect their employees to be trustworthy, this expectation, is not of itself, sufficient to establish a relevant connection with employment so that conduct outside work, where an employee's honesty and integrity is brought into question, is a valid reason for dismissal. The critical distinction between cases where a relevant connection is established is that something beyond mere expectation is required. The connection must relate to an inherent requirement of the employee's position or an attribute which the employee must have to undertake the required duties of the employee's position. It is the conduct which must involve incompatibility, conflict or impediment to the employment relationship or be destructive of confidence. An actual repugnance between the employee's acts and the relationship must be found, and it is not enough that there is ground for uneasiness about future conduct,[67] or a mere apprehension that the employee will act in a manner incompatible with the employee's duty or fidelity.[68]

[99] A relevant connection between conduct outside working hours and employment may also be found where an employee engages in conduct out of hours which materially damages the employer's interests in respect of its relationships with its clients and staff. In *Wakim v Bluestar Global Logistics*,[69] the relevant relationship was found where an employee who was convicted of a child sexual offence was a public figure whose conduct attracted widespread media attention and was also the primary point of contact for current and potential clients of the employer and a senior manager and regarded as a leader in the business.

[100] There are also cases where the relevant connection between out of hours conduct and employment is found based on the effect of the conduct on other employees or the efficient operation of the business. Thus, in *McManus v Scott-Charlton*,[70] conduct engaged in by an employee which involved the harassment of a co-worker outside working hours, was a valid reason for dismissal because of the effect on the victim of the harassment at work. Similarly, a deliberate assault on a foreman outside work, was found to be grounds for dismissal because it would likely impact on the relationship between managers and those they were supervising.[71]

[101] The line that can be traced through the cases is that all the circumstances of the employment must be examined and that the express or implied terms of a contract of employment are relevant to, but not determinative of, the connection between out of hours conduct and employment, where the conduct is relied on as a reason for dismissal. Absent a connection with employment of the requisite kind, out of hours conduct will not constitute a valid reason for dismissal. Further, as Finn J observed in *McManus v Scott-Charlton*:

> "I am mindful of the caution that should be exercised when any extension is made to the supervision allowed an employer over the private activities of an employee. It needs to be carefully contained and fully justified."[72]

[102] We turn now to consider the appeal grounds.

Appeal grounds 1 and 2 – Alleged failure to consider the entire factual matrix

[103] By appeal grounds 1 and 2 the Appellant contends that the Commissioner erred by acting upon a wrong principle, namely by failing to consider the entire factual matrix in determining that, to the extent that the posts sent by Mr Pelly were sent after hours, they lacked sufficient connection with his employment to constitute a valid reason for dismissal. Appeal ground 2 specifies matters that it is asserted the Commissioner failed to have regard, or sufficient regard, to that are said to be relevant to the establishment of that connection.

[104] It is apparent that the Commissioner identified the principles relevant to determining whether out of hours conduct engaged in by an employee, has a sufficient connection to employment so as to constitute a valid reason for dismissal. The Commissioner set out extracts from Full Bench decisions concerning out of hours conduct, and it is not contended that the Commissioner's discussion of the relevant principles disclosed any lack of understanding in relation to their content or application. Rather, the issue for determination in the appeal is whether the Commissioner correctly applied those principles by failing to have regard, or sufficient regard, to the matters identified by the Appellant.

[105] The matters identified by the Appellant overlap to some extent. The first of those matters is the composition of the Sickos Video Sharing Group, including that the majority (83%) were

current or former employees. We do not accept that the Commissioner failed to have regard to this matter. The Commissioner at paragraph [117] of the Decision identified that 11 of the Respondent's work colleagues were members of the Group along with three persons who were former employees and three persons who were not associated with the Appellant. Earlier in the Decision at paragraphs [43] and [55], the Commissioner set out the Respondent's submission that the Group consisted of 15 current and former employees and a "*handful*" of others. At paragraph [144], the Commissioner found that the posts about a work situation, in a Group where 7 of 18 participants were not employed by the Appellant, did not create a sufficient connection to the workplace to sustain the Appellant's argument that the Group was work-related. There was also unchallenged evidence of Mr Thompson that he set up the Group, and that it consisted of friends, of whom all but three had attended his wedding, with 14 of the group being employed by the Appellant at the time of joining and approximately six who were not. Mr Thompson also gave evidence that his friendship group largely consisted of firefighters at the HMAS Albatross facility as they work closely together for extended periods and spend significant days such as Christmas Day and Easter together. The Respondent gave similar evidence about the close relationships between firefighters because the nature of their work and the amount of time they spend together. We also observe that evidence to this effect was also given by Ms Pretorius who emphasised the close relationships between firefighters who are members of the same platoon and spend extended periods of time together. Further, the evidence before the Commissioner established that the membership of the Group was voluntary and consensual. We do not accept that the Commissioner failed to have regard, or sufficient regard to, the composition of the Group.

[106] We do not accept that the Commissioner failed to have regard to the fact that persons who had left the group, being current employees, were referred to as "*soft cocks*" and "*pussies*". The Commissioner questioned the Respondent about these comments and accepted his evidence that none of the persons who had left the group would take offence. That evidence was supported by Mr Thompson. It is notable that Mr Pakes, who had been a member of the Group and left it, and was the subject of some of these comments, did not give evidence that he was offended. Rather, Mr Pakes gave evidence about the views of other persons who had left the Group, in circumstances where those persons did not give evidence corroborating the evidence of Mr Pakes. It was not unreasonable for the Commissioner to prefer the evidence of the Respondent to that of Mr Pakes in relation to this point.

[107] In relation to the second issue raised by the Appellant, it is not in dispute that on 15 February 2021, during working hours, the Respondent posted an image of an old bicycle with a fire extinguisher placed on each side of the bike rack behind the seat (the *Panther S Post*). The Commissioner accepted that this post was critical of management in relation to the procurement of a new piece of equipment, and that it constituted a valid reason for the Respondent's dismissal. The Commissioner accepted this notwithstanding that Mr Pakes, against whom the post was directed, did not take offense to the post and expressed his view that the employees would understand that he was doing his best to secure a new piece of equipment for them.[73] Mr Pakes also agreed in cross-examination that he would share jokes with the Respondent in a confidential setting.[74] In relation to a derogatory comment made about a female employee, the Commissioner accepted the Respondent's evidence that he posted a meme of Homer Simpson sliding backwards into a hedge, to indicate removing himself from the discussion. It is also evident that other persons likewise indicated their disapproval of the particular post.

[108] We accept that a significant majority of the posts made by members of the Group were sexist, pornographic and/or disparaging of women and had a potential to create a hostile work environment particularly for women. To that could be added that several of the posts were racist. We also accept that the Appellant employs both male and female firefighters and wishes to increase the numbers of females. Further, we accept that there was evidence of the "*blokey*" nature of firefighting and policies and training designed to address this culture, as set out in the witness statement of Ms Pretorius. However, we do not accept that these factors, of themselves, establish a connection to the Respondent's employment. In particular, the nature of the posts alone, cannot create such a connection. Further, contrary to the evidence of Ms Pretorius about the steps taken by the Appellant to create a culture necessary to attract and retain female firefighters, we note the Respondent's uncontested evidence about the inadequacy of the training he received in relation to the matters that led to the termination of his employment. Further we note that under cross-examination Ms Pretorius agreed that: she works in Sydney and could not recall when she last went to HMAS Albatross;[75] the Respondent had not received Respect at Work Training;[76] and the expected behaviours of the Respondent should have been made clear during Code of Conduct Training. In response to the proposition that she could not point to training provided to the Respondent making it clear that what he was doing is wrong, Ms Pretorius said that she would rely on common decency of individuals to know what is right and wrong.[77] In our view it was reasonable for the Commissioner to conclude that training provided to the Respondent in the use of social media and workplace harassment left something to be desired and to weigh this matter against the stated objectives and attempts of the Respondent to increase female participation.

[109] In relation to the posting during working hours, the evidence establishes that the Respondent made only one such post – the "*Panther S Post*". We do not accept that the Respondent can be held responsible for the conduct of other employees who may have made posts or read material posted by others, during working time and we see no error in the Commissioner's conclusions in this regard. The Respondent was not in a position of authority over the other participants in the Group. In contrast, on his own evidence, Mr Pakes was aware of the existence of the Group and, on the strength of his view about its name, decided after a few weeks to remove himself. This followed Mr Pakes' participation in an earlier group during which period he made at least one post, involving racially offensive material. We also note the evidence of Ms Pretorius to the effect that firefighters spend a lot of down time together during their shifts while they wait for an emergency to arise. In all of the circumstances, the fact that some of his colleagues spend that time posting or reading posts in a private message group, is not a matter for which the Respondent can be found responsible. Nor is the likelihood that colleagues would engage in this activity, sufficient to establish the requisite connection to the Respondent's employment. We also note that there is no evidence that any resources of the Appellant were used by the members to participate in the Group's activities, other than they may have done so during working time. However, even this point is unclear given evidence of the amount of downtime during periods where firefighters are at work.

[110] While the Commissioner also found that a photograph of a colleague in the carpark of HMAS Albatross posted by the Respondent (*the Oldham post*) was contrary to Company and Defence policy and constituted a valid reason for dismissal, the Appellant led no evidence of damage to its interests except, as the Commissioner noted, possible minor embarrassment with Defence. Apprehension of such embarrassment is not sufficient. As the cases establish, there must be a real likelihood that this will occur. We do not accept that the Respondent's failure to

admonish other members of a private group of consenting men, posting material they consented to receive, which they did not expect would go beyond the group, and did not disseminate outside the group, is a valid reason for his dismissal. While the Respondent held a senior position with the Appellant, there were other members of the Group who held the same or similar positions and at one point, as we have noted, Mr Pakes was a member of the Group (albeit without knowing the full scope of the posts) and was a member of a predecessor group in which he made at least one inappropriate racially offensive post. In those circumstances, it is arguable that Mr Pakes had a duty to stop the Group's activity or at least warn its members of the implications of their conduct. The Commissioner was not in error in rejecting the Appellant's assertions in relation to this point.

[111] The Appellant referred to three cases in support of its assertion that the Commissioner failed to have regard or sufficient regard to the matters identified in appeal ground 2. Those cases do not support the Appellant's contentions. While we accept that the factual scenario in *Rose v Telstra* was fundamentally different, there are also similarities in that there is no evidence that the conduct of the Respondent caused any damage to the interests of Ventia, just as there was no evidence of damage to the interests of Telstra. This finding in *Rose v Telstra* was made notwithstanding that two of its employees engaged in a violent physical altercation causing damage to a hotel room, the police were called, and one employee was charged in the local Court. As was the case in *Rose v Telstra*, there is no evidence in the present case to contradict that of the Respondent, that he was a dedicated and otherwise exemplary employee who engaged in posting material which he openly acknowledged in the hearing before the Commissioner that he should not have shared, even in a private group.[78] The facts in the present case are not analogous to those in *Sydney Trains v Bobrenitsky*. In that case, a train driver was convicted of an offence involving driving a motor vehicle which had a direct impact on his employment as a train driver and the confidence of his employer that he could carry out the essential duties of that role. Here, the conduct does not directly impact the Respondent's employment or the performance of his role as a firefighter.

[112] The facts in the present case are also not analogous to those in *Colwell v Sydney Container Terminal*[79] which involved an employee sending a video of a woman masturbating, to some 19 Facebook friends, with whom he worked. Some of the persons to whom the video was sent took issue with its contents and complained to their Union, which took up the complaints and attempted to resolve them. In that case, the Commissioner found that there was no indication that there was anything other than the cornerstone of the employment relationship which led to the applicant having 20 work colleagues as Facebook friends and sending the video to 19 of them via messenger and that employment by the Respondent was the relevant nexus. Significantly in that case, the 19 employees were not part of a group that existed separately from the group of friends of the applicant on Facebook and the offending post was sent to each person separately. Nor had the employees who received the offending post voluntarily subjected themselves to receiving such material by agreeing to be part of a group. The post was sent to them indiscriminately by a person with whom they were in contact via social media, simply because they worked together. The Commissioner in that case rightly found the relevant nexus existed. Further, it was entirely appropriate in that case for the Commissioner to "*put to rest*" by rejecting the applicant's argument that there was no valid reason for dismissal because the group to whom an offensive post had been sent had consented to be in the applicant's online friendship group, that he did not use work related devices or email addresses and the post was sent outside of working hours.

[113] In the present case, the Group existed independently of the workplace in the sense that there was a connection other than the members simply being work colleagues, who were all simply social media contacts of a person who sent an offensive post. As the Respondent's representative put the matter, the members of the Group were consenting men who were voluntarily members and understood the type of content that would be shared within the Group. Further, in the present case, no complaint was made about the content of a post *per se* by any employee of the Appellant. This is a matter to which we will return. It suffices to observe at this point that all the cases considered by the Commissioner in *Colwell v Sydney Container Terminal* concerned sexual harassment or bullying being directed to an employee by another employee, outside working hours, which had the necessary nexus with employment, because the parties were required to work together in the same workplace. This scenario does not arise in the present case. While the material shared within the Group is offensive, pornographic, sexist, disparaging to women and racist, there is no evidence of any recipient being offended by it or sharing it outside the Group. While this might say much about the disposition of members of the Group, it does not constitute a connection to employment sufficient to constitute a valid reason for dismissal. Relevantly, we note that the material came to the attention of the Appellant because the daughter of a Group member used it in defence of her own conduct related issues at work, in circumstances where it is not clear whether the Group member consented to the material being used in this way.

[114] We do not accept that the Commissioner failed to have regard, or sufficient regard to the matters identified by the Appellant. The Commissioner considered all the evidence and submissions in relation to those matters and applied the principles from the cases relevant to the issues he was required to determine. We are also of the view that the Commissioner's conclusions in relation to these matters were reasonably open to him on the evidence and disclose no error in his approach. We reject appeal grounds 1 and 2.

Appeal grounds 3 and 4 – Differential treatment

[115] Grounds 3 and 4 can be disposed of in short order. While the Commissioner questioned Mr Anderson about his state of mind in deciding to dismiss the Respondent and not Mr Gregory, who was also a member of the Group, no error of principle was involved. Mr Gregory was a member of the Group and engaged in posting material and his posts, which were in evidence before the Commissioner, were objectively offensive. The Respondent's post was a photograph of naked female bottoms beneath the comment "*The difference between new, used and worn shock absorbers*". Mr Gregory's post was a written comment in the following terms: "*Call a girl beautiful one thousand times and she won't notice. Call her fat once and she'll never forget. That's because elephants never forget.*" The Commissioner analysed those posts and concluded that the posts made by Mr Gregory were as offensive, if not more so, than the posts made by the Respondent. Both posts were extremely derogatory to women, and it was open to the Commissioner to reach this conclusion notwithstanding that the Respondent's post included a photograph and Mr Gregory's did not. We deal with the comparison of videos posted by the Respondent and Mr Gregory in our consideration of appeal ground 5. For reasons which will be apparent, that evidence is also relevant to the Respondent's argument in relation to differential treatment and supports the Commissioner's conclusion in this respect.

[116] The evidence about why Mr Gregory was treated differently to the Respondent was not satisfactory. In response to a question as to whether other employees who had been engaged in the Group should still be employed by the Appellant, Ms Pretorius said that she trusts in the Company's internal processes to identify appropriate consequences and that appropriate action had been taken in response to findings.[80] Clearly this was not the case. There is no challenge to the Commissioner's finding that the conduct of Mr Gregory was not investigated.

[117] Further, the Decision and the transcript of the hearing indicates that the Commissioner's questioning of Mr Anderson about his state of mind, related to the changes Mr Anderson made to his witness statement identifying posts made by the Respondent. In short compass, and as the Respondent's submissions in the appeal make clear, Mr Anderson confirmed in his evidence that when he decided to dismiss the Respondent, he had before him incorrect information as to the posts made by the Respondent and had wrongly attributed some posts to the Respondent. That evidence goes directly to the question of whether the dismissal was unjust because the Respondent was not guilty of the misconduct (or the full range of misconduct) on which the employer acted, or unreasonable because it was decided on inferences which could not have been drawn from the material that was before the employer. This is consistent with the decision of a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan*[81] cited by the Commissioner at paragraph [108] of the Decision. We also note that Mr Anderson deleted references to a video shared by Mr Gregory being pornographic and highly offensive and inappropriate, and that he did not provide a satisfactory explanation for doing so. As previously stated, we deal with the video posted by Mr Gregory in our consideration of appeal ground 5. It was open to the Commission to consider that Mr Anderson was attempting to downplay Mr Gregory's wrongdoing to support its case. We reject appeal grounds 3 and 4.

Appeal ground 5 – Serious errors of fact – Respondent's posts

[118] Ground 5 alleges serious errors of fact in the Commissioner's analysis of posts made by the Respondent and Mr Gregory, who was also a member of the Group. As we have observed, it was reasonably open to the Commissioner to consider that the post made by the Respondent depicting three naked female bottoms, and the post made by Mr Gregory comparing overweight women with elephants, were equally offensive.

[119] If this was an error of fact, we do not accept, in all the circumstances of this case, that it was a significant error that vitiates the ultimate exercise of discretion. In relation to the Commissioner's findings about the videos posted by the Respondent and Mr Gregory, it is submitted by the Appellant that a conclusion cannot be drawn from a screenshot, that the video posted by Mr Gregory was pornographic. This, it is submitted, can be contrasted with the evidence of the Respondent, who conceded that the video he posted was a pornographic "*Only Fans*" video, which included four minutes of a woman engaged in sexual acts.

[120] This submission can be dealt with in short compass. We do not accept that the Commissioner misunderstood the nature of the Respondent's video post. Clearly, the Commissioner referred to it as a screenshot of a pornographic video. This description recognises that at the point Mr Anderson decided to dismiss the Respondent, the Appellant did not have the actual video and had only a screenshot of what we presume is the first frame of the video posted by the Respondent. The evidence before the Commissioner also indicated that Mr

Gregory's post was the first frame of a video. Mr Gregory's post,[82] as described by the Commissioner, depicts a woman "*with large breasts, a very tight shirt and panties*". The screen shot has a video "*play*" arrow clearly displayed on the woman's stomach. Even considered in isolation and absent evidence from Mr Gregory, the screen shot evidences that Mr Gregory posted a video. It is improbable in the context of material being shared by a group of persons who styled themselves the Sickos Video Sharing Group, that the video posted by Mr Gregory was not pornographic or otherwise offensive. Indeed, there is little evidence of any content posted by members of the Sickos Video Sharing Group that is not highly offensive, and even content that would otherwise be innocuous is rendered offensive by the language used by members of the Group in their comments. The fact that the Respondent admitted the nature of the video he posted, does not mean that the Commissioner made a significant error of fact in his analysis of the two posts. We do not accept that the Respondent's frank and appropriate concessions about the video he posted, should be used against him to support a finding that his conduct was worse than that of Mr Gregory.

[121] The Respondent put in issue in the hearing at first instance his assertion of differential treatment. If the Appellant wanted to establish that the video Mr Gregory posted was innocuous, it could have called Mr Gregory to give evidence, given that he is still employed. Again, no error of fact in relation to this matter is disclosed, much less a significant error vitiating the ultimate conclusion that the Respondent's dismissal was unfair, for reasons including differential treatment. We also note that Mr Pakes admitted to posting a racially based post that can only be described as highly offensive, on another earlier sharing group operated by employees of the Appellant. Further, we are of the view that there was evidence before the Commissioner indicating that Mr Pakes effectively turned a blind eye to the likelihood that a group entitled the "*Sickos Video Sharing Group*", of which he was a member for several weeks, was likely posting inappropriate material. We reject appeal ground 5.

Appeal ground 6 – Other serious errors of fact

[122] Appeal ground 6 traverses matters asserted in earlier grounds. We do not accept that the Commissioner erred by finding that the Respondent was not responsible for members of the Group accessing the material posted by the Group while they were at work, and it was a matter for each participant when that material was accessed. There was no basis for the Commissioner to draw an inference about why members of the Group remained as members. As the Respondent correctly submits, the persons who might have been called are not clearly in the Respondent's camp such that it would be expected he would have called them. We reject appeal ground 6.

Appeal grounds 7 – 9

[123] Appeal grounds 7 – 9 also traverse matters raised in earlier appeal grounds. These grounds suffer from the same vice that has affected other grounds asserted by the Appellant. The fact that a group of employees of the same employer privately engage in a group posting and sharing, pornographic or otherwise offensive material, is not of itself, a basis to find a connection to employment so as to constitute a valid reason for dismissal.

[124] In the present case, there was no complaint to anchor the out of hours conduct to employment. The Respondent's conduct, and that of the other members of the Group, came to

the attention of the Appellant because a female employee who was alleged to have sent a cake in the shape of male genitalia to a work colleague together with a photo of a male, provided copies of posts obtained from her father, who was a member of the Group, to the Appellant. Our perusal of that employee's response to the allegations against her, indicates that the sending of a cake in the shape of genitalia was considered by the Appellant to be a relatively minor matter, in the context of other matters covered by the response which appear to involve issues associated with the performance of substantive duties as a firefighter and in a control room, rather than sharing offensive material with colleagues.[83] The method of obtaining the posts adopted by the employee concerned, is unclear.

[125] If anything, the present case is illustrative of the abject stupidity of sharing pornographic or other offensive material within a group of work colleagues and indicates the relative ease with which a group that considers it is engaging privately in those activities can run afoul of policies and procedures designed to keep such material out of the workplace. However, the composition of the group and the stupidity of its conduct are not by or in themselves, valid reasons for dismissing one or more of the participants. What is required to found a valid reason for dismissal in such cases, is a connection to work involving matters such as actual repugnance between the conduct of the participants and their employment relationships, or an impact on persons (which may or may not include members of the group) that affects them at or in connection with work, or that pornography or other objectively offensive material was viewed in the workplace where there was a real risk that it could have been seen by other employees, or that there was a nexus such as the use of the employer's devices or resources to access and/or post offensive material in breach of a clearly articulated policy. The Respondent's conduct – other than in the two instances identified by the Commissioner – is not connected to his employment in the requisite sense so that other posts made by him constituted a valid reason for his dismissal.

[126] In relation to this conclusion, we wish to emphasise our view that material of the kind shared by members of the Sickos Video Sharing Group has no place at or in any workplace, regardless of the nature of the work or the constitution of the workforce.

[127] A desire among a group of firefighters to view offensive and pornographic material does not, of itself, impact on their ability to perform the inherent requirements of their roles. However, it is surprising that firefighters who provide a vital service to members of the public, including by volunteering in times of national and international emergencies, would risk careers they are rightly proud of, by sharing objectively offensive material that could be (and in the present case was) viewed by persons outside the consenting group and risk the possibility of that material impacting others in the workplace, or the reputation and business of their employer. In our view, the nature of the work performed by firefighters amplifies rather than mitigates the potential impact of conduct of the kind that the Commission has dealt with in these proceedings, given the amount of time that firefighters spend in the workplace and in close proximity to colleagues including for periods of down time. As Mr Thompson, to his credit, pointed out in his response to the show cause letter provided to him, knowing what he now knows about social media platforms and the chance of material posted on them spreading beyond the intended recipients, he would not share material that he would be unhappy showing his mother or grandparents.[84]

[128] However, in the present case, the Commissioner's conclusions that the Respondent's dismissal was unfair do not constitute an incorrect approach to the matters he was required to determine, nor involve significant errors of fact, and in all the circumstances, his decision to reinstate the Respondent was reasonably open to him. In the context of the Commissioner's findings on the evidence before him, we discern no error in his conclusion that the dismissal of the Respondent was harsh, unjust or unreasonable.

[129] In reaching this conclusion the Commissioner took an orthodox approach to considering whether all the Respondent's out of hours conduct had the requisite connection to his employment so as to constitute a valid reason for dismissal. It was reasonably open to the Commissioner to find that some but not all of the conduct did constitute a valid reason for dismissal and to weigh that finding against the other considerations in s. 387 of the Act. The matters the Commissioner considered for the purposes of s. 387(h) were appropriate and the conclusions in relation to them were reasonably open to him. Finally, we note that the Respondent expressed acceptance of the inappropriateness of his conduct in his initial response to the show cause letter. In his evidence to the Commission, the Respondent made appropriate concessions even in circumstances where these concessions were against his interests. The Appellant has not pointed to any basis for a finding that the Respondent's evidence was not sincere in relation to this point. Mr Pakes confirmed that the Respondent acted appropriately when the termination of his employment was communicated to him and that he could work with the Respondent in the future. In this regard, Mr Pakes said that he was confident that the Respondent would be professional and that he would also conduct himself in a professional manner.[85]

[130] Consistent with the observation of a Full Bench of the Commission in *Gelagotis v Esso Australia Pty* Ltd[86] in relation to findings of fact, the Commissioner had the advantage of seeing and hearing the witnesses and evaluating their credibility and the "*feeling*" of the case. Where the Commissioner based his findings of fact on his preference for the evidence of the Respondent over that of other witnesses, there is no basis for us to find that he "*palpably misused his advantage*" or "*acted on evidence that was inconsistent with facts incontrovertibly established by the evidence*".[87] It is apparent that the Commissioner found the Respondent to be a credible and sincere witness and accepted his evidence in a number of respects, including his understanding of and contrition for, the impact of his conduct as a member of the Sickos Video Sharing Group, and the sincerity of his stated intention that this conduct would not be repeated. On our review of the evidence before the Commissioner his conclusion that reinstatement was appropriate was reasonably open and not affected by any significant error of fact.

[131] We dismiss appeal grounds 7 – 9.

Order

[132] We order as follows:

1. Permission to appeal is granted.
2. The appeal is dismissed.

VICE PRESIDENT

Appearances:

C O'Grady of Senior Counsel and *B Avallone* of Counsel for the Appellant.
J McKenna of Counsel for the Respondent.

Hearing details:

2023.
Melbourne (via Microsoft Teams):
June 9.

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[1] [2023] FWC 907 ('Decision').

[2] *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission and Others* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[3] *Wan v Australian Industrial Relations Commission and Another* (2001) 116 FCR 481 at [30].

[4] (2000) 203 CLR 194.

[5] Ibid at [19] per Gleeson CJ, Gaudron J and Hayne J.

[6] Ibid at [21].

[7] *House v The King* (1936) 55 CLR 499 at [504]-[505] per Dixon, Evatt and McTiernan JJ.

[8] Ibid.

[9] *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] FCAFC 54, 192 FCR 78, 207 IR 177 at [44]-[46].

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

[11] *Fair Work Act 2009* (Cth) s.400(2).

[12] *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54, 192 FCR 78, 207 IR 177 at [43] per Buchanan J (with whom Marshall and Cowdroy JJ agreed).

[13] [2012] FWAFB 3540.

[14] Ibid at [25].

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

[16] Ibid at [43].

[17] Decision at [33].

[18] Decision at [43].

[19] Decision at [54].

[20] Decision at [57].

[21] (1995) 62 IR 371 at 373.

[22] Print Q9292, [1998] AIRC 1592.

[23] Decision at [52].

[24] Decision at [84]. We note that there is a typographical error in the decision which repeats the same error in the Respondent's submission. The actual allegation (in Annexure CA-13 to Mr Anderson's witness which was Exhibit 11 in the first instance hearing and page 873 of the Appeal Book) put to the employee referred to in this passage states that: "It is alleged that you sent a cake that was in the shape of male genitalia together with the photo of a male to …".

[25] Ibid at [87] – [93].

[26] Ibid at [94].

[27] Decision at [130]; Transcript of Proceedings on 7 February 2023 at [PN1374] – [PN1394].

[28] Decision at [138].

[29] Decision at [155].

[30] See too Decision at [120].

[31] Decision at [120]-[121].

[32] Decision at [139]-[149].

[33] [2022] FWCFB 32 at [140] – [150].

[34] *Rose v Telstra* (Print Q9292, 4 December 1998, Ross VP).

[35] [2021] FWCFB 3457.

[36] See in this regard *Sydney Trains v Bobrenitsky* [2022] FWCFB 32 at [112].

[37] Transcript of Proceedings on 6 February 2023 at [PN157] – [PN161] and [PN302] – [PN303].

[38] Ibid at [PN281], [PN286] and [PN301].

[39] Ibid at [PN247] – [PN253] and [PN173] – [PN175]; [PN832] – [PN835]; [PN844] – [PN873]; [PN911] – [PN918].

[40] Ibid at [PN174] – [PN175].

[41] *Sydney Trains v Bobrenitsky* [2022] FWCFB 32 at [148].

[42] See for example 13 June 2013 address to the International Women's Day conference by then-Chief of the Army Lieutenant General David Morrison AO titled "The Standard you walk past is the standard you accept"; Transcript of Proceedings on 7 February 2023 at [PN2742] – [PN2743].

[43] Decision at [2].

[44] Transcript of Proceedings on 6 February 2023 at [PN2741] – [PN 2742].

[45] PR931440.

[46] Decision at [130]; Transcript of Proceedings on 7 February 2023 at [PN1474].

[47] (1995) 62 IR 371 at 373.

[48] Decision at [146]-[147].

[49] Ibid at [135].

[50] Ibid at [120].

[51] *Gelagotis v Esso Australia Pty Ltd* [2018] FWCFB 6092 at [43].

[52] See *Barwon Health – Geelong Hospital v Dr Mark Colson; Dr Mark Colson v Barwon Health – Geelong Hospital* [2013] FWCFB 4515; *City Motor Transport Group v Devcic* [2014] FWCFB 6074; *Jones v Ciuzelis* [2015] FWCFB 84; *Colin Wright v AGL Loy Yang Pty Ltd* [2016] FWCFB 4818.

[53] Decision at [115]-[116].

[54] Decision at [131].

[55] Print Q9292, [1998] AIRC 1592.

[56] [2021] FWCFB 3457.

[57] [2022] FWCFB 32 – Quashed by the Full Court of the Federal Court in *Bobrenitsky v Sydney Trains* [2023] FCAFC 96 for reasons other than the analysis of the cases in relation to out of hours conduct.

[58] McCallum, Pittard and Smith *Labour Law: Cases and Materials* (2nd Edition) 1990 p. 140 cited in *Hussein v Westpac Banking Corporation*.

[59] E I Sykes and H J Glasbeek *Labour Law in Australia* 1972 p. 71.

[60] *AWU-FIME Amalgamated Union v Queensland Alumina Limited* (1995) 62 IR 385; *North Australian Workers' Union v Newcastle Protective Coating Pty Ltd* (1971) 139 CAR 707.

[61] *Rose v Telstra* Print Q9292, [1998] AIRC 1592.

[62] *F.C. Shepherd & Co Ltd v Jerrom* [1986] ICR 802.

[63] *Hussein v Westpac Banking Corporation* (1995) 59 IR 103 at 107.

[64] *Henry v Ryan* [1963] Tas SR 90; (1983) 5 IR 185 at 187; *Pense v Henry* [1973] WAR 40 at 42; *Public Service Board v Morris* (1985) 156 CLR 397 at 404 per Gibbs J and at 408-409 per Wilson and Dawson JJ; 1985) 156 CLR 397 at 412; *Orr v The University of Tasmania* (1957) 100 CLR 526; *In re Wearne* [1893] 2 QB 439; *R v Teachers Appeal Board; Ex parte Bilney* (1983-1984) 6 IR 476; *Re F* (1979) 5 QL 236; *Bercove v Hermes* (1983) 74 FLR 315.

[65] *Hussein v Westpac Banking Corporation* op. cit.; *HEF of Australia v Western Hospital* (1991) 4 VIR 310 at 324.

[66] [1995] IRCA 132; 59 IR 103.

[67] *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 at 82 (per Dixon and McTiernan JJ).

[68] Ibid at 74 per Starke and Evatt JJ; see also *Cementaid (NSW) Pty Ltd v Chambers* NSW Supreme Court, unreported, 29 March 1995.

[69] [2016] FWC 6992 at [32] – [35].

[70] (1996) 140 ALR 625.

[71] *Re Transfield Pty Ltd* [1974] AR (NSW) 596.

[72] (1996) 140 ALR 625 at 636.

[73] Transcript of Proceedings on 7 February 2023 at [PN2131] – [PN2136] (Appeal Book at pg. 1658).

[74] Ibid at [PN1976] – [PN1978] (Appeal Book at pg. 1643).

[75] Transcript of Proceedings on 6 February 2023 at [PN1288] – [PN1289] (Appeal Book at pg. 1575).

[76] Ibid at [PN1304] (Appeal Book at pg. 1577).

[77] Ibid at [PN1305] (Appeal Book at pg. 1577).

[78] Decision at [15].

[79] [2018] FWC 174.

[80] Transcript of Proceedings on 6 February 2023 at [PN1329] – [PN1331] (Appeal Book at pg. 1580).

[81] (1998) 84 (IR) 1.

[82] At page 880 of the Appeal Book.

[83] Appeal Book pages 735 – 739.

[84] First Witness Statement of Adam Thompson Exhibit #4 Appeal Book page 285 – 287.

[85] Transcript PN2153 (Appeal Book page 1660).

[86] [2018] FWCFB 6092.

[87] Ibid at [44] citing *Fox v Percy* (2003) 214 CLR 118 [28] – [29] Gleeson CJ, Gummow and Kirby JJ.