



# DECISION

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

**Robert McLean**

v

**Reserve Bank of Australia**  
(U2023/10811)

COMMISSIONER MATHESON

SYDNEY, 23 AUGUST 2024

*Application for an unfair dismissal remedy – performance improvement plan – unsatisfactory performance – valid reason for dismissal – a number of PIP requirements not expressed clearly enough to know what was required or whether they had been met – feedback after mid-point review did not make clear that the Applicant was ‘off-track’ – second PIP meeting cancelled – show cause letter did not particularise ongoing deficiencies in performance – dismissal harsh – compensation ordered.*

[1] Mr Robert McLean (**Applicant**) has made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that he had been unfairly dismissed from his employment with the Reserve Bank of Australia (**Respondent**). While the Applicant’s application initially indicated he sought reinstatement or, in the alternative, compensation, the Applicant confirmed that he was seeking financial compensation rather than reinstatement in his submissions and during the conference held to determine the matter.

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

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

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

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

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

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

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

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

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

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

### **Background**

**[6]** The uncontested factual background to the matter is as follows:

- The Applicant began working for the Respondent on 18 August 2009.
- On 11 January 2020 the Applicant was appointed to a management role with procurement responsibilities (**Role**).
- On 8 June 2023 the Applicant was asked to attend a performance improvement plan meeting and was notified of the implementation of a performance improvement plan.
- In correspondence dated 8 June 2023 the Respondent stated that it considered that the Applicant was not performing his role to the standard required and raised the following concerns:
  - inability to appropriately plan and prioritise work, causing delayed delivery of key business initiatives, poor stakeholder experience and, on occasion, exposing the Respondent to potential reputational and commercial risks;
  - ineffective communication and a lack of visibility on progress of key business deliverables;
  - inconsistency in driving stakeholder engagement; and
  - lack of ownership and accountability when issues arise, and in proactively seeking to address those.
- The correspondence of 8 June 2023 attached a Performance Improvement Plan (**PIP**).

- On 13 June 2023 the Applicant responded to the correspondence of 8 June 2023 attaching the PIP and, by way of summary:
  - raised concern that leadership had not acknowledged the difficult performance environment in which he had been working, had not observed procedural fairness and had not provided consistent support in clarifying his role and performance objectives;
  - stated that should the performance management process continue it would impact the trust and confidence he has in the Respondent;
  - acknowledged there were opportunities requiring improvement but saw this as most likely to be achieved via a collaborative process ‘featuring full and consistent feedback’;
  - expressed concern that his team’s achievements had not been recognised;
  - indicated that work pressures and resource constraints presented significant limitations on his performance;
  - indicated that his requests to recruit for two vacant positions in his team had been declined, intensifying his work demands;
  - indicated that certain work priorities should be performed by other teams.
- On 19 June 2023 the Respondent provided the Applicant with a revised PIP which commenced on 20 June 2023.
- A midpoint review meeting in relation to the PIP occurred on 31 July 2023 and on 17 August 2023 the Applicant was provided with a document relating to the midpoint review.
- The Applicant took bereavement leave between 28 August 2023 and 5 September 2023 and upon his return to work on 6 September 2023 was advised that the PIP would be extended due to him taking leave.
- On 4 October 2023, following a meeting, the Applicant was provided with a letter inviting him to show cause as to why his employment should not be terminated (**Show Cause Letter**).
- On 5 October 2023 the Applicant commenced a period of personal leave.
- On 6 October 2023 the Applicant provided his response to the show cause letter.
- On 6 October 2023 the Applicant informed Mr Scott Hunter that he would not be able to attend a meeting on 11 October 2023 to discuss the Respondent’s decision concerning his employment and provided a medical certificate.
- On 10 October 2023 the Applicant received an email response from Mr Hunter stating that the meeting scheduled for 11 October 2023 would not be rescheduled and that the outcome would instead be communicated in writing.
- On 11 October 2023 the Respondent provided the Applicant with a letter terminating his employment with effect from that date with the reason for termination stated as a failure to perform his duties to the standard required by the Respondent.
- The Applicant was dismissed on 11 October 2023 and was paid four weeks in lieu of notice.

### *The conference*

[7] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[8] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a conference for the matter (s.399 of the FW Act).

### *Witnesses*

[9] The Applicant gave evidence on his own behalf.

[10] The following witnesses gave evidence on behalf of the Respondent:

- Seraphim Tomaras, employed by the Respondent as a Financial Controller; and
- Scott Hunter, employed by the Respondent as Head of Procurement.

### *Submissions*

[11] The Applicant filed submissions in the Commission on 9 January 2024. The Respondent filed submissions in the Commission on 31 January 2024. Final written submissions were filed by the Applicant on 8 February 2024.

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

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

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

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

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

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

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

### **Initial matters**

[17] Under section 396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);

- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.

***Was the application made within the period required?***

[18] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[19] It is not disputed and I find that the Applicant was dismissed from his employment on 11 October 2023 and made the application on 1 November 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

***Was the Applicant protected from unfair dismissal at the time of dismissal?***

[20] I have set out above when a person is protected from unfair dismissal.

***Minimum employment period***

[21] It was not in dispute and I find that the Respondent is not a small business employer, having 15 or more employees at the relevant time.

[22] It was not in dispute and I find that the Applicant was an employee, who commenced their employment with the Respondent on 18 August 2009 and was dismissed on 11 October 2023, a period in excess of 6 months.

[23] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

***Application of an enterprise agreement/Applicant's annual rate of earnings***

[24] It was not in dispute and I find that, at the time of dismissal, the *Reserve Bank of Australia Workplace Agreement 2008* applied to the Applicant's employment.

[25] It was not in dispute and I find that, at the time of dismissal, the sum of the Applicant's annual rate of earnings, being \$153,685, was less than the high income threshold, which, for a dismissal taking effect on or after 1 July 2023, is \$167,500.

[26] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

***Was the dismissal consistent with the Small Business Fair Dismissal Code?***

[27] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[28] As mentioned above, I find that the Respondent was not a small business employer within the meaning of s.23 of the FW Act at the relevant time, having in excess of 14 employees (including casual employees employed on a regular and systematic basis).

[29] I am therefore satisfied that the Small Business Fair Dismissal Code does not apply, as the Respondent is not a small business employer within the meaning of the FW Act.

***Was the dismissal a case of genuine redundancy?***

[30] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[31] It was not in dispute and I find that the Applicant's dismissal was not a case of genuine redundancy as described in s.389 of the FW Act.

[32] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

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

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

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

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

[34] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>1</sup>

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

***Section 387(a) - Was there a valid reason for the dismissal related to the Applicant’s capacity or conduct?***

*Submissions*

[36] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant’s capacity because of sustained, unsatisfactory performance.<sup>2</sup>

[37] The Applicant appears to dispute this, raising a number of concerns about the performance management process, including concerns that:

- the feedback provided during PIP meetings was inconsistent with the reasons provided in the Show Cause Letter, show cause meeting on 4 October 2023 and termination letter;
- many of the objectives in the PIP were so broad and unmeasurable that the Applicant had no way of reasonably being able to measure his progress of the achievement of these objectives except through ongoing feedback;
- the Respondent ignored his suggestions to add in measurable metrics for performance of the PIP;
- the Applicant was provided with misleading or disingenuous feedback that he was doing well all the way up to the PIP midpoint and by the time he was asked to show cause as to why his employment should not be terminated, the vague and unevicenced narrative had been that he had been effectively failing all along, despite completing all requested PIP deliverables;
- the Respondent added on additional items to the PIP at will and without meaningful consultation, without making adjustments to provide more time or support;
- the Respondent did not take into account short staffing or the Applicant’s actual excessive workload; and
- the Respondent’s Chief Financial Officer was operating on completely different feedback in relation to the PIP as compared to what was told to the Applicant.

[38] The Applicant also alludes to an ulterior motive for the dismissal, submitting that the Respondent has been pursuing plans to restructure its procurement portfolio which would have resulted in elimination or reduction of the Applicant's position.<sup>3</sup> The Applicant referred to two documents, 'Procurement Strategic Review' and 'Procurement Strategic and Operational Reviews', and submitted that these provide evidence that the Applicant's role was to be made redundant which would have led to a significant payment to the Applicant under the Respondent's policies and in accordance with the Applicant's employment contract.<sup>4</sup>

#### *The Applicant's role*

[39] On 2 December 2019 the Respondent wrote to the Applicant offering him the position of 'Manager, Corporate Category & Governance, Workplace', commencing from 11 January 2020. The Applicant said that the title of his role was 'Manager, Corporate Category and Governance, Procurement'.<sup>5</sup> Mr Hunter said that when he first became the Applicant's direct manager in May 2021 the Applicant was employed in the role of 'Manager, Governance, Procurement, Financial Control, Finance', and this was the role the Applicant held up to the termination of his employment.<sup>6</sup> Mr Tomaras said that at the time of the Applicant's dismissal the Applicant was employed in the position of 'Manager, Corporate and Governance, Procurement, Finance'.<sup>7</sup> Despite the differing titles used by the parties, these all refer to the Role.

[40] Mr Hunter said the Applicant was appointed to the Role in January 2020 from a below manager role and that the Role brought with it the added responsibility of being a manager and the requirement to demonstrate leadership skills not required of the Applicant in his prior role.<sup>8</sup>

[41] The responsibilities associated with the Role were set out in a position description (**Position Description**).<sup>9</sup> The Position Description indicates that it was approved on 28 March 2022 and stated that the primary purpose of the role was to:

'Oversee the direction of a procurement area, while leading and developing individuals and teams to achieve goals and deliver RBA outcomes. Lead strategic sourcing initiatives in partnership with the business and support effective governance of procurement activities across the Bank.'

[42] The Position Description states that the Role objectives are to:

- Create a RBA values aligned culture, enabling an environment for high levels of employee engagement and achievement.
- Contribute to the broader strategic direction and leadership of the area, sharing accountability with other leaders for overall performance of deliverables and outcomes.
- Provide advice and insights and deliver accurate and timely reporting and procurement services that contribute to the organisation's strategic goals.
- Ensure operational accountability in regards to people management, budget and processes.
- Lead, guide and develop individuals and teams to effectively achieve area outcomes.
- Enable and recognise workforce performance in a way that encourages continuous improvement.



- Contribute to the improvement of policies, systems and processes, ensuring the integrity and suitability of information as well as compliance with legislative obligations.
- Identify and respond to issues, risks and opportunities, ensuring appropriate processes are in place.
- Maximise value for the Bank by managing internal and external relationships and collaborating effectively with key stakeholders.
- Provide quality assurance of contract documentation for execution and assist with contract establishment and negotiations.
- Create and implement category strategies (for a portfolio of spend) delivering improved value for money to the bank and demonstrating implementation of best practice (KPI's, supplier management, market knowledge, tendering, deal structuring).
- Establish and maintain a contract and supplier management framework.
- Provide quality assurance through the introduction and maintenance of procurement templates and tools for Bank-wide use.

[43] The Position Description also includes 'other position details' which appear to be skill and experience requirements and include:

- Experience in drafting and implementing policies and governance.
- Experience in design and implementation of procurement governance tools (policies, procedures, templates).
- Advanced skills in category management and procurement tendering.
- Experience in commercial contract negotiation and management.

[44] The Position Description includes 'compliance requirements' which include compliance with the Respondent's Code of Conduct and policies, risk management arrangements, statements of responsibilities, manuals, guidelines and procedures including, without limitation, those relating to personal behaviour, work health and safety, diversity and inclusion and information management, confidentiality and security.

#### *Applicant's managers*

[45] The Applicant was appointed to his role in January 2020. Mr Scott Hunter was the Applicant's Manager at the time of his dismissal.

[46] The evidence of Mr Hunter and Mr Tomaras establishes that:

- between May 2021 and December 2021 the Applicant directly reported to Mr Hunter;<sup>10</sup>
- from December 2021 to April 2022, the Applicant reported to the Respondent's Financial Controller, Mr Tomaras<sup>11</sup> while Mr Hunter held the role of 'Acting IT Procurement Manager';<sup>12</sup>
- from April 2022 to December 2022 the Applicant reported to Mr Hunter while Mr Hunter held the role of 'Head of Procurement – Finance';<sup>13</sup>
- from December 2022 to August 2023 Mr Hunter was seconded to the Respondent's 'Enterprise Program Management Office' and Michael Hare acted in the 'Head of Procurement' role.<sup>14</sup> Mr Hunter said Mr Hare had responsibility for managing the

Applicant during this time,<sup>15</sup> however Mr Tomaras' evidence was that from July 2023 the Applicant reported to Mr Hunter who had returned from secondment.<sup>16</sup>

[47] Prior to Mr Hunter becoming the Applicant's manager in May 2021, the Applicant reported to Ms Anna Brown. However it is apparent that after Ms Brown ceased to be the Applicant's Manager, the Applicant had three different direct managers across five periods in the period between May 2021 and his dismissal in October 2023.

[48] Mr Tomaras' evidence was that from October 2021 until the Applicant's employment was terminated, he was either the Applicant's direct or two-up manager.<sup>17</sup>

*The Applicant's FY21 mid-term performance review feedback*

[49] The Applicant's Manager at the time of his 2020-2021 financial year (**FY21**) mid-year review was Ms Brown. Mid-term manager comments within the FY21 performance review document<sup>18</sup> include the following comments about the Applicant's performance:

'Robert has made a significant contribution to the team in the first half of this year, delivering a numbr (sic) of great results. The demands and his workload has (sic) been high, which has made it challenging and we have agreed that this is something we'd like to address in the second half of the year. Robert's strengths are in problem solving, analysis, written and verbal communication, governance and legal advice and his strong network at the Bank. He is very valuable to me in his role as he is perceptive and sees opportunities and gaps and presents ideas to resolve them. He is building a strong team and managing some development areas with staff that are solvable and he's been investing time in coaching and staff development. Robert's development focus for the second half of the year is to strengthen his planning skills (consistent delivery and a method to manage his priorities and forecast changes) and continuing to strengthen his people management skills. He has a very good understanding of the procurement process, CPR's and procurement governance, so it is not an area he needs to develop right now, but I agree with his idea to put aside time to continue to build that knowledge base. We also discussed opportunities for learning in innovation, design, thinking, digitisation to support some more interesting aspects of his role that will make a difference to Procurement in the coming 2 years. Robert is very well established in his role, I enjoy working with him every day and congratulate him on a very strong half of FY20'.

*The Applicant's FY21 performance review and feedback provided on 16 July 2021*

[50] Mr Hunter was involved in the Applicant's end of year performance review for the FY21 as he was the Applicant's manager at that time.<sup>19</sup> A meeting for the purposes of the review was chaired by the Head of the Respondent's Workplace department on 16 July 2021 and during this meeting the Applicant's self-assessment and manager feedback in the FY21 performance review document pertaining to the Applicant (**FY21 Performance Review**) was discussed.<sup>20</sup>

[51] Mr Hunter said that in assessing the Applicant's performance, he had regard to feedback provided by Mr Bruce Harries which was recorded in the FY21 Performance Review and said:

‘...However, there has been negative feedback on the procurement experience from Stake holders in Legal, HR, NI, RM and BK, which form the bulk of your portfolio. In some cases, the feedback was specifically about you and observations that you had a tendency to provide advice that was either hard to follow or changed over time, that you didn’t always appear to listen to the stakeholder issues, or if you did you did not address them to their satisfaction, and that expectations were not well defined or managed. I accept that some of this was no doubt due to the fact that you have been very stretched on the policy, reporting and governance issues, but on balance this negative feedback detracts from your overall performance. That is why I believe a “Good” overall rating is appropriate.

It is not to imply that these issues can’t easily be remedied (I know they can), and part of that is to ensure that you have a more balanced workload and can spend more time on the customer service aspects of your role. There are also some opportunities to work on the clarity and conciseness of your communications and customer engagement approach with Scott and the new Senior Manager for Procurement when they are appointed...’<sup>21</sup>

**[52]** Mr Hunter pointed to the following further comments he provided in the FY21 Performance Review:

‘...Opportunities for improvement include:

Improved stakeholder engagement across your portfolio. We will work together to ensure you have capacity to do this more effectively in the next period.

Offering clear succinct advice that stakeholders can easily understand and act upon.

As simplification is bedded in and phase 1 of procurement digitalisation is completed this will provide some capacity to undertake greater portfolio based strategic work. This will provide an opportunity for increased stakeholder engagement and category strategy work.’

**[53]** Notwithstanding these comments, immediately after them Mr Hunter stated:

‘You should be very proud of your achievements this year.  
Well done!’

**[54]** Mr Hunter said that for FY21 the Applicant gave himself a rating of ‘Great Year’ but was given an overall rating of ‘Good Year’, being the middle performance rating, as Mr Hunter and Mr Harries agreed there had been adverse stakeholder feedback and improvement needed, particularly in relation to stakeholder engagement.

**[55]** A copy of the FY21 Performance Review was annexed to Mr Hunter’s witness statement at Annexure B. While the above feedback is reflected in the FY21 Performance Review, suggesting there were areas for improvement, the balance of feedback captured in the FY21 Performance Review is generally very positive notwithstanding that the Applicant was encountering high work demands and resourcing challenges in the FY21 performance year. While some of Mr Harries’ feedback was negative, he also included the following comments:

‘Robert undertook a great deal of work during the year centred around updating the Procurement policy, guidelines and tools and templates as well as rolling out simplification and training. These items have been undertaken in a much better way that (sic) previous iterations. Highlights include significant executive level engagement to revise the procurement guidelines as well as the roll out of simplification driving buy in along the way and the uplift in dtat (sic) driven decision making through the introduction of BI tools and reporting. The work on digitalization, although at proof of concept, also promises to yeild (sic) efficiencies. Of these achievements (sic) you should be very proud. Well done!’

**[56]** As noted above, Mr Hunter did not become the Applicant’s Manager until May 2021. However as a part of the FY21 performance review process, the FY21 Performance Review indicates that Ms Brown and the Applicant reviewed his performance against the full year goals in mid-April and that Ms Brown’s overall assessment was that all the major goals for FY21 had either been achieved or were on track for delivery by year-end. Ms Brown’s comments in this regard are detailed, generally positive and include the following:

- ‘This is a significant achievement as there has been very little let-up in a big year. Robert has taken the full weight of the material changes we’ve made to procurement this year. His peers have supported him, but no-one at his level has worked to the standard, covered the volume and contributed to work with senior stakeholders as he has this year. He has worked closely with me on managing senior stakeholders and strategic matters’.
- ‘The number of goals that fell to Robert and his team out of the Procurement Review was significant (he had the majority). He has done this in challenging circumstances as his team is not resourced for this level of governance work (it was a peak for FY21). Hopefully it’s not repeated in FY22 as the team need to be able to balance governance work with BAU procurement support (or resources restructured to address this). We did agree with Bruce to minimise time on procurements, but it’s challenging to say no to 14 Departments all year – it’s (sic) just doesn’t work and some level of service needed to be provided. In the majority case where Robert’s team ran a tender and supported the business on a purchase, the savings have been significant and the customer feedback very positive’.
- ‘We agreed to targets at the start of the year without knowledge of the additional goals that would be added (without relief on other goals) or changes in dates. Robert responded positively to this challenge, is always fully committed to getting the best outcome for the Bank and meeting the needs/requirements of our senior stakeholders’.
- ‘We were asked to bring forward the review of the Policy and Guideline by several months. This placed an increased load on Robert in November/December to design the timeline, engage stakeholders early and start the review, while only just finishing the December submission to the RMC on Simplification’.
- ‘Robert has had changes in his staff this year which he has managed very well’
- ‘...In my skip meetings with his team members, I receive very strong feedback about their relationship with Robert and he has a high level of awareness of where he can and wants to improve his management style’.
- ‘Robert has supported me in challenging relationships at the WP Senior Manager level and has shown a level of maturity and skill that is beyond his level. He stepped in to manage resolution of matters with [a stakeholder] and the WP team more broadly and

address their feedback on procurement processes. His maturity and skills to offer to his Manager was valuable to me and again – exceeds the performance of his peers, particularly the peer group across WP.

- ‘Robert has been my sounding board on most of the strategic matters all year and has led the technology roadmap discussion for Procurement. There are a few other people I can discuss matters such as framing a position for ExCo, positioning how to mature elements of the procurement strategy, how to introduce technology to our future strategy – his contribution to strategy and the position of Procurement is unmatched and invaluable to me as a leader’.
- ‘Robert’s contribution in FY21 has been exception and unfortunately I think that’s come at a personal cost to him at times (too much work, too many competing priorities). It is important that the workload reduces to a manageable level in FY 22, and a review of the resourcing model in this team would support that.’
- ‘He is no longer a “learner” in the procurement discipline. He is highly proficient, despite his short time in this area and is sought out by his peer and team members for expert advice weekly (to such a degree that I’ve asked his peers to manage this interaction so that he’s not overloaded and the other Managers step in to support this advisory role).’
- ‘It is a great pleasure working with Robert, he has contributed significantly to the evolution of procurement at the RBA. Where he has development areas and learnings, he is very open to reflecting and changing which is the type of behavior we are aiming to model in the team.’

**[57]** Ms Brown’s feedback indicated that there had been questions about the performance of a team member who had been replaced and the interactions between that team member and the Applicant. In this regard the feedback states that with hindsight, and the opportunity to see the Applicant successfully managing other team members, she was confident that the matter was isolated to the relationship between that team member and the Applicant. Ms Brown’s feedback also indicated that another team member was sometimes challenged in her role, had been coached on some development areas, was likely to have some mixed feedback about working for the Applicant and that the feedback should be considered in context.

**[58]** Ms Brown’s feedback also suggests that the Applicant needed to work with some challenging stakeholders, with Ms Brown including the following comments:

‘Robert and I have discussed some of the mixed feedback he has had from stakeholders during the year. More challenging relationships include for example managing FMG who openly and actively resist complying with the procurement guideline. We have sought senior leadership help to manage these challenges and continue to work with a number of stakeholders to slowly change that behaviour. However I think FMG is an example of an internal customer who give (sic) mixed feedback to all their interactions with Procurement – they have openly resisted the same guidance and direction from Darren’s team and have escalated to me’.

*Initial concerns held by Mr Hunter and Mr Tomaras*

**[59]** As noted above, Mr Hunter first became the Applicant’s direct manager when he was appointed to the role of Interim Senior Manager, Procurement in May 2021.<sup>22</sup>

**[60]** Mr Hunter said:

- it soon became apparent that the Applicant was struggling in his role, particularly in relation to the leadership skills needed to perform the procurement aspect of the role, including planning and providing clarity to his direct reports;
- the Applicant continued to focus disproportionately on governance processes rather than his procurement category objectives;<sup>23</sup>
- he observed the Applicant was not proactive when it came to stakeholder management and his stakeholder engagement was poor, resulting in negative outcomes and feedback;
- the Applicant did not take accountability and ownership of issues that, as a leader, he was responsible for managing;<sup>24</sup>
- he was concerned about the Applicant's performance and provided him with feedback and coaching on numerous occasions, including in regularly scheduled one-on-ones, catch-ups and team meetings;
- he observed that sometimes the Applicant would be defensive about the feedback however more often the Applicant would be receptive to the feedback but didn't ultimately take the action required; and
- he felt the Applicant would follow specific directions and undertake specific tasks given to him but was not otherwise proactive.<sup>25</sup>

**[61]** Mr Tomaras said that when he became the Applicant's two up manager in October 2021 his initial impression of the Applicant was that he was positive as he was welcoming of him into the team.<sup>26</sup> However Mr Tomaras said that soon after that time he was approached by several employees who expressed concern about the Applicant's leadership of the procurement activities he was supporting or advising on, specifically in relation to his communication, advice and lack of follow through.<sup>27</sup> Mr Tomaras said he provided some high level feedback based on those discussions but wished to assess the performance himself.<sup>28</sup> Mr Tomaras said he asked the Applicant about the status of the procurement activities he was responsible for and sought his feedback on any challenges and support required to progress them.<sup>29</sup>

**[62]** Mr Tomaras said that early on in his working relationship with the Applicant he began to observe some performance issues related to:

- poor stakeholder engagement;
- untimely communication;
- lack of transparency around the progress of his work;
- missed deliverables due to a lack of prioritisation and planning; and
- lack of proactivity and ownership over deliverables.<sup>30</sup>

**[63]** Mr Tomaras said he made the Applicant aware of these issues from very early on by providing consistent feedback in relation to them, for example, during regular meetings with the Applicant.<sup>31</sup> Mr Tomaras said he observed that the Applicant did not take ownership of the feedback provided, either by suggesting that someone else was responsible or that others were not providing necessary input.<sup>32</sup>

**[64]** Mr Tomaras referred to a specific example in relation to the pending expiry of the Respondent's Employee Assistance Program (EAP) arrangement with the Respondent's Head

of Health and Safety sending him an email expressing concerns about the Applicant's support in an email in December 2021.<sup>33</sup> Mr Tomaras provided a copy of that email in which the Respondent's Head of Health and Safety indicated that:

- the procurement plan had been submitted on 19 May and the Safety and Wellbeing team had prepared all of the required documentation and provided this to the Procurement team for review and approval on 23 November;
- the Procurement team met with the Safety and Wellbeing team on 30 November and advised that due to resourcing constraints a full tender could not be supported by Procurement due to the amount of work involved;
- two alternatives were proposed (by the Procurement team) being the extension of the current contract for a further year (Option 1) or selection of a provider from a government panel (Option 2).<sup>34</sup>

[65] The Head of Safety and Wellbeing stated that while understanding there were genuine resource constraints this was not acceptable in that:

- the Safety and Wellbeing team had prepared all of the required documentation and all that was required from the Procurement team was their review and approval;
- he believed that the Procurement team resourcing was minimal;
- the Procurement team had known that the tender was required for the best part of a year;
- Option 1 contradicted a previous direction from Workplace that a two-year extension would breach the Commonwealth Procurement Guidelines;
- Option 2 did not allow for the incumbent to tender as they were not part of the government panel of providers and in this regard the Head of Safety and Wellbeing indicated that that this seemed unfair and not necessarily in the Respondent's best interest given they were happy with the service and there were considerable costs involved in changing provider.<sup>35</sup>

[66] Mr Tomaras said that after an initial meeting with the Head of Safety and Wellbeing about his email of 6 December 2021:

- he brought the Applicant to a subsequent meeting to work through the concerns and agree a path forward;
- he had several discussions with the Applicant to support and provide guidance on delivery of the activity.<sup>36</sup>

[67] Mr Tomaras said that this example raised his concerns about the Applicant's communication and customer engagement skills, his ability to plan an activity and his ability to consider and balance elements of compliance with customer needs.<sup>37</sup>

*Feedback provided by Mr Hunter on 29 June 2021*

[68] Mr Hunter provided an example of his concerns about the Applicant's performance in relation to a project the Respondent called the 'Simplification Project'. The Simplification Project had commenced prior to Mr Hunter joining the Respondent and the Applicant was responsible for managing it.<sup>38</sup> The Applicant handed the final stages of the Simplification Project's implementation over to a team member, Ms Camargo, as he was taking annual leave.<sup>39</sup>

Mr Hunter said he reviewed the status of the project at that time and found that much of the required content had not yet been developed and there was a large amount of work outstanding for delivery by 1 June 2021 and limited planning in place.<sup>40</sup> After the Applicant returned from leave Mr Hunter met with him on 29 June 2021 to discuss how the lack of planning had impacted the team and during that meeting told the Applicant that the timeframe had only been met due to Mr Hunter's direct intervention and additional support from Ms Camargo and the Respondent's Corporate Communications Team.<sup>41</sup> Mr Hunter said he discussed the need for greater focus on having a clear and visible plan and using appropriate language for customer facing guidance.<sup>42</sup>

[69] At Attachment A of Mr Hunter's witness statement were notes that Mr Hunter said he kept in relation to meetings with the Applicant. I note that these do not appear to be contemporaneous notes but appear to have been extracted from some other source as they are included in a document that appears to be a chronology of events between 3 May 2021 and 15 August 2023. The notes in relation to the meeting on 29 June 2021 include the following:

*'RM Process Improvement Meeting*

- Discussed lack of planning with simplification impacting the end timeline. Need for a project plan with clear milestones.
- Reviewed template list and prioritised.
- Need greater focus on customer in the language we use with our customer facing guidance.
- Limited capacity for category mgmnt given governance priorities and reporting due.
- Discussed engaging 12 mth contractor to assist. RM to produce job add and PD due 5 July.<sup>43</sup>

*Feedback provided by Mr Hunter on 22 September 2021*

[70] Mr Hunter said he received negative feedback about the Applicant from a customer satisfaction survey on 22 September 2021 in which representatives from the Respondent's Note Issue department and Audit department provided commentary to the effect that the Applicant had a tendency to immediately give them a response to requests for advice, that advice was incorrect and he would then follow up to correct his advice after consultation with others.<sup>44</sup> Mr Hunter said he met with the Applicant that same day and suggested he should hold off on providing the advice until he has made inquiries, as opposed to "shooting from the hip and hoping it is correct".<sup>45</sup> Mr Hunter's notes in relation to the meeting, as reflected in Annexure A of his witness statement state:

- 'Feedback from Note Issue and Audit as part of customer (sic) satisfaction survey'.
- '[N]eed greater consistency in advice, Robert has a propensity to provide a response first that it wrong and then needs to come back and correct it after consultation with others'.
- 'Discussed stakeholder feedback with RM. If he is not sure about providing certain advice to say he will find out and respond separately rather than shoot from the hip and hope it is correct.'<sup>46</sup>

*The Applicant's FY22 mid-term performance review*



[71] Mr Hunter did not participate in the Applicant's mid-term, performance review as he held the role of Acting IT Procurement Manager at that time and the Applicant did not report directly to him.<sup>47</sup>

[72] Mr Tomaras said he raised concerns with the Applicant during the mid-term performance review and recalled explaining to the Applicant that:

- he had received generally negative feedback from several customers within the Respondent, particularly in relation to service delivery, advice provided and their personal engagements with the Applicant;
- he had failed to communicate effectively and follow through on commitments in a timely way;
- his approach to advice and planning was often considered overly conservative and negative by stakeholders.<sup>48</sup>

[73] Mr Tomaras said he discussed with the Applicant the manager feedback contained in the FY22 performance review document pertaining to the Applicant (**FY22 Performance Review**).<sup>49</sup>

[74] Mid-term comments by Mr Tomaras within the FY22 Performance Review included the following positive feedback:<sup>50</sup>

- 'Robert has been a tremendous support in my transition to the procurement team, both in terms of his willingness to share his clearly detailed knowledge of the Bank's procurement policies, processes and practices, but also being extremely generous with his time and jumping in to help myself and the broader procurement team through what has been a difficult period on the resourcing front (not least of which within his own team, which has seen a number of unplanned exits and staff absences over the period and Robert riding solo for an extended period).'
- 'During the period, Robert was very active in guiding the work to map out the teams end-to-end processes, workshoping this with the team to ensure buy in and understanding and delivering a guidance document which will be highly beneficial to the team going forward as both a knowledge centre and a tool to support process improvement. In this spirit, Robert has also continued to carry forward the work for a digital procurement app, demonstrating both his SME knowledge and drive and passion for automation and process improvement; and the work to outsource the Bank's fleet management services. Both these initiatives should be well placed for delivery over the second half of the performance year, but will require ongoing engagement and collaboration with partner departments across the Bank to ensure buy in and support (given resourcing constraints and competing priorities which have already posed some challenges to the planned delivery timeframes).'
- 'Robert has a clear passion to ensure the function delivers a high quality of service which supports the Bank in its broader goals, and has an unquestionably strong work ethic to support this. If he can continue to work on his customer engagement and portfolio goals, combined with us addressing the current resourcing challenges in the team, such goals are within reach.'

[75] The mid-term comments in the FY22 Performance Review also included the following regarding areas for improvement:<sup>51</sup>

- ‘In terms of Robert’s key performance goals for the remainder of the period, he is strongly encouraged to focus on his customer experience and procurement portfolio goals, which have not progressed as planned for various reasons. In particular, feedback from a number of Departments has tended to remain generally negative, in terms of both their experience with the service/advice provided and with their engagement with Robert himself (some of which reflects experiences in prior periods). This has tended to reflect a lack of communication and timely follow through on commitments. An at times very conservative and negative approach to advice and planning, rather than a risk based approach (i.e. trying to eliminate rather than manage risk), was also noted, and has been observed and raised by myself. Building these relationships and addressing the associated perceptions (some of which are historical) through regular and ongoing communication, and a focus on understanding and supporting the customer to provide valued advice, will be crucial in the immediate period ahead, and to support the ongoing development of the portfolio going forward. This in itself doesn’t mean always agreeing, as the nature of this role is such that difficult conversations will inevitably arise (and customers will always have their own lens on the priority of a deliverable), but such engagement still needs to occur productively and bearing in mind the role we play in procurement. Ongoing support will be provided, both in terms of the engagements themselves, working through any roadblocks and any formal development opportunities, but much will be driven by Robert actively seeking to work on these relationships.’
- ‘In terms of his leadership, Robert should work to actively manage the pipeline of work and prioritise this to ensure the highest value activities are prioritised (viewing this from an enterprise wide perspective), especially given the current resourcing constraints, and ensure the team are appropriately empowered to own some of these initiatives (which should free up Robert’s time) and provide them a good mix of work to support their ongoing development with appropriate stretch in their work.’

*The Applicant’s FY22 end of year performance review and feedback provided on 25 May 2022*

[76] Mr Hunter and Mr Tomaras conducted the Applicant’s end of year performance review for the 2021-2022 financial year (FY22) and held a meeting for this purpose on 25 May 2022.<sup>52</sup>

[77] Mr Hunter said that Mr Tomaras began by outlining positive feedback and that both he and Mr Tomaras mentioned that there had been mixed stakeholder feedback, negative customer engagement and a need to improve communication regarding the status of activities.<sup>53</sup> Mr Hunter said that he and Mr Tomaras discussed their concern that the Applicant had a tendency to downplay or ‘mask’ issues and specifically told the Applicant that he should provide a “warts and all assessment of issues” so he and Mr Tomaras could provide support and escalate when required.<sup>54</sup> Mr Hunter said he and Mr Tomaras also raised with the Applicant the need to improve the Applicant’s planning and prioritisation, emphasising actions that would deliver the most value to stakeholders.<sup>55</sup>

[78] Mr Hunter said he gave the Applicant an overall performance rating of ‘inconsistent year’ for FY22, which was the lowest rating that could be given, and felt this was appropriate

due to the performance concerns discussed at the performance review meeting.<sup>56</sup> Mr Tomaras said that this rating meant that the Applicant was not performing to the standard expected of a manager level role.<sup>57</sup>

**[79]** Mr Hunter pointed to the following specific feedback within the FY22 Performance Review pertaining to the Applicant:

‘...Customer Engagement : Customer feedback has been positive in key areas of engagement however there have also been some areas where feedback is mixed. This feedback generally aligns with the mid year feedback with some improvements evident in HR and Note Issue.

We discussed the need for Robert to improve communication regarding the status of activities and initiatives to ensure that, when needed, support can be provided. Examples of where greater transparency could have been provided was in regard to the status and coordination of Contract Management Plans and the status/progress of the Fleet outsourcing agreement. We discussed the need to provide a warts and all assessment of progress, be open about progress and where there are issues call them out early so we are clear where support is needed.

Further discussion covered the need to focus on the priority actions that will deliver the most value. We discussed that this has been sometimes difficult due to the complexity of the Categories within the Corporate Portfolio as well as balancing the Compliance functional responsibilities. One suggestion provided was for Robert to structure his time (that best fits his job profile) to create dedicated time spaces to focus on key elements of the role (eg. Monday (people), Tuesday (process), Wednesday (systems) etc.)...’

**[80]** A copy of the FY22 Performance Review was attached to Mr Hunter’s statement and also included the following comments.

- ‘Robert acknowledges that it has been a challenging year in his role with the key concern areas for him being around leadership and strategy ambiguity, team resourcing, services delivery of fleet, process changes, complexity of work profile and prioritisation of business engagement.’
- ‘General feedback is that there have been positive signs of improvement in stakeholder engagement when this has been a focus. Although there has been mixed feedback kfrom (sic) stakeholders throughout the year, it has been a more positive finish to the year.’

*The Applicant’s FY23 mid-term performance review and feedback provided on 24 January 2023*

**[81]** Mr Hunter said that after the Applicant’s FY22 performance review, he continued to become aware of issues with the Applicant’s performance.

**[82]** On 24 January 2023 Mr Hunter and Mr Hare met with the Applicant to discuss his mid-term performance review for the 2022-2023 financial year (**FY23**).<sup>58</sup> Mr Hunter said in that meeting he and Mr Hare discussed areas of the Applicant’s performance requiring further improvement including:

- the need for the Applicant to take more direct responsibility for procurement activities under his category to improve his understanding of process in practice and in doing so raise his credibility with his stakeholders;<sup>59</sup>
- improvements to his coaching and leadership style, notably ‘listening to hear versus respond’ and providing more autonomy in delivery to his direct reports, taking greater accountability and ownership of his portfolio and focusing more on proactive stakeholder engagement with a view to finalising Category/Portfolio plans by June 2023.<sup>60</sup>

[83] Mr Hunter noted that the areas for improvement raised with the Applicant in his mid-term review were recorded in the FY23 performance review document pertaining to the Applicant (**FY23 Performance Review**), including the need to:

- improve his coaching skills so as to promote autonomy in delivery, and drive ownership and accountability;
- take ownership and lead procurement activities; and
- improve his stakeholder engagement, including in light of negative stakeholder experiences arising from his giving of inaccurate advice.<sup>61</sup>

[84] Mr Hunter said a consistent theme with the Applicant’s performance, which was raised with the Applicant in his FY23 performance review, was the need to improve his leadership skills and this was despite the Applicant completing seven leadership courses offered to him by the Respondent to support his development between 2021 and 2023.<sup>62</sup>

*Applicant’s account of when performance concerns were first raised and implications*

[85] The Applicant said that performance concerns were first raised with him by the Procurement leadership team between February and May 2023<sup>63</sup> and that he was:

- subject to isolation and exclusion within the team; and
- observed other procurement team managers withholding crucial information pertaining to his areas of responsibility for professional services engagements which were material to the Applicant’s ability to perform his role and duties.<sup>64</sup>

[86] Mr Tomaras did not agree with the Applicant’s account that performance concerns were first raised with him by the Procurement leadership team between February and May 2023<sup>65</sup> and said that performance concerns were raised with the Applicant informally and made clear in his performance reviews from FY21 onwards, including the performance rating ‘inconsistent year’ as part of the FY22 Performance Review.<sup>66</sup>

*Initiation of the Performance Improvement Plan*

[87] Mr Tomaras said that in the period between February and May 2023 he became increasingly concerned about a decline in the Applicant’s performance and that a few major issues arose during and leading up to this period, resulting in negative stakeholder feedback and potential exposure of the Respondent to liability.<sup>67</sup>

**[88]** Mr Tomaras said that on 8 February 2023 immediately prior to the Applicant commencing a period of leave where the Applicant would have no access to systems, the Applicant sent an email to Mr Tomaras and others in the team notifying of an issue involving a supplier Eighty20 who was claiming payment for unpaid invoices relating to work performed several months earlier.<sup>68</sup> Mr Tomaras said he was concerned as he could see from the email trail that the matter had been escalated to the Applicant in August 2022 with multiple and regular follow-ups by the supplier.<sup>69</sup> Mr Tomaras said that when the Applicant returned from leave on 24 March 2023 it was necessary for him to meet with the Applicant about the issue and he expressed concern about the Applicant's communication with the supplier and lack of escalation internally to support resolution in a timely manner.<sup>70</sup> Mr Tomaras said he noted concerns about how the supplier relationship was managed to lead to the dispute around the work performed and encouraged him to raise issues with him or others in the team as required.<sup>71</sup> Mr Tomaras sent the Applicant an email about this issue on 24 March 2023.<sup>72</sup>

**[89]** Mr Tomaras said that he met with the Applicant again on 5 May 2023 as it had come to his attention that the Applicant had provided misleading and inaccurate information about the steps taken to obtain insurance for the Respondent's motor vehicle fleet resulting in the potential for the Respondent's motor vehicle fleet to be uninsured, potentially exposing the Respondent to liability.<sup>73</sup> Mr Tomaras also said that the Applicant's actions committed the Respondent to a financial arrangement where he did not have the appropriate authority to do so.<sup>74</sup> Mr Tomaras said:

- he expressed disappointment that the new issue had arisen soon after the other discussion where he had provided feedback and guidance to the Applicant about communication and that key details appeared to have been withheld from him when relevant approvals were sought;<sup>75</sup>
- he noted the Applicant's poor planning and that he needed to take accountability and ownership over his goals and action;
- he advised the Applicant that he was on track for an 'inconsistent year' performance rating for FY23 and that a PIP was under consideration.<sup>76</sup>

**[90]** On 6 May 2023 Mr Tomaras sent the Applicant an email summarising the 5 May 2023 meeting which:<sup>77</sup>

- stated 'Thanks for making the time on Friday morning to discuss the two items below in more detail, and to talk through my assessment of your broader performance and feedback on this has recently progressed';
- expressed disappointment and said:

'Both items raise concerns for me given your role and that they again involve third parties and financial management, and especially as we have only recently discussed similar matters as part of the dispute resolution for Eighty20...and in the initial response to the insurance renewal being rushed through at the last minute';

- expressed an expectation that matters should be planned and that there be open, honest and transparent communication with staff and external parties, especially when an issue has arisen;

- acknowledged that the nature of operations meant that things would go wrong from time to time and deliverables will fall behind but indicated that when this is the case, there was a need to appropriately respond and manage such instances and that this would almost always require timely and transparent communication with the Applicant's team, colleagues or manager to address the situation and provide relevant support;
- expressed an understanding that there was no intention to mislead around the insurance renewal or to commit the Respondent to the insurance policy prior to Mr Tomaras' approval as the delegated approver and that those outcomes were more a factor of insufficient planning and that the Applicant was seeking to ensure the Respondent was covered given the policy was expiring on 31 March;
- noted the Applicant's feedback that expectations set by Mr Tomaras as a part of the review process were high, and that added weight may have been given to the financial approval processes given his role;
- expressed an understanding from Mr Tomaras that he may 'enquire on items more than some others' and was 'possibly more familiar with the relevant policies';
- expressed an expectation that staff involved in procurement activity, especially those leading procurement teams, should have a high standard when it came to ensuring the Respondent achieved value for money, acted (and were seen to act) fairly with suppliers, acted with integrity, and were familiar with the relevant policies and apply them as intended (or seek support where uncertainty arises);
- said that 'considering these events, and despite feedback and support being provided over a substantive period' Mr Tomaras had not seen enough improvement in performance or the required uplift in capability expected for the role;
- indicated that Mr Tomaras did not believe the Applicant had delivered against his performance objectives in the performance year and that his assessment was that he was on track for an inconsistent rating, following a similar rating in the prior year;
- stated that as there had been little assessed improvement moving to a PIP was under consideration, the aim of which would be to more clearly outline goals and capability to be demonstrated, and have a regular check in to assess against these;
- encouraged the Applicant to focus on maintaining open, timely and transparent communication with his team members and stakeholders, and to take more accountability and ownership for his goals, decisions and actions;
- recommended that the Applicant take time to appropriately plan and outline actions to address the various priorities he had recently discussed with Mr Hunter relating to fleet, labour hire, the guidelines and pipeline of activity for the corporate portfolio and prioritise his time to ensure sufficient progress is being made on these and in leading and supporting his team (over other items that can be deprioritised or otherwise managed across the team);
- stated that this would require the Applicant to be more actively engaged with the team to support and help their development;
- indicated that Mr Tomaras was happy to make time the following week to follow up on any items he and the Applicant were not able to conclude or that the Applicant wanted to think about, including how the Applicant was finding the role and work more broadly;
- foreshadowed a further meeting to discuss the broader performance feedback.<sup>78</sup>

**[91]** Mr Tomaras said that on 12 May 2023, before the Applicant commenced a further period of planned leave, the Applicant sent a number of emails regarding outstanding actions including reporting of contracts on AusTender and several fleet issues that had not been completed and

seeking support to progress those items in his absence.<sup>79</sup> Mr Tomaras said that he was concerned as these issues were raised immediately prior to going on leave (and after normal business hours to allow peers to discuss the actions) and in circumstances where the Applicant had earlier indicated that the matters were otherwise further progressed.<sup>80</sup>

[92] Mr Hunter was on secondment between December 2022 and August 2023 and was not the Applicant's direct manager at this time however Mr Hunter said he received regular updates on the Applicant's performance from Mr Tomaras and Mr Hare.<sup>81</sup> Mr Hunter, recalled that Mr Tomaras and Mr Hare:

- gave negative feedback about the Applicant's management of fleet services;<sup>82</sup>
- said there had been internal customer complaints about the Applicant;
- said the Applicant was failing to plan and execute on 'Labour Hire improvement' – a task that was required of him in his role and which Mr Hunter discussed with the Applicant prior to Mr Hunter taking on his secondment.<sup>83</sup>

[93] Mr Hunter said that the Respondent's senior management had identified that the Applicant had not arranged for payment of invoices issued by Eighty20, a supplier engaged to develop a procurement workflow portal which damaged the Respondent's commercial relationship with the supplier and exposed the Respondent to potential liability.<sup>84</sup> Mr Hunter also said that he was made aware of a failure by the Applicant to ensure that the Respondent's motor vehicle insurance was put in place correctly and with the appropriate level of authority prior to the expiry of the policy and that the Applicant had overall responsibility and accountability for this.<sup>85</sup>

[94] Mr Hunter said that he, Mr Tomaras and Mr Hare had serious concerns about the Applicant's performance and decided that a performance improvement plan was needed to manage the performance issues and support him to uplift his performance to the required standard.<sup>86</sup>

[95] Mr Tomaras, Mr Hare (who was Acting Head of Procurement at the time) and Mr Hunter developed the PIP, supported by the then HR Business Partner.<sup>87</sup> Mr Hunter was involved in the development of the goals for the PIP.<sup>88</sup>

[96] On 8 June 2023 a meeting was held in which the Applicant and his support person, Mr Tomaras and the Respondent's Head of Business Partnering were in attendance.<sup>89</sup>

[97] During this meeting the Applicant was notified that a PIP would be implemented and would commence on 13 June 2023.<sup>90</sup> Mr Tomaras said that during the meeting he informed the Applicant of the purpose of implementing the PIP and that his employment may be terminated if his performance did not improve to the base level of competency expected of a manager.<sup>91</sup>

[98] Later that day follow up correspondence was sent via email (**PIP Letter**) which was signed by Mr Tomaras. By way of summary, the PIP Letter stated that:

- the Respondent had concerns in relation to some aspects of the Applicant's performance;

- the Respondent had raised these concerns with the Applicant several times as part of the Respondent's formal review processes over the prior 18 months, and most recently in discussions about supplier engagement matters in February, March and May 2023;
- at a meeting on 5 May 2023 the Applicant was notified that as he had failed to demonstrate an improvement in performance, a more formal performance management process may be implemented;
- the Respondent considered that the Applicant had failed to demonstrate sufficient improvement and it was concerned about the following aspects of his performance:
  - inability to appropriately plan and prioritise work, causing delayed delivery of key business initiatives, poor stakeholder experience and, on occasion, exposing the Respondent to reputational and commercial risks. The Applicant's engagement with Eighty20 and renewal of the Respondent's motor vehicle insurance policy were provided as examples;
  - ineffective communication and a lack of visibility on progress of key business deliverables;
  - inconsistency in driving stakeholder engagement; and
  - lack of ownership and accountability when issues arise, and in proactively seeking to address those;
- the Respondent considered he was not performing his role of 'Manager, Corporate and Governance' to the standard required;
- a formal performance management process would be commenced by implementing a PIP, a copy of which was attached to the letter;
- the purpose of the PIP was to work with the Applicant and support him in seeking to improve his performance to the standard reasonably expected for his role;
- the Applicant's performance would be reviewed over the next three months and the Respondent would meet with him on an ongoing basis to provide feedback and guidance on improving performance (in particular, the areas outlined in the PIP);
- the Applicant may be subject to disciplinary actions up to and including termination if the Respondent was not satisfied that he was demonstrating sufficient progress during the PIP or his performance had not improved to the standard required.<sup>92</sup>

[99] The Applicant gave evidence that at that time he was managing an excessive workload.<sup>93</sup> The Applicant also said that his team was understaffed, with one team member away on leave and that he was expected to 'pick up that slack'.<sup>94</sup>

#### *Applicant's Response to the Performance Improvement Plan*

[100] On 13 June 2023 the Applicant responded to the PIP Letter and said, by way of summary:

- he was an employee of almost 14 years who took pride in his work, had a strong affinity to the Respondent, its people and purpose;
- he was disappointed that the Respondent had determined the standard of his work to be so unsatisfactory that it initiated a formal performance management process;
- should the performance management process continue it would impact the trust and confidence he would have in the organisation;



- he acknowledged that there were opportunities requiring improvement but considered improvement was most likely to be achieved in a genuinely collaborative process featuring full and consistent feedback from management;
- across the prior three years the Corporate and Governance team had, under his leadership, been recognised as achieving many successes and these had not been reflected in the PIP letter or sufficiently recognised in his feedback from management or performance appraisals;
- leadership had not acknowledged the difficult performance environment in which he had been working over the past three years, had not observed procedural fairness and had not provided consistent support in clarifying role and performance objectives;
- work pressures and resource constraints were significant limitations on his performance;
- the objectives of his team were designed to be achieved by three or four permanent positions plus a manager however he had not had more than two other team members since December 2021;
- his requests to hire into two vacant permanent positions had been repeatedly declined, which had intensified the work demands of the Applicant and his team;
- a direction in his mid-term appraisal to undertake 0.5 FTE of sourcing activity was inconsistent with achievement of all of the other goals articulated in his position description;
- work priorities including execution of Statements of Work under master agreements, Labour Hire support and support of operational fleet services should be performed by other teams;
- he had not had consistent leadership coaching in his role, feedback was more typically task based and constructive feedback had been limited;
- the Head of Procurement role to which he reported had changed over the three years, having been held by four different people across five different periods;
- leadership stability and consistent feedback would have been more conducive to high performance;
- Mr Tomaras had not fully heard his response to concerns raised at the meeting on 5 May 2023 and the Applicant believed that hearing his response and the results of the pulse survey may have led him to adjust course before escalating from informal to formal performance management;
- the PIP Letter contained several vague and negative statements that were not supported by examples;
- the example ‘internal customer feedback has also generally remained negative’ conflicted with many of his recent conversations with internal customers, his manager and results of the quarterly survey and he wanted to better understand the information that underlies such statements so he could learn and better respond in the future;
- the Respondent’s Procurement Section was a culturally and operationally difficult environment, he experienced low role clarity, excessive urgent demands, inadequate support from management and low job control as a result of other business units’ inability to adequately plan.<sup>95</sup>

**[101]** The Applicant’s response to the PIP Letter also stated that the process for initiating formal performance management was not aligned with guidance published by the Fair Work Ombudsman in the following respects:

- expectations remained unclear at the task level and overall;
- the actions and aggressive timeframe for completion were unreasonable;
- the PIP was not provided before the meeting and the meeting did not allow time for detailed commentary;
- the offer of a clarification meeting the next day provided no opportunity for reflection on the content of the PIP;
- little or no support had been offered to accomplish the tasks in the PIP and additional training, mentoring and/or work examples would be useful;
- the non-collaborative tone and compressed timeframe of the meeting did not sufficiently allow for his participation;
- there was no positive or supportive content in the meeting.

[102] The Applicant requested that:

- the performance management process set out in the PIP Letter be cancelled and that further informal performance management discussions be held;
- additional information be provided in relation to the issues raised in the letter that lacked actionable detail;
- his feedback on issues raised be heard and considered;
- any new formal performance management process be designed in good faith, taking into account the workload and operating environment in the development of work priorities.

#### *Commencement of the PIP*

[103] Mr Tomaras said he considered the Applicant's concerns about the PIP, made certain changes to replace one of the PIP deliverables and to amend the timelines given the delay in commencing the PIP, but otherwise assessed the PIP as being appropriate.<sup>96</sup> On 19 June 2023 Mr Tomaras and an Employee Relations Consultant for the Respondent met with the Applicant.<sup>97</sup> Mr Tomaras said he discussed the revised PIP, responded to the matters the Applicant raised in the 13 June 2023 email and reiterated the Respondent's performance concerns giving rise to the PIP.<sup>98</sup>

[104] The revised PIP commenced on 20 June 2023.<sup>99</sup> Mr Hunter was still on secondment at this time however said he was kept updated on progress.<sup>100</sup> A copy of the PIP was attached to Mr Hunter's statement and describes the performance issues as follows:

#### ***'Stakeholder Engagement***

There has been insufficient proactive engagement with customers to support development of an appropriate pipeline of activity within the corporate portfolio. Feedback from key internal customers has also generally remained negative, in terms of both their experience with the service/advice provided. This has generally been due to poor communication, inconsistent or contradictory advice and lack of responsiveness.

#### ***Planning and Prioritisation***

A lack of planning and prioritisation has resulted in delays to the delivery of key activities, including fleet outsourcing, labour hire centralisation and Procurement Digital; and timely completion of core accountabilities of the role (e.g. periodic review of the procurement policy and guidelines; procurement activity and oversight of external

compliance reporting obligations (e.g. Austender reporting). Robert has been provided with consistent feedback that improvement is required in relation to planning and prioritisation, and to ensure his participation in several working groups (which he has voluntarily joined) can be managed without impacting his people leadership and procurement accountabilities.

### ***Communication and Sharing of Information***

On several occasions Robert has not shared or provided transparency of status and progress of activities and projects, and on occasion sought action and approvals from staff without clearly communication (sic) relevant information to support those considerations. Pertinent information and the accurate status of activities has often not been shared with relevant stakeholders in a timely fashion (or, on occasion, at all). In some instances, issues relation to outstanding items have only been identified when others have raised them as part of escalations, including external parties on occasion, or issues have inadvertently come to light. This behaviour has the potential to create increased risks in relation to fulfilling compliance obligations as well as financial management and reputational risks when dealing with Suppliers and external parties.

### ***Accountability***

Robert has demonstrated a lack of accountability and ownership of issues in his work. This includes problem identification and resolution of associated issues, with a propensity to defer decisions and responses to others without being proactive in supporting them (especially where there is a clear responsibility for him to support or lead).

**[105]** The PIP included performance improvement targets or tasks under four improvement goals and a further descriptor of the required performance standards relevant to those targets or tasks.

**[106]** Under the improvement goal 'Fleet Service', the PIP required the Applicant to:

- conduct an 'end-to end' review of processes post outsource, with a view to simplifying and centralising support within procurement (addressing current pain points and recent incidents). The required performance standard was the development of 'a status tracker of various processes with proposed actions and dates for remediations';
- propose and implement the 'supplier management approach' (i.e. ongoing management model with SG Fleet). The performance standard required the Applicant to:
  - complete, have approved and implement a Contract Management Plan for SG Fleet, clearly identifying the performance management approach; and
  - establish the standing agenda, attendee list and book in supplier meetings for the coming 12 months;
- communicate outcomes and implement recommendations with SG Fleet and internal stakeholders and update any reference material to clearly document updates. The performance standard required the Applicant to update fleet management supporting processes and customer reference material and, subject to changes, communicate with impacted staff (both drivers and support partners in Finance and HR).

**[107]** Under the improvement goal 'Labour hire services', the PIP required the Applicant to:

- establish a customer education session with relevant updates to support self-service and a new approach, ensuring relevant support partners in Shared Service and HR were engaged and part of the education roll out. The performance standard required the Applicant to:
  - develop and book education sessions; and
  - coordinate and roll out sessions focusing on high volume users first (e.g. IT and PMO);
- with relevant Departments, develop a pipeline of activity in the labour hire space to support timely delivery. The performance standard required the Applicant to develop a tracking report capturing the status of expiring arrangements and a pipeline of upcoming requests;
- ensure existing ‘preferred’ supplier agreements are managed to support timely engagement and continuity ahead of a broader panel. The performance standard required the Applicant to update and actively monitor a centralised supplier management list.

**[108]** Under the improvement goal ‘Procurement Pipeline and Operations’, the PIP required the Applicant to:

- ensure that the pipeline for the corporate category was up to date and each team member, including the Applicant, had an allocation (i.e. a lead role). The performance standard required the Applicant to update the pipeline capturing the current and planned pipeline of procurement activities with effective resource allocation;
- propose an approach for engagement, including a template pack and supporting information and to ‘address coordination with relevant FBPs’. The performance standard required the Applicant to develop a template engagement pack, and agree on an engagement approach to ‘leverage existing FBP interactions with relevant departments’;
- engage with departments to forecast upcoming non-ICT and workplace procurement activities, with a ‘particular focus on BK, HR, NI and PS’. The performance standard required the Applicant to develop a portfolio plan outlining an 18 month ‘forward plan of procurement activity based on engagement discussions, contract renewals data, project pipelines and discussion with relevant FBPs’.

**[109]** Under the improvement goal ‘category leadership and advice, the PIP required the Applicant to:

- undertake timely assessment, prioritisation, and allocation of work requests as they arise and relate to the corporate portfolio. The performance standard required the Applicant to ensure work requests were triaged and allocated based on assessed priority (relative to the current pipeline of activity) and that the outcomes of assessments were notified to stakeholders and included in the procurement pipeline;
- provide timely, accurate and actionable advice to the business, as it relates to activity in the corporate portfolio. The performance standard required the Applicant to provide a response to stakeholders with actionable outcomes, consistent with the Respondent’s policies and ‘the CPRs’;

- ensure routine deliverables, including any reporting obligations residing with the corporate and governance category, were met within agreed timeframes. The performance standard required the Applicant to complete deliverables within agreed/required timeframes.

[110] The PIP indicated that these actions would be supported via the Applicant's weekly meeting with his manager and the weekly procurement manager's meeting.

*PIP review meeting on 21 June 2023*

[111] A second meeting in relation to the PIP took place on 21 June involving the Applicant, Mr Tomaras and Mr Hare.<sup>101</sup>

[112] Mr Tomaras said that matters discussed during this meeting included the requirements of the PIP (including desired outcomes), the Applicant's concerns about the PIP, the Applicant's workload for the week ahead and general feedback on the Applicant's performance.<sup>102</sup>

[113] The Applicant gave evidence that at this meeting he sought more clarity as to the actions and requirements of the PIP and was told that the dates for fixed deliverables were indicative dates for assessment of the deliverables, as opposed to being hard deadlines.<sup>103</sup>

[114] Mr Tomaras said that he informed the Applicant that while the deadlines for the PIP goals were firm, there would remain flexibility to account for other urgent work, should it arise, and unplanned absence.<sup>104</sup>

*PIP meetings between 28 June 2023 and 26 July 2023*

[115] The Applicant attended subsequent PIP meetings with Mr Tomaras and Mr Hare between 28 June 2023 and 16 July 2023.<sup>105</sup> Mr Tomaras' evidence was that there were five meetings during this period, with the meeting on 12 July 2023 also forming a part of the FY end of year performance review during which the Applicant was again given a rating of 'inconsistent year'.<sup>106</sup>

[116] Mr Tomaras gave evidence that at the PIP review meeting on 28 June 2023, matters discussed included deliverables and the objectives of those, specific tasks in relation to fleet services, labour hire, pipeline and advisory goals, issues that the Applicant should consider and suggested actions to progress deliverables.<sup>107</sup>

[117] Mr Tomaras gave evidence that at the PIP review meeting on 5 July 2023, it was raised with the Applicant that 'several action target completion dates discussed in the PIP meeting on 29 June 2023 were yet to be addressed', he provided guidance on progressing deliverables and that he recalled asking the Applicant if there was any further support he could provide to assist him in progressing the remaining goals.<sup>108</sup>

[118] Mr Tomaras gave evidence that at the PIP review meeting on 12 July 2023, he and the Applicant discussed PIP progress and he acknowledged that he was pleased the Applicant 'has bought into the process' despite an initial reluctance to engage with the PIP.<sup>109</sup> Mr Tomaras

said that his meeting also formed the FY23 end of year performance review meeting where the Applicant was given a rating of 'inconsistent year'.<sup>110</sup>

[119] Mr Tomaras gave evidence that at the PIP review meetings on 19 and 26 July 2023 he again discussed with the Applicant his progress towards achieving the PIP deliverables.<sup>111</sup>

[120] The Applicant said he did not receive any negative feedback at these meetings that would suggest he was failing to meet the deliverables stipulated within the PIP.<sup>112</sup> The Applicant said that on the contrary Mr Hare and Mr Tomaras consistently commented that the Applicant had engaged positively with the PIP, had uplifted his performance, that the deliverables were being completed to the standard required, that he had demonstrated a positive and constructive attitude, and that he showed commitment to performing his role to the expected performance standard.<sup>113</sup>

[121] The Applicant gave evidence that at a PIP meeting on 26 July 2023 with Mr Tomaras and Mr Hare he received consistent feedback affirming that he was meeting the performance expectations and deliverables outlined in the PIP based on progress measured to that date.<sup>114</sup> The Applicant said that during this period there were unexpected team member absences and the emergence of new high-priority work, which was added to his responsibilities without any reduction in other PIP expectations or deadlines, and to manage this he dedicated a significant amount of time in excess of normal working hours.<sup>115</sup>

#### *Mid-point review of the PIP on 31 July 2023*

[122] A mid-point review was held in relation to the PIP on 31 July 2023 between the Applicant, Mr Tomaras, Mr Hare and Mr Andrew Boyd.<sup>116</sup>

[123] Mr Tomaras said that he observed a measured uplift in the Applicant's performance in the first half of the PIP review process relative to the period which led to the decision to initiate the PIP but that in many cases the progress was in part due to there being a large amount of input from others in the team, and management follow up to ensure that the PIP deliverables were progressing.<sup>117</sup>

[124] Mr Tomaras gave evidence that during the mid-point review meeting:

- he thanked the Applicant for engaging positively with the PIP and the Applicant acknowledged that support and flexibility had been provided;
- he provided the Applicant with feedback that he needed to focus on achieving individual tasks, but also on achieving the agreed overarching outcomes of these goals;
- he informed the Applicant that, going forward, the PIP review meetings would be held on a fortnightly rather than weekly basis;
- he explained that the reason for the reduction in the frequency of PIP meetings was predominantly to allow him to demonstrate independent progression of the remaining deliverables, providing him with greater scope to plan and progress goals without extensive senior manager input;
- he confirmed that due dates for some of the PIP deliverables had been adjusted to accommodate unplanned absences within the Applicant's team.<sup>118</sup>

[125] The Applicant gave evidence that during the mid-point review meeting:

- attendees unanimously confirmed that the Applicant had engaged constructively with the PIP process and that they were pleased with the Applicant's improvements under the PIP;
- he was told he was on track to successfully complete the PIP;
- he was advised that the the PIP meetings would from this point be reduced to occur fortnightly due to his achievement of the bulk of the deliverables in the PIP;
- Mr Tomaras noted that the objective of reducing the frequency of the PIP meetings was to give the Applicant more opportunity to demonstrate his increased capability;
- he was advised that Mr Hare was to be replaced by Mr Hunter (returning as Head of Procurement) effective from the end of July 2023 and that Mr Hare would therefore no longer participate in the PIP process, with his role to be performed by Mr Hunter;
- he sought clarification that he would continue to receive consistent, clear and actionable feedback so that he could accurately deliver the PIP in light of the PIP being handed over from Mr Hare to Mr Hunter and the decrease in the frequency of PIP meetings and this was confirmed as a responsibility of Mr Hunter going forward.<sup>119</sup>

[126] Mr Tomaras did not agree that the Applicant was told he was 'on track to successfully complete the PIP' without further improvement beyond what he had demonstrated to this point.<sup>120</sup> In this regard Mr Tomaras said:

- a number of PIP deliverables remained partially complete, or incomplete, including some which were passed their set due date;
- a number of PIP deliverables were assessed as 'on track', indicating that achievement of the deliverables was possible within the time remaining on the PIP and that progress had been made towards meeting the deliverable.<sup>121</sup> Mr Tomaras said that this did not mean that the Applicant was doing all that was required to meet the deliverable and in most cases further uplift of his performance was needed to attain the deliverable in the remaining period;
- the Applicant was not assured that he should simply "carry on as such, and there would be no further issues towards passing the PIP overall".<sup>122</sup>

[127] Mr Hunter did not attend the mid-point review as he was still on secondment however said he did review the PIP mid-point review document (**Mid-point PIP Review**) prior to it being sent to the Applicant.<sup>123</sup> Mr Hunter said that he 'could see that it indicated some deliverables were met, some were unmet, and some were past their due date but had been commenced and were partially met'.<sup>124</sup>

[128] A copy of the Mid-point PIP Review was attached to Mr Hunter's statement.<sup>125</sup> The Mid-point PIP Review indicates that the Applicant had:

- partially met the performance requirements in relation to 'Fleet Services' but was 'on-track';
- met the performance requirements in relation to 'Labour hire';<sup>126</sup>
- partially met the performance requirements in relation to 'Procurement pipeline and operations' but was 'on-track';
- was 'on-track' in relation to the 'Category leadership and advice' requirements.

[129] While the mid-point PIP Review meeting was held on 31 July 2023, the Applicant said he did not receive a copy of the Mid-point PIP Review until 17 August 2023.<sup>127</sup>

*Change of manager in August 2023*

[130] Mr Hunter became the Applicant's direct manager again in August 2023 after the mid-point PIP Review and at this stage assumed responsibility for the PIP and attended the PIP review meetings after this time.<sup>128</sup> Mr Hunter said he had alternating PIP meetings and check-in meetings with the Applicant each fortnight which meant he was meeting with the Applicant almost weekly.<sup>129</sup>

*PIP review meeting on 9 August 2023*

[131] The Applicant gave evidence that on 9 August 2023 he attended a PIP meeting with Mr Hare, Mr Hunter and Mr Tomaras whereby Mr Hare handed over responsibility to Mr Hunter from that point forward.<sup>130</sup> The Applicant said that he did not receive negative feedback during this meeting.<sup>131</sup>

[132] Mr Hunter and Mr Tomaras did not recall there being a PIP review meeting with the Applicant on 9 August 2023.<sup>132</sup>

*PIP review meeting on 15 August 2023*

[133] Mr Hunter, Mr Tomaras and the Applicant attended a PIP review meeting on 15 August 2023.<sup>133</sup>

[134] Mr Tomaras said that at this meeting:

- he reminded the Applicant that as Mr Hunter had resumed as his manager, Mr Hunter rather than Mr Hare would be managing his performance going forward;<sup>134</sup>
- he spent a significant amount of time reconfirming the PIP deliverables with the Applicant to ensue clarity as he did not appear to understand what was required of him;
- he explained to the Applicant that he was concerned that, in re-explaining the objectives previously agreed, he was simply re-prosecuting the same discussions that had occurred since the commencement of the PIP and that these goals should have been very clear at that late stage of the PIP.<sup>135</sup>

[135] The Applicant said that during this meeting he was 'reported to have made consistent progress towards deliverables, closing deliverables, and demonstrating alignment to the PIP objectives'.<sup>136</sup>

[136] However both Mr Tomaras and Mr Hunter's evidence was that concerns were raised with the Applicant's progress.

[137] Mr Hunter and Mr Tomaras both gave evidence that they raised concern that the Contract Management Plan had not progressed.<sup>137</sup>



[138] Mr Hunter said that when he questioned the Applicant about two agreements nearing expiry in relation to labour hire services, the Applicant stated he was uncertain and needed to explore the possibility of an extension and Mr Hunter recalled informing the Applicant ‘that we had to be more organised in the future’.<sup>138</sup> Mr Tomaras gave evidence that while the Labour Hire goal of the PIP had been completed by the mid-point review, the Applicant told him that he would investigate the status of the expiring labour hire services agreements and any actions required however it was Mr Tomaras’ expectation that the Applicant would have already been across that information.<sup>139</sup> Mr Tomaras said that the Applicant did not have full information relayed to the status of the two expiring labour hire agreements, other than to advise that these may need to be extended given uncertainty around the Whole of Australian Government People Panel.<sup>140</sup> Mr Tomaras said he had asked for an update on the progress towards the establishment of and the Respondent’s potential participation in the People Panel and the Applicant responded that the People Panel was not yet finalised and there remained uncertainty around its applicability to the Respondent’s needs.<sup>141</sup> Mr Tomaras said that upon further investigation he discovered that, despite what the Applicant had said, the People Panel had already been announced in early August along with the relevant details to assess its applicability to the Respondent’s needs.<sup>142</sup>

[139] Mr Hunter also said the Applicant had not properly prepared for a meeting with SG Fleet (RBA’s fleet vehicle management leasing provider) and his agenda (which was delivered quite late) had a lack of clarity on the areas of focus RBA wanted to raise.<sup>143</sup>

[140] Mr Hunter said that Mr Tomaras had made him aware that the Applicant had been given significant support during the first half of the PIP with senior management being more involved in matters to ensure work was completed and it was agreed that this support would be reduced to allow the Applicant to demonstrate he could perform the inherent requirements of the role without such heavy oversight and guidance.<sup>144</sup>

[141] Mr Hunter said that when he assessed the progress of the PIP deliverables in the second half of the PIP it appeared to him that without the high-touch support that had been provided to the Applicant in the first half of the PIP, deliverables were stagnating.<sup>145</sup>

#### *Meeting on 23 August 2023*

[142] A meeting was held between Mr Hunter and the Applicant on 23 August 2023 as a general ‘catch-up’ and Mr Hunter said he recalled providing the Applicant with encouragement to more actively engage with stakeholders to push matters forward, noting that a significant high profile project was looking like it was delayed.<sup>146</sup> Mr Hunter said he prompted the Applicant to escalate the matter rather than simply waiting for others to take control, or for stakeholders to approach him.<sup>147</sup> Mr Hunter said he observed a lack of proactivity that was not suitable in a procurement role, particularly from a manager of the procurement function.<sup>148</sup>

#### *Extension of the PIP*

[143] The Applicant took bereavement leave between 28 August 2023 and 5 September 2023 and the PIP was extended to account for this time away from work.<sup>149</sup>

#### *PIP review meeting on 13 September 2023*

[144] On 13 September 2023 Mr Hunter, Mr Tomaras and the Applicant participated in a meeting to discuss progress towards PIP deliverables.<sup>150</sup>

[145] The Applicant said that in this meeting:

- he was informed of updates regarding fleet services responsibilities;
- it was announced that the fleet service delivery had a deadline to transition to another team at the end of September 2023;
- it was communicated to the Applicant that he would be responsible for the completion of a Handover Document, to revise process maps for the fleet services transfer and that this would be required as an additional deliverable aligned to the PIP.<sup>151</sup>

[146] The Applicant said this meeting was scheduled to be the final PIP meeting and that prior to this meeting he had no responsibilities or objectives under the PIP related to a fleet services transition.<sup>152</sup> Rather, the Applicant said that the PIP deliverables associated with fleet services were preliminary and preparatory, concerning improving service delivery, and that he considered the plan or execution of a transition of fleet services to another team to be an unreasonable inclusion.<sup>153</sup>

[147] Mr Hunter and Mr Tomaras did not agree with the Applicant's assertion that he had no prior responsibilities in relation to fleet services and that additional deliverables were added to the PIP during the meeting on 13 September 2023.<sup>154</sup> In this regard Mr Hunter said that preparation of guidance documents and process maps were, and had always been, an element of the PIP, this was discussed in context of preparing for the future state operating model and those responsibilities fell within the following PIP items:

- '1.1 – develop a status tracker of various processes with proposed actions and dates for remediation, with a view to centralise support within procurement (addressing pain points and recent incidents)'; and
- '1.4 – update fleet management supporting processes and customer reference materials'.

[148] Mr Tomaras said, in relation to the Applicant being asked to complete the handover document and to review the process maps, that this was what was expected of the Applicant in his role as a part of handover activities during the fleet services transition period and had been discussed and commenced as a part of the initial outsourcing of fleet management a year or so earlier.<sup>155</sup> Mr Tomaras said that it was his expectation that someone in the Applicant's role would be aware when handing activities to a new department that a handover document and process maps would be required to support such transition.<sup>156</sup> Mr Tomaras said that enabling the fleet transition was a key overarching goal of the PIP from the beginning and the PIP was not an exhaustive list of all tasks required of the Applicant in his role but was rather a guideline for certain key tasks that operated alongside his general work duties.<sup>157</sup> Mr Tomaras said it was not the Applicant's responsibility to personally execute the transition of the fleet services to the Respondent's Operations team but rather it was his role to ensure that the fleet service was sufficiently organised to enable it to be handed to the Operations team, including organising documents and identifying pain points in the transition.<sup>158</sup>

[149] Mr Hunter said he considered a September 2023 delivery date to be necessary for the fleet services transition as this was already substantially overdue and he believed that without a hard date, the Applicant would not be motivated to push it forward and the project would stagnate.<sup>159</sup> Mr Hunter said he believed the September due date was reasonable and would encourage the Applicant to prioritise progress of this work.<sup>160</sup>

[150] Mr Tomaras joined the meeting approximately 20 minutes after its commencement and said he recalled that:

- it was agreed that the deadline for fleet services related goals would be moved due to the Applicant's bereavement leave;
- he provided the Applicant with feedback that there remained a lack of positive and proactive engagement with customers, with specific reference to engagement with the Respondent's Financial Markets Group (FMG);
- the Applicant agreed that engagement with customers like FMG had been limited and mainly reactive and that there were opportunities to be more proactive in support of FMG.<sup>161</sup>

#### *Meeting on 20 September 2023*

[151] Mr Tomaras gave evidence that after the meeting on 13 September 2023, he and Mr Hunter continued to be concerned about the Applicant's performance and decided this warranted consideration as to whether the Applicant's employment should continue.<sup>162</sup>

[152] On 20 September 2023 during a meeting between Mr Hunter and the Applicant, Mr Hunter raised further concerns about the Applicant's performance.<sup>163</sup>

[153] One of these concerns was that the fleet service transition items due to be delivered by 15 September 2023 had been delivered in draft on 18 September 2023 with no advanced notice of the delay and that the items were incomplete and required a significant amount of further work.<sup>164</sup> Mr Hunter said the process maps were incomplete and needed finalisation, the list of 'Stop Start Continue' activities addressed greater work and complexity counter to the goal of simplifying the services, and there was no complete list of activities in relation to the processes being handed over.<sup>165</sup> Mr Hunter said of greater concern was that the Applicant still seemed confused about the need for a handover document, despite extensive discussions that this was an essential part of a service transition, and that was part of his role as the responsible manager.<sup>166</sup> During the meeting Mr Hunter said words to the effect of:

"It is pretty clear that if the goal is to prepare for hand over of fleet activities to another area (now procurement operations), a handover document will be required."

[154] Mr Hunter said the Applicant was also confused about how to approach the task, he needed to provide the Applicant with detailed instructions on formatting and this is not the level of guidance he would expect to have to give someone in a managerial position.<sup>167</sup>

[155] Mr Hunter told the Applicant that he was concerned that the Applicant was not on track to meet the PIP targets and complete the PIP and in relation to fleet services said words to the effect:

“I am concerned that we will not be able to close this out based on the status, and the way that matters have been slipping.”<sup>168</sup>

[156] Mr Hunter also raised concerns with the Applicant regarding his leadership management. In particular Mr Hunter raised concerns about feedback provided by a member of the Applicant’s team who had told Mr Hunter that she wished to move to a different team because of the Applicant poor leadership and lack of support and because she felt undermined as the Applicant would interrupt or speak over her in meetings.<sup>169</sup> Mr Hunter said he asked the Applicant to consider this feedback and that the matter would be addressed when the team member returned from leave.<sup>170</sup>

[157] Mr Hunter kept notes for the meeting with the Applicant on 20 September 2023 which appear in the ‘general feedback’ tab of the PIP tracker document attached to his witness statement.<sup>171</sup>

*Meeting between Mr Hunter and the Respondent’s Chief Financial Officer on 20 September 2023*

[158] Later on 20 September 2023, after he had met with the Applicant, Mr Hunter met with the Respondent’s Chief Financial Officer (CFO) who was, at that time, Mr Hunter’s ‘one up’ manager.<sup>172</sup> The CFO asked Mr Hunter about the Applicant’s progress in relation to the PIP and Mr Hunter expressed concerns regarding the current status and performance issues which had been raised with the Applicant.<sup>173</sup>

*Fleet transition documents provided on 21 September 2023*

[159] On 21 September 2023 the Applicant provided Mr Hunter with some draft process documents and a draft contract management plan for the fleet transition to review however did not provide a handover document at this time.<sup>174</sup> Mr Hunter said the documents were significantly below the standard he would expect from a manager level employee and he returned the documents to the Applicant with significant editing and comments.<sup>175</sup>

[160] On 22 September 2023 the Applicant requested a meeting to obtain guidance on the structure and content of the handover document and a meeting was held between the Applicant and Mr Hunter.<sup>176</sup> Mr Hunter said that during the meeting he stepped the Applicant through the specifics of what was required, said that the handover document should be on a ‘cradle to grave’ basis and discussed the comments he had made in relation to the documents the day before.<sup>177</sup>

[161] Mr Hunter said:

- he was disappointed that at that late stage of the project and PIP he was having to walk the Applicant through what his job entailed and how to complete his tasks and that he had not completed the draft handover document;
- he considered this demonstrated poor planning, poor performance and a complete lack of understanding about what was required to succeed in his role;
- he considered the Applicant’s performance was well below what he expected from a manager;

- the Applicant failed to demonstrate that he had grasped what was required of him or had the skill set to develop the required capability, placing the onus on Mr Hunter to provide direction at a very low level.<sup>178</sup>

*Meeting between the Applicant and the Respondent's CFO on 27 September 2023*

[162] The Applicant gave evidence that on 27 September 2023 he was called to a meeting with the Respondent's CFO who revealed that she had received inconsistent feedback from stakeholders, providing a negative assessment of the Applicant's performance associated with the PIP.<sup>179</sup> The Applicant said he raised concerns with the CFO that her comments did not align with feedback provided by Mr Hare, Mr Hunter and Mr Tomaras in the PIP meetings given the PIP meetings had confirmed he was on track to meet the expected performance standard.<sup>180</sup> The Applicant said that when he complained about this discrepancy the CFO did not provide the Applicant with the clarity sought and advised him to seek alternative opportunities both internally as well as externally.<sup>181</sup>

*Meeting between Mr Hunter and the Applicant on 29 September 2023*

[163] On 29 September 2023 Mr Hunter met the Applicant at the Applicant's request.<sup>182</sup> The Applicant said that he had organised the meeting for guidance on a specific work item.<sup>183</sup>

[164] The Applicant said that in this meeting he raised concerns about the CFO's feedback on his progress under the PIP that she gave in the meeting on 27 September 2023, which he said was inconsistent with the feedback he had received from Mr Hare, Mr Hunter and Mr Tomaras.<sup>184</sup> The Applicant said he asked Mr Hunter for confirmation that Mr Hunter and Mr Tomaras had assessed his performance as being on track to meet the requirements of the PIP, that Mr Hunter was vague in his response but was not speaking in line with previous positive feedback.<sup>185</sup>

[165] Mr Hunter said that in this meeting:

- the Applicant said he had spoken to the CFO and 'seemed to be pondering what his options were moving forward';<sup>186</sup>
- he did not recall discussing PIP deliverables in this meeting and he disagreed with the Applicant's assertion that he provided vague responses and did not speak in line with previous feedback at this meeting.<sup>187</sup>

*Assessment of Applicant's performance upon completion of the PIP*

[166] Mr Hunter cancelled the final PIP meeting scheduled for 27 September 2023.<sup>188</sup> Mr Hunter considered that the Applicant did not meet the relevant deliverables under the PIP or PIP objectives and had missed deadlines, left deliverables incomplete and was not managing his team or the procurement pipeline effectively.<sup>189</sup>

[167] Mr Tomaras said that he disagreed with the Applicant's assertion in his witness statement that all measurable deliverables in the PIP were provided for<sup>190</sup> and said that several PIP goals were either partially met, not met or met significantly after the due date.<sup>191</sup> Mr Tomaras provided a tracking document with his evidence.<sup>192</sup>

**[168]** As noted earlier, under the improvement goal ‘Fleet Service’, the PIP required the Applicant to conduct an ‘end-to-end’ review of processes post outsource, with a view to simplifying and centralising support within procurement (addressing current pain points and recent incidents). The required performance standard was the development of ‘a status tracker of various processes with proposed actions and dates for remediation’. At the 12 week mark this goal was recorded as ‘partially met’. The tracking document records comments from:

- Mr Tomaras dated 26 September 2024 stating “No material progress on this item over the second half of the review period, including for items that have been discussed at length and which guidance on likely solutions had been provided (e.g. delivery notifications to payroll). The focus continues to be very tactical and in response to issues being identified rather than proactively managing the identified risk areas (including via the CMP)”; and
- Mr Hunter dated 28 September 2023 which stated “Fleet handover documents and processes have been marked up however there still remains some gaps and in draft. Preparation and completion of this activity has been very last minute with limited focus until escalated at the end of the process. Presentation of documents remained in a draft state when submitting as ready for review.”

**[169]** Under the improvement goal ‘Fleet Service’, the PIP required the Applicant to propose and implement the ‘supplier management approach’ (i.e. ongoing management model with SG Fleet). The performance standard required the Applicant to complete, have approved and implement a Contract Management Plan for SG Fleet, clearly identifying the performance management approach and establish the standing agenda, attendee list and book in supplier meetings for the coming 12 months. At the 12 week mark this goal was recorded as ‘met (though significantly after due date)’. The tracking document records comments from:

- Mr Tomaras dated 26 September 2023 stating, “CMP was completed materially later than had been planned and despite discussions in catch ups on how to close this out and move to managing the plan;” and
- Mr Hunter dated 28 September 2023 stating “CMP in place with material matters outstanding including the renegotiation of KPI’s with the Supplier. There appears to be limited follow through in terms of the CMP in practice. Internal customer engagement appears focused on stakeholders in the process and less from a customer perspective. This was feedback provided when a survey was sent initially, but had not been addressed.”
- Mr Tomaras dated 26 September 2023 stating “Agenda item for first meeting was only drafted and provided within 24hrs of the delayed meeting, with little in the way of identified areas of focus and no relevant background to ensure internal alignment on targeted outcomes for the meeting. On enquiring about this Rob noted a copy would be provided that day, though was only provided a few days later (suggesting the document possibly has not yet been created even though the meeting was due to have occurred before the request)”.

**[170]** Under the improvement goal ‘Fleet Service’, the PIP required the Applicant to communicate outcomes and implement recommendations with SG Fleet and internal stakeholders and update any reference material to clearly document updates. The performance

standard required the Applicant to update fleet management supporting processes and customer reference material and, subject to changes, communicate with impacted staff (both drivers and support partners in Finance and HR). At the 12 week mark this goal was recorded as ‘partially met’. The tracking document records comments from Mr Tomaras dated 26 September 2023 stating “Some elements have been refined and updated via the intranet though customer feedback remained that there was a lack of clear guidance on certain elements (even after engaging directly with Robert).”

**[171]** Goals under ‘Labour hire services’ as set out in the PIP were recorded as met at the 12 week mark.

**[172]** Under the improvement goal ‘Procurement Pipeline and Operations’, the PIP required the Applicant to ensure that the pipeline for the corporate category was up to date and each team member, including the Applicant, had an allocation (i.e. a lead role). The performance standard required the Applicant to update the pipeline capturing the current and planned pipeline of procurement activities with effective resource allocation. At the 12 week mark this goal was recorded as ‘partially met’. The tracking document records comments from:

- Mr Tomaras dated 26 September 2023 stating “This appears partially completed and lacks the rounded effort of considering contract expiry; project pipeline and feedback from engagement meetings;” and
- Mr Hunter dated 28 September 2023 stating “Forward pipeline and resourcing to include contract expires etc. only partially in place.”

**[173]** Under the improvement goal ‘Procurement Pipeline and Operations’, the PIP required the Applicant to propose an approach for engagement, including a template pack and supporting information and to ‘address coordination with relevant FBPs’. The performance standard required the Applicant to develop a template engagement pack, and agree on an engagement approach to ‘leverage existing FBP interactions with relevant departments’. At the 12 week mark this goal was recorded as ‘not met’. The tracking document records comments from:

- Mr Tomaras dated 26 September 2023 stating “This does not appear to have progressed beyond initial work completed by others within the team”;
- Mr Hunter dated 28 September 2023 stating “Limited progress beyond what Maria had developed”.

**[174]** Under the improvement goal ‘Procurement Pipeline and Operations’, the PIP required the Applicant to engage with departments to forecast upcoming non-ICT and workplace procurement activities, with a ‘particular focus on BK, HR, NI and PS’. The performance standard required the Applicant to develop a portfolio plan outlining an 18 month ‘forward plan of procurement activity based on engagement discussions, contract renewals data, project pipelines and discussion with relevant FBPs’. At the 12 week mark this goal was recorded as ‘partially met’. The tracking document records comments from:

- Mr Tomaras dated 26 September 2023 stating “Evaluation subject to broader customer feedback being collected (esp (sic) in regards to sourcing activity). Discussion around approach to Financial Markets group identified little had been done. In response to an enquiry from Sam on engagement with Financial Markets Group during a PIP check in

on 13/9, Robert response focused almost solely on compliance with him noting there were little other benefits to be obtained given their spend profile (citing examples of not being able to make any headway with the likes of Bloomberg), In response Sam provided feedback around how potential benefit could be obtained, citing the dollar value of e-media spend (given success in locking in savings with such spend in the past) and potentially to achieve non-financial efficiencies, and how these could work to further enhance the relationship with his customers which seemed to be rather limited in the case of this group. Other examples seemed more promising in terms of engagement and supporting planning in areas like Audit”;

- Mr Hunter dated 28 September 2023 stating “Limited evidence of planning being undertaken to include FBP’s. Limited forward (sic) planned approach for Labour Hire which Robert had not progressed as yet. There was not (sic) clear forward plan at this stage, as Robert suggested this was not included within the PIP process. Assess whether this is indicative of not yet having developed a forward plan for the categories within his portfolio.”

[175] Under the improvement goal ‘category leadership and advice’, the PIP required the Applicant to undertake timely assessment, prioritisation, and allocation of work requests as they arise and relate to the corporate portfolio. The performance standard required the Applicant to ensure work requests were triaged and allocated based on assessed priority (relative to current pipeline of activity) and that the outcomes of assessments were notified to stakeholders and included in the procurement pipeline. At the 12 week mark this goal was recorded as ‘partially met’.

[176] Under the improvement goal ‘category leadership and advice’, the PIP required the Applicant to provide timely, accurate and actionable advice to the business, as it relates to activity in the corporate portfolio. The performance standard required the Applicant to provide a response to stakeholders with actionable outcomes, consistent with the Respondent’s policies and ‘the CPRs’. At the 12 week mark this goal was recorded as ‘partially met (TBC based on feedback from customers)’.

[177] Under the improvement goal ‘category leadership and advice’, the PIP required the Applicant to ensure routine deliverables, including and reporting obligations residing with the corporate and governance category, were met within agreed timeframes. The performance standard required the Applicant to complete deliverables within agreed/required timeframes. At the 12 week mark this goal was recorded as ‘partially met’ with comments from Mr Tomaras dated 26 September 2023 stating “Lack of ownership of reporting and other compliance activity within the category noted, though this partially talks to a lack of clarity on RACI within the team (i.e. others had put their hand up on updating reporting).”

*Meeting with the Applicant on 4 October 2023*

[178] On 29 September 2023 Mr Hunter called the Applicant seeking a meeting on 4 October 2023 to discuss the next step in relation to outcomes concerning the PIP, providing the Applicant with the details of the meeting and offering the Applicant an opportunity to bring a support person to that meeting.<sup>193</sup>



[179] The meeting proceeded on 4 October with the Applicant and his support person, Mr Hunter, Mr Tomaras and the Respondent's Human Resources Business Partner in attendance.<sup>194</sup> Mr Hunter and Mr Tomaras said the matters raised in that meeting were as set out in the Respondent's show cause letter to the Applicant dated 4 October 2023 (**Show Cause Letter**).<sup>195</sup>

[180] The Applicant's evidence suggests that he had assumed the meeting was to discuss the PIP.<sup>196</sup> The Applicant said the Respondent failed to provide any context as to why the show cause meeting was being held and that during the meeting there was no discussion of the deliverables under the PIP.<sup>197</sup> The Applicant said the rationale for the show cause meeting was underperformance in relation to:

- the fleet services transition; and
- the Applicant's overly directive leadership.<sup>198</sup>

[181] The Applicant said that during the meeting:

- he said that at the halfway point of the PIP he had received feedback that he was on track towards meeting the PIP requirements and that the meeting was the first time he was being told he was not meeting the standard required of him under the PIP;
- he raised queries as to why or how his performance was unsatisfactory and Mr Hunter responded vaguely to the effect that the Applicant should have been aware that there were issues and that the recent feedback was similar to the feedback which preceded and led to the PIP;
- Mr Hunter cited the number of PIP meetings as evidence of the alleged consistent feedback and coaching throughout the meetings;
- when he asked "when did you tell me I was not meeting the performance standard" Mr Hunter acknowledged that he had not been clear and was unable or unwilling to provide specifics of any actual negative feedback;
- he made enquiries about what options aside from termination were under consideration as possible outcomes and in response the Human Resources Business Partner in attendance was unable to provide a clear answer and said it would depend on the Applicant's response to the show cause letter that would be sent later that day;
- it was explained that the Applicant was required to provide a response within two calendar days, at which point the Applicant requested an extension of time.<sup>199</sup>

#### *The Show Cause Letter*

[182] On 4 October 2023, following the meeting held earlier that day, the Respondent provided a Show Cause Letter to the Applicant.<sup>200</sup> The Show Cause Letter stated:<sup>201</sup>

#### **'Show cause – Unsatisfactory performance**

As you are aware, we have had ongoing concerns that you are not performing the duties of your position of Manager, Corporate and Governance at the standard required by the Bank.

The purpose of this letter is to confirm our discussion today where you were notified that you have made insufficient progress towards the expected performance requirements as set out in your Performance Improvement Plan (**PIP**).

Following you receiving a performance rating of “inconsistent year” in your FY-2022 and FY-2023 performance years, we provided you with coaching and mentoring designed to assist you to bridge the gaps in your performance.

On 8 June 2023, due to ongoing concerns in relation to your performance and insufficient improvement notwithstanding our discussion, you were placed on a PIP which sets out the Bank’s expectations in relation to your performance and identified specific performance measures. The PIP detailed our primary areas of concern and we discussed these with you in detail. When you were placed on a PIP, we discussed that, if you were unable to demonstrate improvements in your performance to the level required that we would need to consider taking disciplinary action and that this might include termination of your employment with the Bank.

Since the implementation of your PIP, we have met with you regularly to provide feedback and guidance in relation to your performance. We also provided you with support including:

- Meetings held with you on 21, 28 June, 5, 12, 19, 26,31 July, 15 August and 13 September 2023 to discuss your progress against the PIP and understand if you required additional support;
- Additional coaching and guidance on stakeholder engagement, planning and prioritisation and effective communication; and
- Offering frequent check-ins to ensure adequate support, notwithstanding that you did not request additional support during the PIP process.

During our most recent meeting, we raised concerns that there has been insufficient improvement in your performance against the objectives set in the PIP. The Bank considers that you continue to perform below our reasonable expectations in relation to key aspects of your role. As a result, we are now considering terminating your employment’.

[183] The Show Cause Letter sought a response by close of business 6 October 2023 and indicated that if no response was provided by that time a decision would be made based on the information available.<sup>202</sup>

*Applicant’s response to the Show Cause Letter*

[184] The Applicant provided a response to the Show Cause Letter on 6 October 2023.<sup>203</sup> At that time the Applicant also provided a medical certificate certifying that the Applicant was unfit to work through to 12 November 2023.<sup>204</sup>

[185] In his response the Applicant indicated:

- on 20 June 2023 he agreed to participate in a PIP with 14 deliverables with specific dates and that Mr Hunter confirmed these were not delivery dates but assessment dates aligned to two meetings at the 6 and 12 week points;
- on 31 July 2023 at the first PIP review meeting the Applicant was assessed as having met 6 deliverables, partially met 5 deliverables and having not met one deliverable with two other deliverables considered 'n/a' and this was confirmed in writing on 17 August 2023;
- all present at the 31 July 2023 PIP review meeting acknowledged the Applicant's positive engagement with the PIP process and stated that the Applicant was actively tracking towards expectations and on the basis of this assessment the Applicant continued his efforts;
- a second improvement plan review meeting was not held since 31 July 2023 and the Applicant was not provided with a written evaluation or any written warning of a failure to meet expectations;
- he was not given any direction in relation to his deliverables setting out how he could have done better and was not provided with feedback as to any alternative style or approach or practical steps he should have taken in order to be successful;
- he drew the conclusion that he was either tracking satisfactorily towards completion of the PIP or that information and guidance reasonably necessary to be successful in the PIP was being withheld;
- in the final fortnightly check-in meeting on 13 September 2023 Mr Hunter said words to the effect that the Applicant needed to ensure the plan was on track in relation to the fleet transition and this was the first time that the Applicant had received information that his performance during the PIP was in question;
- the Applicant responded by taking on additional tasks (which the Applicant indicated included 'fleet handover document, process maps updates, start/stop/continue retrospective') which were not within the scope of the PIP. The Applicant indicated that he did this in order to show his commitment to demonstrating the required standard of performance;
- he completed a coaching course to enhance his team leadership skills which was not within the PIP deliverables;
- he had successfully completed all deliverables in the PIP and had no reasonable cause for concern as to the continuation of his employment until the 4 October 2023 meeting;
- he was shocked and disappointed by the assessment of his performance in the meeting of 4 October 2023 and the letter suggesting the possibility of his employment being terminated;
- the meetings during the PIP did little to provide coaching or guidance and merely seemed to allow the Applicant an opportunity to provide an update on progress and for Mr Hunter to acknowledge that everything seemed fine;
- in the second half of the PIP the frequency of check-ins was reduced from weekly to fortnightly. The Applicant said that this and the completion by this stage of the majority of the deliverables appeared to indicate that the Respondent was satisfied that less feedback and less monitoring of the plan was required;
- he had ongoing resourcing challenges in his role and had been denied additional support on several occasions. In this regard the Applicant said:
  - under-resourcing has made it impossible to achieve optimum performance;

- his team was designed to include 3-4 employees plus a manager but for much of the duration of the PIP, including the Applicant's own compassionate leave, his team had 1-2 employees including a manager due to unplanned leave;
- despite this, the Applicant substantively delivered what was required and there were no specific discussions had with him or concrete examples to the contrary prior to the meeting on 4 October 2023;
- the Applicant's mid-term performance assessment in January 2023 required that he take on 0.5 FTE of sourcing personally and during the PIP his allocation to sourcing significantly exceeded this benchmark;
- his team has had no spare resourcing during the PIP due to additional work requests for the business at short notice and he had been working long hours under high pressure to deliver that workload during a time of increased stress due to the PIP;
- he was not clear on what aspects of his performance were considered to be below a reasonable standard and how this was measured;
- it was difficult for him to adequately respond to the generalities provided in the 4 October 2023 meeting which referenced performance that pre-dated the PIP and performance areas not covered by the PIP being directive leadership and this caused significant confusion as to what was being measured.<sup>205</sup>

**[186]** The Applicant's response included the following statements indicating he was seeking alternatives to termination in the circumstances:<sup>206</sup>

- 'If you believe my performance under the PIP is inadequate despite my having completed it as required, you can require another PIP'.
- 'If you believe I require more training, propose it to me.'
- 'If you do not wish me to continue in Procurement, you can allow me to apply for other positions in the organization'.
- 'If my team is to be restructured and my position made redundant, you could follow the applicable Bank process, consult me on these changes and provide me with options'.
- 'Certainly you could at least provide with the courtesy of a discussion of other possibilities.'
- 'The option to terminate is severe and is disproportionate in the context of a 14-year career.'

**[187]** The Applicant also stated that as a result of the process issues in the management of the PIP, he believed 'there to be significant challenges to continuing in the role, and also that the termination resulting from this would be harsh, unjust and unreasonable.'<sup>207</sup>

**[188]** Mr Hunter disputed the assertion in the Applicant's response to the Show Cause Letter that he was not given any direction in relation to his deliverables or how he could have done better and said he gave him clear guidance and feedback.<sup>208</sup>

**[189]** Mr Tomaras disagreed with the Applicant's assertions that:

- the Applicant had not been provided with sufficient clarity in order to respond to the performance issues;
- the performance issues concerned matters that were not covered by the PIP; and

- there were significant resourcing issues during the PIP that impacted his performance.<sup>209</sup> In this regard Mr Tomaras said that any resourcing concerns were addressed by adjusting PIP deliverable due dates, one of the PIP goals was prioritisation and planning and it was Mr Tomaras' expectation that the Applicant would be aware of any resourcing issues and reallocate or raise concerns to Mr Tomaras or senior management.<sup>210</sup>

*Applicant's absence from work from 5 October 2023 medical certificate*

[190] On 5 October 2023 the Applicant commenced a period of personal leave and provided a copy of a medical certificate to Mr Hunter on 6 October 2023 indicating that the Applicant would be unfit for work from 5 October 2023 to 12 November 2023.<sup>211</sup> The Applicant said that on 6 October 2023 he informed Mr Hunter that he would not be able to attend a meeting scheduled for 11 October 2023 to discuss the Respondent's decision concerning the show cause process.<sup>212</sup>

[191] On 10 October 2023 Mr Hunter emailed the Applicant stating:<sup>213</sup>

'Having regard to the medical certificate you shared with me on 6 October 2023 and as per your email from yesterday, I will cancel the meeting for tomorrow, which was scheduled to discuss the outcome of the showcause which was presented to you on 4 October. The Bank is in receipt of your response to the showcause dated 6 October 2023 and after carefully reviewing and considering it; we will communicate the outcome of the showcause to you in writing.'

*The decision to dismiss the Applicant and communicated reasons for dismissal*

[192] Mr Hunter made the decision to dismiss the Applicant. Mr Hunter said:

- he was aware of ongoing performance issues despite the PIP;
- he considered that he and other members of the leadership team had given the Applicant consistent and regular feedback and despite efforts to coach him he had not achieved the necessary sustained uplift in performance;
- there was nothing he or the Respondent could do to support the Applicant in lifting his performance to the standard expected;<sup>214</sup>
- he observed that the Applicant's performance was having an impact on his team and, in certain cases, his failure to deliver or execute was exposing the Respondent to risk;
- it was not, in his view, tenable for the Applicant to continue in his role.<sup>215</sup>

[193] It is also apparent that Mr Tomaras was involved in the decision to terminate the Applicant's employment with Mr Tomaras giving evidence that:

- the decision to terminate the Applicant was made as he had not met expectations of the minimum capability requirements expected of a manager in the Applicant's role;<sup>216</sup>
- it was clear to him that the Applicant was not performing to the standard of a manager and was failing to adequately progress goals related to his general management functions without excessive oversight from senior management.<sup>217</sup>

*Termination Letter*

[194] On 11 October 2023 Mr Hunter communicated the Respondent’s decision to dismiss the Applicant via correspondence attached to an email (**Termination Letter**). The Termination Letter noted the Applicant’s response and that the Applicant had asked the Respondent to review options in addressing its performance concerns by implementing another PIP, allowing him to apply for another position at the Bank or making his position redundant. The Termination Letter went on to say:

‘These alternatives are not appropriate. Your role continues to exist. You were placed on a PIP after receiving a performance rating of “inconsistent year” for FY22 and FY23. We have already worked with you and supported you through both informal performance management as well as a formal performance management process in order to assist you in demonstrating improvement in your performance to the standard reasonably expected for your role of Manager, Corporate and Governance. You have not been able to demonstrate sustained improvement in your performance to the standard required.

As a result, we have determined that it is appropriate to terminate your employment with the Bank...’

[195] It is apparent that the reason for the Applicant’s dismissal was that he was not performing the Role to the standard expected by the Respondent.

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

[196] The question requiring consideration is whether there was a valid reason for the termination the Applicant’s employment which related to his capacity or conduct. The Applicant’s conduct is not in issue, the question is therefore whether there was a valid reason for termination related to the Applicant’s capacity.

[197] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”<sup>218</sup> and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>219</sup> However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>220</sup>

[198] As noted above, the Respondent says that the Applicant’s employment was terminated because of sustained, unsatisfactory performance<sup>221</sup> and in this regard refers to the decision of the Full Bench of the Commission in *Reseigh v Stegbar Pty Ltd* which said:

‘...The assessment of whether there was a valid reason for the dismissal involves, amongst other things, determining whether there was a valid reason related to a person’s capacity or conduct or both. In this context “capacity”, as used in s. 387(a) of the Act, means the employee’s ability to do the work he or she is employed to do. A capacity related reason for dismissal might be concerned with an employee’s performance, the employee’s physical capacity to perform the work, the loss of a qualification or licence necessary to perform the work, or an inability to perform the inherent requirements of the job because of some injury, illness or other disability.’<sup>222</sup>

[199] The Respondent submitted and I accept that sustained unsatisfactory performance may constitute a valid reason for dismissal.<sup>223</sup>

[200] Both parties provided a detailed account of events leading up to the termination of the Applicant's employment. It is apparent that the Applicant was a long serving employee and while there are discrepancies in the evidence regarding the Applicant's title, he commenced in a management role on 11 January 2020, with the role's primary purpose being to:

‘Oversee the direction of a procurement area, while leading and developing individuals and teams to achieve goals and deliver RBA outcomes. Lead strategic sourcing initiatives in partnership with the business and support effective governance of procurement activities across the Bank.’

[201] Prior to the Applicant reporting to Mr Hunter in May 2021, the Applicant reported to Ms Brown. This meant that Ms Brown was the Applicant's manager for the majority of time during FY21. Ms Brown provided detailed feedback concerning the Applicant's performance in FY21 as reflected in the FY21 Performance Review and, by way of summary, that feedback suggests:

- that in mid-April 2021 all of the Applicant's major goals for FY21 had either been achieved or were on track for delivery by year-end;
- the Applicant demonstrated commitment to his work and his performance exceeded that of his peers;
- the Applicant had successfully navigated staffing changes;
- the Applicant had made a significant contribution to procurement strategy;
- the Applicant had achieved his goals in circumstances where his team were not resourced for the level of governance work required and balancing governance work with 'business as usual' procurement activities had been challenging;
- the Applicant's work volume was high and there was a need to improve resourcing and reduce the Applicant's work volume to a manageable level in FY22;
- the Applicant supported Ms Brown in navigating 'challenging relationships' and the Applicant needed to work with challenging stakeholders, including a group within the organisation (FMG) who had resisted compliance with the procurement guideline.

[202] Overall, the comments made by Ms Brown suggest she considered the Applicant's performance under her leadership during FY21 to be exceptional in an environment made difficult due to resourcing and stakeholder challenges.

[203] Mr Hunter became the Applicant's manager in May 2021. Notwithstanding the overwhelmingly positive feedback, the FY21 Performance Review indicated that there had been negative feedback from stakeholders including that:

- the Applicant had a tendency to provide advice that was either hard to follow or changed over time;
- the Applicant didn't always appear to listen to stakeholder issues or did not address them to the stakeholder's satisfaction;
- expectations were not well defined or managed.

**[204]** Identified opportunities for improvement included improved stakeholder engagement and offering clear and succinct advice to stakeholders.

**[205]** Mr Hunter said it ‘soon became apparent that the Applicant was struggling in his role’, and while he may have held this view I am not satisfied based on the evidence before the Commission that Mr Hunter actually communicated this to the Applicant during the early stages of him managing the Applicant. Further, the feedback in the Applicant’s FY21 Performance Review was provided a short time after Mr Hunter’s commencement as his manager and indicated that the Applicant ‘should be proud of his achievements’ that year and the Applicant was assigned a performance rating of ‘good’. The Applicant’s overwhelmingly positive FY21 Performance Review does not suggest that the Applicant was, at that time, failing to meet the requirements of his role or ‘struggling in his role’.

**[206]** Mr Hunter said he provided the Applicant with feedback and coaching, including in regularly scheduled one-on-ones, catch ups and team meetings. While it is unclear as to precisely what was discussed during the early stages of Mr Hunter’s management of the Applicant, I do accept that Mr Hunter did provide feedback on:

- 29 June 2021 in relation to certain identified issues including concerns about a lack of planning in relation to the ‘Simplification Project’ that required Mr Hunter’s direct intervention and additional support to meet the delivery deadline, the need for greater focus on having a clear and visible plan and using appropriate language for customer facing guidance;<sup>224</sup>
- 22 September 2021 in response to stakeholder feedback in a customer satisfaction survey in which Mr Hunter indicated that the Applicant should refrain from providing advice until he has made inquiries, as opposed to “shooting from the hip and hoping it is correct”.<sup>225</sup>

**[207]** Mr Tomaras became the Applicant’s two-up manager in October 2021 and gave evidence that he made the Applicant aware of performance concerns he held and provided feedback to the Applicant about them.<sup>226</sup> It is unclear what the specific feedback was although it does appear that he had a meeting with the Applicant about concerns he had about the Applicant’s approach to the expiry of the Respondent’s EAP arrangement when a stakeholder raised concerns about the Applicant.

**[208]** By the time the mid-year performance review for FY22 came around, Mr Tomaras was the Applicant’s manager. Mr Tomaras’ comments in the FY22 Performance Review include a combination of positive and negative feedback.<sup>227</sup> Negative feedback included feedback about:

- a lack of communication and timely follow through on commitments; and
- a very conservative and negative approach to advice and planning, rather than a risk based approach.

**[209]** The feedback indicated that building relationships and addressing associated perceptions (including historical perceptions) through regular communication and a focus on understanding and supporting the customer would be crucial. The feedback was also directed toward prioritisation, given resourcing constraints, and empowering team members.



[210] Having considered the timeline of events and feedback of managers up until this point it seems that during the Applicant's appointment to his role, the Respondent had undergone a period of change, that there was a heightened focus on governance which had an impact on 'business as usual' procurement activities and that bringing some stakeholders on board with that change had at times been challenging. It is also apparent that the Applicant's success in his role, as assessed by his managers, was highly dependent on his ability to build relationships with multiple stakeholders and prioritise his work in a high volume, resource challenged environment.

[211] It is apparent that the environment that the Applicant was working in was complex and the competing priorities and areas of focus would have been difficult to navigate. This would have been compounded by the Applicant having three managers in relatively short succession. It is also apparent that the Applicant was hard working and committed to his work.

[212] However it is apparent that the Applicant's managers were sensitive to stakeholder feedback and it seems likely that when they received negative feedback it was passed on to the Applicant. It is less clear as to whether this negative stakeholder feedback was always warranted given the challenging environment. Nevertheless, the feedback suggests the Applicant's managers wanted him to attach greater priority to his relationship with stakeholders and wanted him to be less conservative in his approach (i.e. in relation to governance and risk) to better place him to meet the needs of those stakeholders and shift negative perceptions.

[213] By the time of the Applicant's end of year performance review for FY22 it should have been apparent to the Applicant that both Mr Hunter and Mr Tomaras believed there was a problem with his performance as a result of the 'inconsistent' rating applied. Mr Tomaras and Mr Hunter indicated that there had been mixed stakeholder feedback, negative customer engagement and a need to improve communication regarding the status of activities<sup>228</sup> and raised with the Applicant the need to improve the Applicant's planning and prioritization, emphasising actions that would deliver the most value to stakeholders.<sup>229</sup>

[214] Similar feedback followed when Mr Hunter and Mr Hare met with the Applicant to discuss his mid-term performance review for FY23 in January 2024,<sup>230</sup> with feedback including a need for the Applicant to improve his stakeholder engagement, including in light of negative stakeholder experiences arising from his giving of inaccurate advice.<sup>231</sup> This should have given the Applicant increasing cause for concern that his performance was not meeting expectations, particularly in relation to his engagement with stakeholders and prioritisation of work.

[215] There were at least two different events that occurred after this time that appear to have contributed to Mr Tomaras and Mr Hunter's view that the Applicant was not performing to expectations. This included the delay in payment to the supplier Eighty20, a matter that was escalated internally, and the 'rushed' approach to obtaining insurance for the Respondent's motor vehicle fleet which Mr Tomaras considered resulted in risk for the organisation and a circumstance where the Applicant acted outside his authority in committing the Respondent to a contract without Mr Tomaras' approval. The evidence also suggests that the Applicant's managers had concerns about outstanding actions that the Applicant flagged with his team immediately prior to commencing periods of leave in circumstances where the Applicant had earlier indicated that the matters were otherwise further progressed.<sup>232</sup>

[216] The PIP was initiated shortly thereafter. Unsurprisingly in light of the areas of concern communicated by Mr Tomaras and Mr Hunter up until this point, the areas of concern set out in the PIP included stakeholder engagement, planning and prioritisation. Other areas of concern related to communication and accountability.

[217] The Applicant expressed concerns about the PIP, and I consider that some of these concerns were validly held. In particular, the Applicant stated that Mr Tomaras had not fully heard his response to concerns raised at the meeting on 5 May 2023 and the Applicant believed that hearing his response and the results of the pulse survey may have led him to adjust course before escalating from informal to formal performance management. The Applicant also said that the assessment of the PIP that ‘internal customer feedback has also generally remained negative’ conflicted with many of his recent conversations with internal customers, his manager and results of the quarterly survey and he wanted to better understand the information that underlies such statements so he could learn and better respond in the future. In this regard I have earlier observed that the Applicant’s managers were sensitive to stakeholder feedback and, absent further evidence about the specific stakeholder feedback being put to the Applicant so he could respond, I hold some concern that the managers may have held the view that the ‘customer is always right’. I am not satisfied that this was necessarily the case in an environment where there was a high volume of work, multiple competing priorities and a shift in governance practices. Within the Applicant’s resource limitations, greater priority was required to be attached to some stakeholder needs and disagreements were likely to arise. Ms Brown appeared to have an understanding about this, as evident in her feedback given during the FY21 performance review, and Mr Tomaras’ feedback also appears to contemplate this at various stages.

[218] It does however seem likely that the Applicant’s managers had received negative feedback about the Applicant by his stakeholders, and there was a need to deal with this in the context of a role requiring a strong focus on relationships and stakeholder management. In these circumstances I do not consider it was unreasonable for the Respondent to implement a plan with a view to addressing this. Further, the PIP appeared to have utility in clarifying what activities should be given priority given Mr Tomaras and Mr Hunter held concerns about the Applicant’s prioritisation of work activities.

[219] While the Applicant expressed concerns about the content of the PIP, it appears that he ultimately engaged constructively in the process and this was acknowledged at various stages by his managers. Multiple meetings were held with the Applicant and a combination of one or more of his three managers across that period, being Mr Tomaras, Mr Hunter and Mr Hare.

[220] A mid-point review was held in relation to the PIP on 31 July 2023 between the Applicant, Mr Tomaras, Mr Hare and Mr Boyd.<sup>233</sup> There are differing perceptions between the Applicant, Mr Tomaras and Mr Hare about the Applicant’s performance at this point however I note the Mid-point PIP Review indicates that the Applicant had:

- partially met the performance requirements in relation to ‘Fleet Services’ but was ‘on-track’;
- met the performance requirements in relation to ‘Labour hire’;

- partially met the performance requirements in relation to ‘Procurement pipeline and operations’ but was ‘on-track’;
- was ‘on-track’ in relation to the ‘Category leadership and advice’ requirements.<sup>234</sup>

[221] Based on the feedback provided at this time, it would have been reasonable for the Applicant to form the view that he was on track to meet the PIP requirements at this stage and that Mr Tomaras and Mr Hare were pleased with the uplift they had observed in his performance.

[222] There appears to have been a disconnect between the Applicant and his managers about why the PIP meetings would from this point be reduced to occur fortnightly. While the Applicant expressed an understanding that this was due to his achievement of the bulk of the deliverables in the PIP, his managers indicated they did this to see if he could work more independently without as much intervention from them.

[223] Mr Hunter became the Applicant’s direct manager again after the mid-point review of the PIP and it appears there was a disconnect between the Applicant and Respondent’s perception of what was communicated to the Applicant about his performance during PIP meetings that occurred in August 2023. It seems likely that Mr Tomaras and Mr Hunter provided both positive feedback to the Applicant about progress while also raising concerns and that while the Applicant has attached a greater focus to the positive feedback, Mr Tomaras and Mr Hunter have attached greater focus to the concerns they had raised.

[224] The Applicant gave evidence that new deliverables were introduced to the PIP in the meeting on 13 September 2023 however Mr Tomaras and Mr Hunter appear to dispute that what they were asking him to do was a new requirement. It is not in contention that fleet services were to transition to another team at the end of September 2023 and that the Applicant was told that he would be responsible for the completion of a Handover Document and revising process maps to support this transition. It is however in dispute as to whether the PIP had contemplated that this was a requirement prior to the 13 September 2023 meeting. The Applicant said that the PIP deliverables associated with fleet services were preliminary and preparatory, concerning improving service delivery, and that he considered the plan or execution of a transition of fleet services to another team to be an unreasonable inclusion.<sup>235</sup> Mr Hunter said that preparation of guidance documents and process maps were, and had always been, an element of the PIP, this was discussed in context of preparing for the future state operating model and those responsibilities fell within the following PIP items:

- ‘1.1 – develop a status tracker of various processes with proposed actions and dates for remediation, with a view to centralise support within procurement (addressing pain points and recent incidents)’; and
- ‘1.4 – update fleet management supporting processes and customer reference materials’.

[225] Mr Tomaras said, in relation to the Applicant being asked to complete the handover document and to review the process maps:

- this was what was expected of the Applicant in his role as a part of handover activities during the fleet services transition period and had been discussed and commenced as a part of the initial outsourcing of fleet management a year or so earlier;<sup>236</sup>

- it was his expectation that someone in the Applicant's role would be aware when handing activities to a new department that a handover document and process maps would be required to support such transition;<sup>237</sup>
- enabling the fleet transition was a key overarching goal of the PIP from the beginning and the PIP was not an exhaustive list of all tasks required of the Applicant in his role but was rather a guideline for certain key tasks that operated alongside his general work duties.<sup>238</sup>

**[226]** As noted earlier in this decision, under the improvement goal 'Fleet Service', the PIP required the Applicant to:

- conduct an 'end-to-end' review of processes post outsource, with a view to simplifying and centralising support within procurement (addressing current pain points and recent incidents). The required performance standard was the development of 'a status tracker of various processes with proposed actions and dates for remediation';
- propose and implement the 'supplier management approach' (i.e. ongoing management model with SG Fleet). The performance standard required the Applicant to:
  - complete, have approved and implement a Contract Management Plan for SG Fleet, clearly identifying the performance management approach; and
  - establish the standing agenda, attendee list and book in supplier meetings for the coming 12 months;
- communicate outcomes and implement recommendations with SG Fleet and internal stakeholders and update any reference material to clearly document updates. The performance standard required the Applicant to update fleet management supporting processes and customer reference material and, subject to changes, communicate with impacted staff (both drivers and support partners in Finance and HR).

**[227]** Having considered the PIP content and the request made of the Applicant, the lack of alignment is understandable. I accept that it had been contemplated that the Fleet Services function would be transferred to another team and this was the likely motivation for the Respondent prioritising Fleet Services tasks in the Applicant's PIP. However the PIP appears to be focused on process improvement in the context of 'simplifying and centralising support within procurement' and while the Applicant was required to 'update fleet management supporting processes and customer reference material' it does not specifically make reference to a requirement to complete a handover document or revise process maps to support the transition of Fleet Services to another team and if this was the requirement it should have been communicated more clearly in the preparation of the PIP.

**[228]** Despite the lack of alignment about what was required of the Applicant in relation to Fleet Services, it is apparent that the Applicant tried to meet the expectations communicated to him on 13 September 2023, providing some draft process documents and a draft contract management plan for the fleet transition on 21 September 2023 but no handover document.<sup>239</sup> Mr Hunter's view was that the documents were significantly below the standard he would expect from a manager level employee and he returned the documents to the Applicant with significant editing and comments.<sup>240</sup> Mr Hunter said that during a meeting on 22 September 2023 he stepped the Applicant through the specifics of what was required and was disappointed at that late stage of the project and PIP that he was having to walk the Applicant through what his job entailed and how to complete his tasks. However given the lack of clarity in the PIP

about this expected requirement and given that the Applicant had only come to the realisation that the handover document and process maps to support fleet transition were a requirement at the meeting on 13 September 2023, I consider Mr Hunter's disappointment unreasonable.

[229] It nevertheless seems likely that the Applicant's failure to meet the expectations of Mr Hunter in relation to the Fleet Services deliverables and the degree of oversight that Mr Hunter needed to provide to the Applicant were significant catalysts for Mr Hunter's decision to cancel the final PIP meeting scheduled for 27 September 2023 and move to a show cause process. Mr Hunter considered that the Applicant did not meet the relevant deliverables under the PIP or PIP objectives and had missed deadlines, left deliverables incomplete and was not managing his team or the procurement pipeline effectively.<sup>241</sup>

[230] Whether this assessment was factually correct and reasonable requires further engagement with the PIP deliverables. The PIP deliverables were designed to address performance issues in the areas of:

- 'Stakeholder Engagement';
- 'Planning and Prioritisation';
- 'Communication and Sharing of Information'; and
- 'Accountability'.

[231] The specific PIP requirements are set out below:

Requirement #	Improvement Goal	Requirement	Performance standard	Due date
1.1	'Fleet Service'	'End-to end review of processes post outsource, with a view to simplifying and centralising support within procurement (addressing current pain points and recent incidents)'.	'Development of a status tracker of various processes with proposed actions and dates for remediation'.	26 June 2023
1.2	'Fleet Service'	'Propose and implement the 'supplier management approach' (i.e. ongoing management model with SG Fleet'.	'Complete, have approved and implement a Contract Management Plan for SG Fleet, clearly identifying the performance management approach'	30 June 2023
1.3	'Fleet Service'	'Propose and implement the 'supplier management	'Establish the standing agenda, attendee list and book in supplier	14 July 2023

		approach’ (i.e. ongoing management model with SG Fleet’.	meetings for the coming 12 months’.	
1.4	‘Fleet Service’	‘Communicate outcomes and implement recommendations with SG Fleet and internal stakeholders and update any reference material to clearly document updates’.	‘Update fleet management supporting processes and customer reference material and, subject to changes, communicate with impacted staff (both drivers and support partners in Finance and HR)’.	14 July 2023
2.1	‘Labour hire services’	‘Establish a customer education session with relevant updates to support self-service and new approach (ensure relevant support partners in Shared Service and HR are engaged and part of the education roll out).’	‘Education sessions developed and booked.’	28 June 2023
2.2	‘Labour hire services’	‘Establish a customer education session with relevant updates to support self-service and new approach (ensure relevant support partners in Shared Service and HR are engaged and part of the education roll out).’	‘Coordinate and roll out sessions, focusing on high volume users first (e.g. IT PMO).’	30 June 2023
2.3	‘Labour hire services’	‘With relevant Departments, develop a pipeline of activity in the labour hire space to support timely delivery.’	‘Tracking report developed capturing status of expiring arrangements and pipeline of upcoming request.’	26 June 2023
2.4	‘Labour hire services’	‘Ensure existing ‘preferred’ supplier agreements are	‘Centralised supplier management list	30 June 2023

		managed to support timely engagement and continuity ahead of a broader panel.’	updated and actively monitored’	
3.1	‘Procurement Pipeline and Operations’	‘Ensure that the pipeline for the corporate category is up to date and each team member including yourself have an allocation (i.e. a lead role). Continue to keep this current going forward.’	‘Updated pipeline capturing current and planned pipeline of procurement activities with effective resource allocation.’	30 June 2023
3.2	‘Procurement Pipeline and Operations’	‘Proposed approach for engagement, including template pack and supporting information, also address coordination with relevant FBPs.’	‘Develop a template engagement pack, and agree engagement approach to leverage existing FBP interactions with relevant Departments.’	31 July 2023
3.3	‘Procurement Pipeline and Operations’	‘Engage with departments to forecast upcoming non-ICT and workplace procurement activities, with particular focus on BK, HR, NI, PS.’	‘Portfolio plan outlining 18-month forward plan of procurement activity based on engagement discussions, contract renewals data, project pipelines and discussion with relevant FBPs.’	31 August 2023
4.1	‘Category leadership and advice’	‘The timely assessment, prioritization, and allocation of work requests as they arise and relate to the corporate portfolio.’	‘Work requests are triaged and allocated based on assessed priority (relative to the current pipeline of activity). Outcomes of assessment are notified to stakeholder and included in the Procurement pipeline.’	On-going
4.2	‘Category leadership and advice’	‘Provision of timely, accurate and actionable advice to business, as it relates to activity in the corporate portfolio.’	‘Response provided to stakeholder with actionable outcome, which is consistent with the Bank’s policies, the CPRs.’	On-going

4.3	‘Category leadership and advice’	‘Ensuring routine deliverables, including any reporting obligations residing with the corporate and governance category, are met within agreed timeframes.’	‘Deliverables are completed within agreed/required timeframes.’	On-going
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*Did the Applicant meet the PIP requirements in relation to ‘Fleet Services’?*

Requirement 1.1

[232] The performance standard in relation to ‘Requirement 1.1’ as set out in the table above is quite specific in that it requires development of a status tracker.

[233] During the mid-point review, it appears that a tracker had in fact been developed with the evaluation feedback was recorded as stating:

‘The tracker has been updated to capture remediation tasks, mainly covering operational issues at this stage (some which are in progress or have been addressed)’.<sup>242</sup>

[234] Further, the ‘status tracker’ developed in relation to the PIP<sup>243</sup> records:

- feedback from Mr Tomaras that the ‘Tracker was established ahead of the PIP, and Rob has worked to add and update items based on operational feedback and following meetings with SG Fleet. Feedback has been provided on including specific dates for actions and more broadly to identify any key issues needing remediation, both operationally and more strategically. To date, some of the operational aspects have been identified and progressed, albeit with some items open for an extended period, though a focus for the next 6 weeks should be on progressing the key themes with a view to addressing (sic) service shortfalls (disposals of vehicles and timely remittance (sic) of funds to RBA) at pending engagement meeting and internal process issues (i.e. delivery notification and payroll; calculator approvals) as part of the revised process review and with pending ops team to support. Overall – partially met, with focus on ensuring overall risk and objectives are managed and met in order to demonstrate influence, stakeholder engagement and communication and planning;
- feedback from Mr Hare that ‘the tracker has been developed capturing remediation tasks, though given the intent to imbed the services and eventually lift and shift administration a more strategic approach is required. Importantly, over the next period greater focus on driving resolution of remediation actives (sic) is required.’

[235] During the mid-point review on 31 July 2023 requirement 1.1 was assessed as being ‘partially met’. I consider this is confusing feedback in the context of a deliverable that had 26 June 2023 as its due date and when it is apparent the status tracker had in fact been developed.

[236] However the feedback at the mid-point review goes on to say:



‘Given the intent to imbed the service offering from SG Fleet and eventually transfer the remaining administrative support tasks, focus for the second half of the PIP should be on identifying how to progress service shortfalls by SG Fleet (i.e. disposals of vehicles and timely remittance of funds to RBA), leveraging the pending engagement meeting; and the Bank’s own internal process issues (i.e. delivery notification and payroll deductions; calculator approvals etc) as part of updating the overall process and support arrangement’.

[237] It appears from this feedback and the feedback in the PIP tracker that the PIP was a ‘moving target’ and that despite the performance deliverable for requirement 1.1 having an initial due date of 26 June 2023, more was required. The feedback provided in relation to requirement 1.1 as set out above does not, in my view, clearly set out what was specifically required of the Applicant post the development of the tracker or the date by which this was required.

[238] At the 12 week mark, the Applicant was assessed as having ‘partially met’ requirement 1.1 of the PIP and Mr Tomaras and Mr Hunter’s comments in the PIP tracker include:

- “No material progress on this item over the second half of the review period, including for items that have been discussed at length and which guidance on likely solutions had been provided (e.g. delivery notifications to payroll). The focus continues to be very tactical and in response to issues being identified rather than proactively managing the identified risk areas (including via the CMP)”;
- “Fleet handover documents and processes have been marked up however there still remains some gaps and in draft. Preparation and completion of this activity has been very last minute with limited focus until escalated at the end of the process. Presentation of documents remained in a draft state when submitting as ready for review.”

[239] I consider this assessment to be problematic in that the PIP does not clearly state what was required of the Applicant beyond the ‘development of ‘a status tracker’ of various processes with proposed actions and dates for remediation’ and when these additional requirements needed to be met. The PIP does not make reference to ‘fleet handover documents and processes’ and I am not satisfied that the development of such documents to support the transition of Fleet Services was clearly communicated as being a requirement until 13 September 2023 as the end of the PIP process was approaching.

### Requirement 1.2

[240] The performance standard in relation to ‘Requirement 1.2’ as set out in the table above is also quite specific in that it required the Applicant to ‘Complete, have approved and implement a Contract Management Plan for SG Fleet, clearly identifying the performance management approach’. The due date for this deliverable was 30 June 2023.

[241] During the mid-point review, it appears that this item was only partially met with the evaluation feedback and comments in the PIP tracker indicating that:

- the Contract Management Plan had been drafted but had not been implemented;

- the Applicant needed to update content, mainly in relation to the risk management section and key performance indicators.

[242] At the 12 week mark, feedback recorded in the PIP tracker included feedback from:

- Mr Tomaras that the “CMP was completed materially later than had been planned and despite discussions in catch ups on how to close this out and move to managing the plan;” and
- Mr Hunter stating “CMP in place with material matters outstanding including the renegotiation of KPI’s with the Supplier. There appears to be limited follow through in terms of the CMP in practice. Internal customer engagement appears focused on stakeholders in the process and less from a customer perspective. This was feedback provided when a survey was sent initially, but had not been addressed.”

[243] It seems likely that the Contract Management Plan was completed and implemented later than the due date. The PIP tracker records that requirement 1.2 was met, but significantly after its due date, and based on the evidence of Mr Tomaras and Mr Hunter this appears to be an accurate assessment.

### Requirement 1.3

[244] The performance standard in relation to ‘Requirement 1.3’ as set out in the table above is also quite specific in that it required the Applicant to ‘establish the standing agenda, attendee list and book in supplier meetings for the coming 12 months’. The due date for this deliverable was 14 July 2023.

[245] During the mid-point review, it appears that this item was ‘not yet met’ with the evaluation feedback and PIP tracker indicating that supplier meetings had been scheduled, though standing agenda items were yet to be developed in the context of the Contract Management Plan.

[246] At the 12 week mark, Mr Tomaras’ comments in the PIP tracker state:

“Agenda item for first meeting was only drafted and provided wihtin (sic) 24hrs of the delayed meeting, with little in the way of identified areas of focus and no relevant background to ensure internal alignment on targeted outcomes for the meeting. On equiring (sic) about this Rob noted a copy would be provided that day, though was only provided a few days later (suggesting the document possibly has not yet been created even though the meeting was due to have occurred before the request)”.

[247] Requirement 1.3 was assessed as being ‘partially met’. It appears that supplier meetings were scheduled and that an agenda was also developed ahead of the first meeting but this was provided later than the due date of 14 July 2023 and with insufficient notice of the agenda ahead of the first scheduled meeting. In these circumstances it seems likely that ‘Requirement 1.3’ was either partially met or met late.

### Requirement 1.4

[248] The performance standard in relation to ‘Requirement 1.4’ as set out in the table above required the Applicant to ‘Update fleet management supporting processes and customer reference material and, subject to changes, communicate with impacted staff (both drivers and support partners in Finance and HR)’. The due date for this deliverable was 14 July 2023.

[249] At the time of the mid-point review the evaluation feedback stated:

‘Customer reference material and guidance updated, and appear to be working well. Internal processes pending review and recommendations for future state’.

[250] The PIP tracker included feedback that:

- ‘Customer reference material and guidance updated, though internal processes pending review and recommendations for future state’;
- ‘Activities have commenced, though further engagement will be required with internal stakeholders to ensure processes and approach is bedded down for all parties’.

[251] During the mid-point review on 31 July 2023 requirement 1.4 was assessed as being ‘partially met’ however this is confusing feedback in the context of a deliverable that had 14 July 2023 as its due date and when the feedback stated ‘Customer reference material and guidance updated, and appear to be working well’. It seems that this requirement of the PIP was also a ‘moving target’ however it is not clear what the further specific requirements were or the date by which they needed to be met.

[252] At the 12 week mark, Mr Tomaras’ comments in the PIP tracker state that ‘Some elements have been refined and updated via the intranet though customer feedback remained that there was lack of clear guidance on certain elements (event after engaging directly with [the Applicant])’. This appears to relate to the quality of the deliverable and not whether the deliverable was achieved. It is unclear what the specific customer feedback was, whether the feedback was reasonable and how the customer reference material and guidance fell short of what the Respondent required of the Applicant in meeting this deliverable.

*Did the Applicant meet the PIP requirements in relation to ‘Labour Hire Services’?*

[253] The evaluation feedback at the mid-point review of the PIP indicates that the requirements in relation to ‘Labour Hire Services’ had been met by the time of the mid-point review.

*Did the Applicant meet the PIP requirements in relation to ‘Procurement and Pipeline Operations’?*

### Requirement 3.1

[254] The performance standard in relation to ‘Requirement 3.1’ as set out in the table above required the Applicant to ‘Ensure that the pipeline for the corporate category is up to date and each team member including yourself have an allocation (i.e. a lead role). Continue to keep this current going forward.’ The due date for this deliverable was 30 June 2023, however there was an expectation about a continuing obligation.

[255] At the time of the mid-point review the evaluation feedback stated:

‘Pipeline allocations have been updated for the period to November 2023, though further stakeholder engagement is required to plan out future commitments and existing contract support. Robert is working with the team on capturing insights from the contracts pipeline to support this activity in the coming weeks. Overall, Robert seems to be well across his pipeline and has managed this despite unplanned staff leave during the review period.’

[256] During the mid-point review on 31 July 2023 requirement 3.1 was assessed as being ‘partially met’ but overall the assessment was that the Applicant was ‘on-track’.

[257] While it would be reasonable to draw an inference from the above that there was no concern in relation to the Applicant’s performance in respect of this PIP requirement, the PIP tracker included a comment from Mr Tomaras stating ‘Not clear this includes a forward view, and team allocations seem incomplete?’ While this suggests that Mr Tomaras and Mr Hare may not have been aligned in relation to the Applicant’s performance against this requirement I am not satisfied Mr Tomaras’ concerns were clearly communicated.

[258] At the 12 week mark, feedback in the PIP tracker included:

- feedback from Mr Tomaras that the requirement ‘appears partially completed and lacks the rounded effort of considering contract expiry, project pipeline and feedback from engagement meetings’;
- feedback from Mr Hunter that ‘Forward pipeline and resourcing to include contract expiries etc. only partially in place’.

[259] It appears that the Applicant only partially met ‘Requirement 3.1’ by the end of the PIP in that it had not been completed.

### Requirement 3.2

[260] The performance standard in relation to ‘Requirement 3.2’ as set out in the table above required the Applicant to ‘Develop a template engagement pack, and agree engagement approach to leverage existing FBP interactions with relevant Departments.’ The due date for this deliverable was 31 July 2023.

[261] No evaluation feedback was recorded in relation to this requirement at the mid-point review, although an overall assessment was made in relation to the requirements under the ‘Procurement pipeline and operations’ category that the requirements were ‘Partially met but on-track’.

[262] At the 12 week mark, feedback in the PIP tracker included:

- feedback from Mr Tomaras that ‘This does not appear to have progressed beyond initial work completed by others within the team’;

- feedback from Mr Hunter that there had been ‘Limited progress beyond what Maria had developed’,

[263] Overall, I am satisfied that by the end of the PIP the Applicant had not met this requirement.

### Requirement 3.3

[264] The performance standard in relation to ‘Requirement 3.3’ as set out in the table above required the Applicant to develop a ‘Portfolio plan outlining 18-month forward plan of procurement activity based on engagement discussions, contract renewals data, project pipelines and discussion with relevant FBPs.’ The due date for this deliverable was 31 August 2023.

[265] No evaluation feedback was recorded in relation to this requirement at the mid-point review, although an overall assessment was made in relation to the requirements under the ‘Procurement pipeline and operations’ category that the requirements were ‘Partially met but on-track’.

[266] At the 12 week mark, the PIP tracker reflects that the requirement had been assessed as ‘Partially met’ and Mr Tomaras included lengthy comments in the PIP tracker indicating that his evaluation was subject to broader customer feedback being collected. This included:

“Discussion around approach to Financial Markets Group identified little had been done. In response to an enquiry from Sam on engagement with Financial Markets Group during a PIP check in on 13/9, Robert response focused almost solely on compliance with him noting there were little other benefits to be obtained given their spend profile (citing examples of not being able to make any headway with the likes of Bloomberg). In response Sam provided feedback around how potential benefit could be obtained, citing the dollar value of e-media spend (given success in locking in savings with such spend in the past) and potentially to achieve non-financial efficiencies, and how these could work to further enhance the relationship with his customers which seemed to be rather limited in the case of this group. Other examples have seemed more promising in terms of engagement and supporting planning in areas like Audit.”

[267] Mr Hunter’s comments in the PIP tracker at the 12 week mark were that there was:

“Limited evidence of planning being undertaken to include FBP’s. Limited forward (sic) planed approach for Labour Hire which Robert had not progressed as yet. There was not clear forward plan at this stage, as Robert suggested this was not included within the PIP process. Assess whether this is indicative of not yet having developed a forward plan for the categories within his portfolio.”

[268] This feedback is confusing in that while the requirement was relatively clear it is unclear as to which element of the requirement had not been met, i.e.:

- Did he fail to develop an 18-month forward plan at all?

- Did he develop an 18-month forward plan but he failed to engage with the people he was supposed to engage with and, if so, who specifically?

[269] Without further particulars, it is difficult to identify whether the Applicant met the requirement or not. The feedback does however suggest that Mr Tomaras remained concerned about the focus on compliance over other matters in his engagement with stakeholders and that there was a lack of alignment about what needed to be in the forward plan.

*Did the Applicant meet the PIP requirements in relation to ‘Category Leadership and Advice’?*

#### Requirement 4.1

[270] The performance standard in relation to ‘Requirement 4.1’ as set out in the table above required the Applicant to ensure ‘Work requests are triaged and allocated based on assessed priority (relative to the current pipeline of activity). Outcomes of assessment are notified to stakeholder and included in the Procurement pipeline.’ This requirement did not have a due date but was said to be ‘ongoing’.

[271] At the time of the mid-point review this requirement was assessed as being ‘met’ with evaluation feedback indicating that the Applicant had demonstrated growth, “actively reaching out to discuss workload and prioritising deliverables. Work requests are therefore getting managed in a timely manner, including allocation of deliverables to relevant staff (including peers, where required).” The feedback also stated that the Applicant had been “more proactive in seeking guidance as needed, but also offering up his own view first which is pleasing.”

[272] At the 12 week mark, the assessment in the PIP tracker indicated that this requirement had only been partially met but it was unclear why.

#### Requirement 4.2

[273] The performance standard in relation to ‘Requirement 4.2’ as set out in the table above required the Applicant to ‘Response provided to stakeholder with actionable outcome, which is consistent with the Bank’s policies, the CPRs.’ This requirement did not have a due date but was said to be ‘ongoing’.

[274] At the time of the mid-point review this requirement was assessed as being ‘met’ with evaluation feedback indicating that the Applicant had “actively uplifted engagement with customers, providing timely feedback on support requests and new activity. Recent procurement activities such as the NGB\$5 represent a good development opportunity, addressing learnings from the engagement process and technical procurement challenges”.

[275] At the 12 week mark, the assessment in the PIP tracker indicated that this requirement had only been partially met but it was unclear why.

#### Requirement 4.3

[276] The performance standard in relation to ‘Requirement 4.3’ as set out in the table above required the Applicant to ‘Deliverables are completed within agreed/required timeframes.’ This

requirement was in the context of ‘Ensuring routine deliverables, including any reporting obligations residing with the corporate and governance category, are met within agreed timeframes.’ This requirement did not have a due date but was said to be ‘ongoing’. This requirement does not, in my view, clearly describe what deliverables are to be completed and by when they are required to be completed.

[277] At the time of the mid-point review this requirement was assessed as being ‘partially met/met’ with evaluation feedback stating that the Applicant had “been responsive on routine deliverables as they arise (i.e. reporting requirements), but focus going forward should be on ensuring there are processes in place to support a more proactive approach (i.e. periodic assessment of CPR and related frameworks; ensuring regular reporting is known ahead of time etc)”.

[278] At the 12 week mark, the PIP tracker identified that this requirement had been assessed as ‘partially met’ and included feedback from Mr Tomaras that there was a “Lack of ownership of reporting and other compliance activity within (sic) the category noted, though this partially talks to a lack of clarity on RACI within the team (i.e. others had put their hand up on updating reporting)”.

[279] It is unclear as to whether Mr Tomaras’ feedback is directly related to the requirement and whether the Applicant met the requirement or not in that it does not identify what deliverables were required, what the agreed timeframes were for the deliverables and which deliverables were not completed within those agreed timeframes.

#### Overall performance against the PIP

[280] The Respondent submitted that the PIP set out the areas of improvement required of the Applicant in order for him to be assessed by the Respondent as performing his Role at the minimum level required of him.<sup>244</sup> The Respondent submitted that as at the 12 week mark the Applicant had only ‘met’ five out of 14 PIP deliverables and that nine were ‘partially met’ or ‘unmet’.

[281] Overall, I am satisfied that by the end of the PIP the Applicant had met some PIP requirements including:

- requirement 1.1 to develop ‘a status tracker of various processes with proposed actions and dates for remediation’ by the due date specified in the PIP. While the Respondent does not share this view and appears to have wanted more from the Applicant, the evaluation feedback and PIP tracker indicates the status tracker was in fact developed. The Respondent did not clearly set out what was specifically required of the Applicant post the development of the tracker or the date by which this was required;
- requirements 2.1, 2.2 and 2.3 in relation to Labour Hire Services. While the Respondent submitted that at the PIP review meeting on 15 August 2023 it was noted that the Applicant had failed to progress the Labour Hire Services improvement goal<sup>245</sup> the PIP did not specify what was required in relation to this improvement goal after the specific requirements in the PIP had been met.

[282] The Applicant had also taken steps to meet the communicated requirement 1.4 to ‘Update fleet management supporting processes and customer reference material and, subject to changes, communicate with impacted staff (both drivers and support partners in Finance and HR)’. I accept that Mr Hunter and Mr Tomaras held some concerns around the quality of the material produced however it is unclear within the PIP as to how the quality of this deliverable was to be measured and what was required to meet expectations.

[283] It is unclear as to whether the Applicant met certain requirements in the PIP as:

- without further particulars, it is difficult to identify whether the Applicant met the requirement 3.3 or not, although it is clear that Mr Tomaras remained concerned about the focus on compliance over other matters in his engagement with stakeholders and that there was a lack of alignment about what needed to be in the forward plan;
- it is unclear as to why requirements 4.1 and 4.2 were considered to have been partially met;
- requirement 4.3 does not identify what deliverables were required and what the agreed timeframes for the deliverables were and it is therefore unclear as to which deliverables were not completed within those agreed timeframes.

[284] However the Applicant only partially met or did not meet certain PIP requirements that were expressed in clear terms including:

- requirement 3.1 to “Ensure that the pipeline for the corporate category is up to date and each team member including yourself have an allocation (i.e. a lead role)’ as this was incomplete;
- requirement 3.2 “To Develop a template engagement pack, and agree engagement approach to leverage existing FBP interactions with relevant Departments” in that it appears someone in his team started this work but he did not take it further.

[285] The Applicant had also met some PIP requirements but did so late including:

- requirement 1.2 to ‘Complete, have approved and implement a Contract Management Plan for SG Fleet, clearly identifying the performance management approach’ but significantly after the due date specified in the PIP. Mr Hunter and Mr Tomaras both gave evidence that they raised concern that the Contract Management Plan had not progressed;<sup>246</sup>
- requirement 1.3 to ‘establish the standing agenda, attendee list and book in supplier meetings for the coming 12 months’ but significantly after the due date specified in the PIP and with the agenda provided with insufficient time to enable meaningful preparation in advance of the first meeting.

### *Findings*

[286] While a number of PIP requirements were met or are not expressed clearly enough to know what was required or whether they have been met, other requirements of the PIP that were expressed in a clear and measurable way were either not met, met late or partially met as identified above. I do not consider those requirements that were expressed in a clear and measurable way and which were not met to be unreasonable. I accept that the Applicant was



working in a challenging environment with resource limitations however to the extent that the PIP included a requirement to complete tasks that were clear and measurable it should have been apparent to the Applicant that priority needed to be attached to these specific tasks. This was especially the case in a context where concerns had been raised with the Applicant about prioritisation and where this was clearly an important aspect of his role given the challenging operational environment and competing priorities of multiple stakeholders.

[287] The Respondent has indicated that the PIP requirements constituted the ‘minimum’ requirements for the Applicant’s role. While there were deficiencies in relation to some aspects of the PIP, the Applicant, despite the implementation of the PIP and feedback provided to him through the process, failed to meet those minimum requirements and his performance therefore fell below the Respondent’s expectations of him.

[288] Further, the evidence before the Commission is clear in that it was the Applicant’s performance that was the reason for the dismissal and does not establish there was an ulterior motive for the dismissal, e.g. to circumvent redundancy in the event of a restructure to the procurement portfolio.

[289] Having regard to the matters I have referred to above, I find that there was a valid reason for the dismissal related to the Applicant’s capacity, being unsatisfactory performance. This weighs against a finding of unfairness.

[290] However, the procedures followed by the Respondent in giving effect to the dismissal warrant consideration and I have dealt with this below in relation to the remaining considerations falling within s.387 of the FW Act.

***Section 387(b) - Was the Applicant notified of the valid reason?***

[291] Proper consideration of s.387(b) of the FW Act requires a finding to be made as to whether the Applicant “was notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a) of the FW Act.<sup>247</sup>

[292] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,<sup>248</sup> and in explicit and plain and clear terms.<sup>249</sup>

*Applicant’s submissions*

[293] The Applicant submitted that he was given an opportunity to respond to the reasons given for his dismissal and did so in providing a response to the Show Cause Letter. However the Applicant raised concern that:

- the feedback provided during the PIP meetings were inconsistent with the reasons provide in the Show Cause Letter, the show cause meeting and the Termination Letter;
- when the Respondent became aware that the Applicant was on personal leave, the Respondent made no attempt to reschedule the meeting to discuss the outcome of the show cause events and he was instead terminated without consideration of the personal circumstances that required the Applicant to take sick leave.<sup>250</sup>

### *Respondent's submissions*

[294] The Respondent submitted that it notified the Applicant of the reasons for its proposal to terminate his employment:

- verbally, in a meeting with him on 4 October 2023; and
- in writing by the Show Cause Letter which it said explained the reasons for the proposed dismissal in detail, including that the Applicant had made insufficient progress towards the expected performance requirements of the PIP.<sup>251</sup>

[295] The Respondent also submitted that:

- the nature of the poor performance had also been explained to the Applicant both informally and in the PIP review meetings;<sup>252</sup>
- it clearly set out the reasons for termination in the letter of termination provided to the Applicant on 11 October 2023.<sup>253</sup>

[296] In response to the Applicant's concerns about the Respondent issuing the Termination Letter without first conducting a face to face meeting with him, the Respondent submitted that:

- while it would have been its preference to meet with the Applicant, he was unable to meet and was unwell and on personal leave;
- it understood that the Applicant was awaiting the communication of its decision and decided to issue the Termination Letter, noting that it had already met with the Applicant to discuss his response to the Show Cause Letter and had considered his detailed written response.<sup>254</sup>

### *Findings*

[297] A meeting was held on 4 October 2023 with the Applicant and his support person, Mr Hunter, Mr Tomaras and the Respondent's Human Resources Business Partner in attendance.<sup>255</sup> Mr Hunter and Mr Tomaras said the matters raised in that meeting were as set out in the Respondent's Show Cause Letter to the Applicant dated 4 October 2023.<sup>256</sup> Mr Tomaras also said that he was informed that due to ongoing underperformance, particularly in relation to the fleet services transition, the Respondent was considering terminating his employment.<sup>257</sup>

[298] The Applicant's evidence contradicted this, and the Applicant said the Respondent failed to provide any context as to why the show cause meeting was being held and that during the meeting there was no discussion of the deliverables under the PIP.<sup>258</sup> The Applicant said the rationale for the show cause meeting was underperformance in relation to:

- the fleet services transition; and
- the Applicant's overly directive leadership.<sup>259</sup>

[299] The Show Cause letter provided to the Applicant on 4 October 2024 notified the Applicant that:

- the Respondent had ongoing concerns that he was not performing the duties of his role to the standard it required;
- as discussed earlier that day, he had made insufficient progress towards the expected performance requirements as set out in the PIP;
- it considered that he continued to perform below its expectations in relation to key aspects of his role;
- as a result, it was considering terminating his employment.

[300] The Show Cause letter sought a response by close of business 6 October 2023 and indicated that if no response was provided by that time a decision would be made based on the information available.<sup>260</sup>

[301] The Applicant provided a response to the Show Cause Letter on 6 October 2023.<sup>261</sup> At that time the Applicant also provided a medical certificate certifying that the Applicant was unfit to work through to 12 November 2023.<sup>262</sup>

[302] The Termination Letter provided on 11 October 2023 ultimately indicated that:

- the Respondent had implemented both informal performance and formal performance management processes in order to assist the Applicant in demonstrating improvement in his performance to the standard reasonably expected for the Role;
- the Applicant had not been able to demonstrate sustained improvement in his performance to the standard required;
- as a result, the Respondent had determined that it was appropriate to terminate the Applicant's employment.

[303] I have earlier found that the Respondent's reason for dismissal was unsatisfactory performance and that this was a valid reason for the Applicant's dismissal. Notification of this reason for termination was given to the Applicant before the decision was made to terminate their employment.<sup>263</sup> Having regard to the matters referred to above, I find that the Applicant was notified of the reason for his dismissal prior to the decision to dismiss being made, and in explicit and plain and clear terms.

[304] To the extent that the Applicant indicated that he was not clear on what aspects of his performance were considered to be below a reasonable standard and how this was measured, I consider this in dealing with ss.387(c) and (h) below.

***Section 387(c) - Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?***

[305] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.<sup>264</sup>

[306] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.<sup>265</sup> Where the employee is aware

of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.<sup>266</sup>

*Applicant's submissions*

[307] In his response to the Show Cause Letter the Applicant indicated (among other things) that:

- he was not clear on what aspects of his performance were considered to be below a reasonable standard and how this was measured;
- it was difficult for him to adequately respond to the generalities provided in the 4 October 2023 meeting which referenced performance that pre-dated the PIP and performance areas not covered by the PIP being directive leadership and this caused significant confusion as to what was being measured.<sup>267</sup>

*Respondent's submissions*

[308] The Respondent relied on the show cause meeting on 4 October 2023 and Show Cause Letter in support of its submissions that the Applicant was provided with an opportunity to respond to the reason for his dismissal related to his capacity.<sup>268</sup>

*Findings*

[309] While the Applicant was put on notice that his employment was at risk of termination due to unsatisfactory performance, and I have found that there was a valid reason for dismissal on this basis, s.387(c) requires consideration as to whether the Applicant was given an opportunity to respond to that valid reason.

[310] The evidence of Mr Tomaras and Mr Hunter was that matters raised in the show cause meeting on 4 October 2023 were those set out in the Respondent's Show Cause Letter. Mr Tomaras also said that the Applicant was informed that the Respondent was considering terminating his employment due to ongoing underperformance, particularly in relation to the fleet services transition.<sup>269</sup>

[311] The Show Cause Letter indicates:

- the Respondent had ongoing concerns that he was not performing the duties of his role to the standard it required;
- he had made insufficient progress towards the expected performance requirements as set out in the PIP;
- it considered that he continued to perform below its expectations in relation to key aspects of his role;
- as a result, it was considering terminating his employment.

[312] The Applicant provided a response to the Show Cause Letter on 6 October 2023.<sup>270</sup>

[313] Having regard to the matters referred to above, I find that the Applicant was given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

[314] While the Applicant responded in detail to the Show Cause Letter, I do however accept that the Show Cause Letter does not clearly identify the ongoing deficiencies in the Applicant's performance post-instigation of the PIP, why the Respondent considered that progress towards the performance requirements was insufficient, or in what respect he was continuing to perform below key aspects of his role and I deal with this further under my consideration of s.387(h).

***Section 387(d) - Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?***

[315] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[316] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”<sup>271</sup>

[317] The Applicant requested to have a support person present, that request was granted and he did have a support person present to assist in discussions relating to the dismissal.

[318] In all the circumstances, I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal. I consider this to be a neutral consideration.

***Section 387(e) - Was the Applicant warned about unsatisfactory performance before the dismissal?***

[319] A dismissal relates to unsatisfactory performance where it refers to “the level at which the employee renders performance, including factors such as diligence, quality, care taken and so on.”<sup>272</sup> This matter involves a dismissal on the grounds of unsatisfactory performance and, as such, s.387(e) of the FW Act is relevant.

[320] A warning for the purposes of s.387(e) must clearly identify:

- the areas of deficiency in the employee's performance;
- the assistance or training that might be provided;
  
- the standards required; and

- a reasonable timeframe within which the employee is required to meet such standards.<sup>273</sup>

[321] In addition, the warning must “make it clear that the employee’s employment is at risk unless the performance issue identified is addressed.”<sup>274</sup>

[322] In order to constitute a warning for the purposes of s.387(e), it is not sufficient for the employer merely to exhort their employee to improve their performance.<sup>275</sup>

#### *Applicant’s submissions*

[323] The Applicant submitted that while he was advised in the PIP Letter that his performance required improvement, throughout the PIP process:

- he was consistently advised that he was meeting the requirements of the PIP;
- he was not advised of a material discrepancy between his performance in the Role and the Respondent’s expectations such that his ongoing employment was potentially to be terminated until provided with the Show Cause Letter,<sup>276</sup>

[324] The Applicant further submitted that while he understood the purpose of the PIP process was to improve performance, the Respondent was misleading or disingenuous in providing feedback during the process and abandoned the process before the second review prescribed by the PIP.<sup>277</sup>

#### *Respondent’s submissions*

[325] The Respondent submitted that in assessing whether the Applicant was warned about the unsatisfactory performance, the Commission should also consider the performance management process, specifically, whether there was a period of time between an employee being warned about unsatisfactory performance and subsequent dismissal, giving the Applicant the chance to improve.<sup>278</sup> In this regard, the Respondent submitted:

- From 2021 onwards, the Applicant was informed on multiple occasions, both formally and in formal performance reviews, that his performance in the Role was considered unsatisfactory in certain respects, with concerns increasing and culminating in the implementation of the PIP.<sup>279</sup>
- When the Applicant was informed that he would be placed on a PIP on 8 June 2023 he was informed, verbally that his employment may be terminated if his performance did not improve to the base level of competency expected of a manager.<sup>280</sup>
- The letter issued to the Applicant following the PIP meeting on 8 June 2023 confirmed in writing the nature of the performance concerns and that the Applicant may be subject to disciplinary action, including termination of employment, if he did not demonstrate sufficient progress during the PIP or if his performance did not improve to the standard required.<sup>281</sup>
- The PIP included the following employee acknowledgement:

“...the employee acknowledges that a failure to improve to the standard required, in the time frame required and over a sustained period may result in further action, including disciplinary proceedings up to and including termination”.<sup>282</sup>

- In a meeting with the Applicant on 19 June 2023 to discuss the PIP, Mr Tomaras warned the Applicant that if his performance did not improve the Respondent would consider terminating his employment.<sup>283</sup>
- In the show cause meeting and Show Cause Letter, the Applicant was again informed that termination of employment was being considered by the Respondent, and he was given an opportunity to respond to that disciplinary action.<sup>284</sup>

[326] The Respondent also submitted that the PIP was conducted over a period of approximately 16 weeks (excluding the period of leave), the contents of the PIP were revised following feedback from the Applicant prior to its commencement and on multiple occasions the requirements of the PIP were explained to the Applicant where he indicated concerns that what was expected of him was unclear.<sup>285</sup>

[327] The Respondent submitted that:

- it was not, at the end of the PIP, bound to issue a separate written warning to the Applicant and initiate a further performance plan;
- the PIP process, including the PIP itself and PIP review meetings, constituted sufficient warning and section 387(e) of the FW Act does not require the Respondent to issue a stand-alone letter referred to as a ‘written warning’ in order for the Applicant to have received a clear warning about the risk of termination should his performance not improve to the standard required.<sup>286</sup>

### *Findings*

[328] I am satisfied that at commencement of the PIP the Applicant was warned that if the Respondent was not satisfied that he demonstrated sufficient progress during the PIP or his performance had not improved to the standard required he may be subject to disciplinary action, including potential termination of employment. The PIP and accompanying letter described the the areas of deficiency in the employee’s performance, the PIP process, performance standards required and timeframes in which these needed to be met.

[329] I am satisfied that, pursuant to s.387(e) that the Applicant was warned about unsatisfactory performance prior to dismissal. The conduct of the Respondent after the implementation of the PIP and the provision of the warning does however warrant further consideration and I have dealt with this further under s.387(h).

***Sections 387(f) and (g) - To what degree would the size of the Respondent’s enterprise and absence of dedicated human resource management specialists or expertise in the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal?***

[330] Where an employer is substantial and has dedicated human resources personnel and access to legal advice, there will likely be no reason for it not to follow fair procedures.<sup>287</sup> It is not disputed that the Respondent is a large employer with access to human resources expertise.

[331] In the circumstances of this case, I consider the matters in s.387(f) and (g) of the FW Act to be neutral.

*Section 387(h) - What other matters are relevant?*

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

*Applicant's submissions*

[333] The Applicant raised a range of additional matters in his submissions. Among these was a submission that the Respondent had been pursuing plans to restructure the procurement portfolio, the Applicant's role would have been redundant and the Applicant would have been paid a significant payment under the Respondent's policies and in accordance with the Applicant's employment contract.

[334] The Applicant also states in his submissions that:

- he 'has a right to bring an unfair dismissal claim in the (Commission) due to the lack of procedural fairness demonstrated by the Respondent, ultimately leading to the harsh and disproportionate termination of the Applicant's employment with the Respondent'; and
- taking into account the temporal proximity between the PIP Meetings, the show cause events and the termination, the Respondent did not afford the Applicant with a fair process that he was legally entitled to.

[335] The Applicant submitted that while he was advised in the PIP Letter that his performance required improvement:

- many of the objectives contained in the PIP were so broad and unmeasurable that he had no way of reasonably being able to measure his progress or the achievement of these objectives except through ongoing feedback;
- the Respondent ignored the Applicant's reasonable suggestions to add in measurable metrics for the performance of the PIP;
- throughout the PIP process he was consistently advised that he was meeting the requirements of the PIP;
- he was not advised of a material discrepancy between his performance in the Role and the Respondent's expectations such that his employment was at risk of termination until he was provided with the Show Cause Letter;
- he was not provided with training suggested or initiated by the Respondent during the PIP process;
- the PIP meetings provided little feedback to improve performance, as they were more focused on the progress of the associated deliverables and other business-as-usual workload tasks;



- he was provided with clearly misleading or disingenuous feedback that he was doing well all the way up to the PIP midpoint;
- by the time of the show cause events the Respondent provided a vague and unevicenced narrative that he had been effectively failing all along, despite completing all requested PIP deliverables;
- the Respondent added on additional items to the PIP at will and without meaningful consultation, without making adjustments to provide more time or support;
- the Respondent did not take into account short staffing or his excessive workload;
- the feedback provided during the PIP meetings was inconsistent with the reasons provided in the Show Cause Letter, show cause meeting and Termination Letter;
- the CFO was operating on completely different feedback in relation to the PIP as compared to what was told to the Applicant.

[336] The Applicant also submitted that:

- when the Respondent became aware that the Applicant was on personal leave, it made no attempt to reschedule the meeting to discuss the outcome of the show cause events and that he was instead terminated without consideration of the personal circumstances that required the Applicant to take sick leave;
- he was not afforded an opportunity to say goodbye to his colleagues, some of whom he had worked with for over a decade and instead he was humiliated by having to leave immediately as if he had engaged in serious misconduct.

[337] The Applicant also pointed to his length of service, submitted he had worked for the Respondent for 14 years, had a good employee record and no history of significant performance issues until the PIP discussions in June 2023.

#### *Respondent's submissions*

[338] In response to the Applicant's submission that the feedback in PIP meetings was inconsistent with the Show Cause Letter and Termination Letter, the Respondent submitted that:

- the Show Cause Letter and Termination Letter reflect the decline in the Applicant's performance following the PIP mid-point review (his performance having initially improved due to the additional support provided to him during the first half of the PIP); and
- these concerns were raised with him in both PIP meetings after the mid-point review, as well as by Mr Hunter in his fortnightly catch-ups with the Applicant.<sup>288</sup>

[339] The Respondent denied the Applicant's assertions that:

- the feedback was misleading and disingenuous or that the Applicant was told he should "carry on as such";<sup>289</sup>
- the feedback given to the CFO about his performance was different to the feedback given to the Applicant.<sup>290</sup>

[340] The Respondent denied the Applicant's assertions that many PIP objectives were broad and unmeasurable and submitted that the PIP had both qualitative and quantitative deliverables which were capable of being assessed by his managers and where the Applicant was unclear about what was expected this was clarified by Mr Hunter and Mr Tomaras.<sup>291</sup>

[341] The Respondent also denied that it added additional deliverables to the PIP and submitted that the facilitation of the fleet services transition was always part of the PIP and the Applicant's job.<sup>292</sup>

[342] The Respondent submitted that the Applicant's assertion that it did not consider short staffing and his excessive workload was incorrect and the PIP deliverables and their due dates were set accounting for the size of the Applicant's team and adjusted where necessary to account for leave and absences.<sup>293</sup> The Respondent submitted that the Applicant's inability to ultimately deliver in the required timeframes was due to his own poor performance and planning and not due to short staffing.<sup>294</sup>

[343] In response to the Applicant's assertions about the termination of his employment without consideration to his personal circumstances requiring the taking of sick leave, the Respondent submitted that:

- while it would have been its preference to meet with the Applicant (and it had sent the Applicant a meeting invitation for October 2023), the Applicant was unable to meet as he was unwell on personal leave; and
- it understood that the Applicant was awaiting the communication of its decision and decided to issue the Termination Letter, noting that it had already met with the Applicant to discuss his response to the Show Cause Letter and had considered his detailed written response.<sup>295</sup>

[344] The Respondent submitted that to the extent that the Applicant was not able to say goodbye to his colleagues, this was regrettable, but did not result in the dismissal being 'harsh, unjust or unreasonable'.

### *Findings*

[345] The Applicant's submissions can be broadly placed into the following categories:

1. a potential entitlement to redundancy payments but for the dismissal;
2. the performance management process;
3. matters the Respondent failed to consider when dismissing the Applicant;
4. the manner in which the dismissal was effected; and
5. the Applicant's length of service.

[346] While it seems changes to the procurement function were contemplated by the Respondent I am not satisfied based on the evidence before the Commission that the Applicant's role would necessarily have been made redundant or that he would have been terminated as a result and in the absence of the concerns about his performance.

[347] I do however consider that the following matters are relevant to my consideration of whether the dismissal was harsh, unjust or unreasonable.

[348] Procedural fairness is one factor that the Commission may take into consideration when deciding if a dismissal has been harsh, unjust or unreasonable. It concerns the decision-making process followed or steps taken by a decision maker, rather than the actual decision itself.

[349] In the context of administrative decision-making, the rules of natural justice are flexible and require fairness in all the circumstances, including the nature of the power exercised and the statutory provisions governing its exercise.<sup>296</sup> Ordinarily, procedural fairness requires that an allegation be put to a person and they be given an opportunity to answer it before a decision is made.<sup>297</sup>

[350] I have earlier found that the Applicant was given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss him being made. However the Show Cause Letter does not particularise the ongoing deficiencies in the Applicant's performance post-investigation of the PIP, why the Respondent considered that progress towards the performance requirements in the PIP was insufficient, or in what respect he was continuing to perform below key aspects of his role. The PIP was a critical tool in the management of the Applicant's performance and as the matters raised in the show cause meeting on 4 October 2023 were those set out in the Respondent's Show Cause Letter, I am not satisfied that the Applicant was provided with the specific details of what particular aspects of the PIP he had not met at the time of being asked to show cause as to why his employment should not be terminated.

[351] This is particularly problematic in circumstances where it was reasonable for the Applicant to form the view at the mid-point review of the PIP that he was on track for successful completion and that at the mid-point review it was apparent that Mr Tomaras and Mr Hare were pleased with the uplift they had observed in his performance. I am not satisfied that feedback provided subsequent to the mid-point review and prior to the show cause process made it clear that there had been a material change in the Applicant's performance such that this assessment had changed, and the Applicant's employment was therefore at risk. The second PIP review meeting that had been contemplated may have provided an opportunity for the Applicant to fully understand the Respondent's residual concerns but this meeting did not ultimately proceed.

[352] In these circumstances I accept that the show cause process would have come as a surprise to the Applicant, who was expecting a second PIP review meeting as contemplated by the PIP. As such, it is understandable that, as the Applicant indicated in his response to the Show Cause Letter, the Applicant was unclear at the time of being asked to show cause as to why his employment should not be terminated as to what aspects of his performance were considered to be below a reasonable standard and how that was measured. Without particularising what the residual performance concerns were, the Respondent placed the Applicant in a difficult position in responding to show cause as to why his employment should not be terminated.

[353] An employee's long and satisfactory work performance or history may be taken into consideration under s.387(h) of the FW Act and, depending on all the circumstances, may weigh in favour of a conclusion that the dismissal of the employee was harsh, unjust or

unreasonable.<sup>298</sup> I accept that the Applicant had over 14 years' service with the Respondent and up until the latter period of his tenure had a long and satisfactory performance history. In this context, the manner in which the Applicant was dismissed also appears unnecessarily abrupt in that the Respondent bypassed the end of PIP review meeting to move straight to the show cause process and, notwithstanding the Applicant's response to the Show Cause Letter and period of personal leave, proceeded to dismiss the Applicant via written correspondence with immediate effect. This would have been an undignified experience for the Applicant who had given 14 years of service to the Respondent, who has a history of satisfactory performance for the vast majority of this time and whose performance in his role had been described as 'exceptional' by his manager, Ms Brown, in his performance review immediately prior to Mr Hunter and Mr Tomaras becoming his managers.

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

[354] I have made findings in relation to each matter specified in s.387 of the FW Act as relevant.

[355] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>299</sup>

[356] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of the Applicant was harsh because:

- the Applicant would have reasonably held a belief at the mid-point review of the PIP that he was on track for successful completion of the PIP. The feedback after the mid-point review did not make clear that he was 'off-track' and at risk of having his employment terminated prior to the show cause process, which I accept would have come as a shock to him. If the Respondent's assessment of the Applicant's performance had changed following the mid-point review such that he was off-track and at risk of having his employment terminated this should have been clearly communicated to him and there were multiple opportunities for the Respondent to do so;
- the PIP was a critical tool in the management of the Applicant's performance and the Applicant was not provided with the details of what particular aspects of the PIP he had not met so that he could provide a more considered response to the specific concerns that the Respondent still had about his performance at the time the Show Cause Letter was provided to him. The Respondent placed the Applicant in a difficult position in responding to show cause as to why his employment should not be terminated as it did not particularise what the residual performance concerns were;
- the Applicant had over 14 years' service with the Respondent and up until the latter period of his tenure had a long and satisfactory performance history;
- the second PIP review meeting was cancelled and he was terminated with immediate effect (although he was paid in lieu of notice) whilst on personal leave and the Respondent did not attempt to reschedule a face to face meeting. Given the Applicant had dedicated 14 years' service to the Respondent and that he had a satisfactory performance history for the overwhelming majority of that period, the manner in which the Applicant was dismissed was unnecessarily abrupt.

## Conclusion

[357] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the FW Act.

## Remedy

[358] Being satisfied that the Applicant:

- made an application for an order granting a remedy under s.394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[359] Under s.390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

- (a) I am satisfied that reinstatement of the Applicant is inappropriate; and
- (b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

### *Is reinstatement of the Applicant inappropriate?*

[360] The Applicant's submissions indicate that he did not seek an order for reinstatement and he confirmed during the hearing that he does not wish to be reinstated. The Applicant submitted that he had the following concerns in relation to reinstatement:

- whether he would have a reasonable prospect of success if he were to be reinstated to his previous role due to the conduct of the Respondent prior to and since the Applicant's termination;
- whether a suitable role could be found in another team and business area if the working relationship with leadership positions has been impacted by the Applicant's termination and reaction to his termination by bringing an unfair dismissal application;
- he has now secured a suitable alternative position with another employer;
- he has had a loss of trust and confidence in the Respondent.

[361] In such circumstances, "the Applicant's disposition is a sure guide to the Commission as to whether or not it would be appropriate to reinstate or re-employ the Applicant. To act contrary to the Applicant's desired position in this respect would be to give effect to an order that may not yield a productive or cooperative workplace."<sup>300</sup>

[362] The Applicant has also found alternative employment. As stated by the Full Bench, "[i]n assessing whether reinstatement is an appropriate remedy, it is obviously relevant as to whether

the dismissed employee has obtained alternative employment. Where that new employment is satisfactory to the employee, it will be no remedy at all to reinstate the employee to the pre-dismissal employment to which the employee, for well-founded reasons, has no desire to return.”<sup>301</sup>

[363] Having regard to the matters referred to above, I consider that reinstatement is inappropriate. I will now consider whether a payment for compensation is appropriate in all the circumstances.

***Is an order for payment of compensation appropriate in all the circumstances of the case?***

[364] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, “[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one...”<sup>302</sup>

[365] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.<sup>303</sup>

[366] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

- (a) the effect of the order on the viability of the Respondent’s enterprise;
- (b) the length of the Applicant’s service;
- (c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;
- (d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;
- (e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;
- (f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the Commission considers relevant.

[367] In considering each of the criteria in s.392 of the FW Act, it is useful to refer to the helpful restatement of principles to be applied in the assessment of compensation in *Johnson v North West Supermarkets T/A Castlemaine IGA*.<sup>304</sup>

“[9] The well-established approach to the assessment of compensation under s 392 is to apply the ‘Sprigg formula’, derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul Licensed Festival Supermarket*. This approach was articulated in the context of the current legislative framework in *Bowden v Ottrey Homes Cobram and District Retirement Villages*. Under that approach, the first step to be taken in assessing compensation is to consider s.392(2)(c), that is, to determine what the applicant would have received, or would have been likely to receive, if the person had not been dismissed. In *Bowden* this was described in the following way:

“[33] The first step in this process - the assessment of remuneration lost - is a necessary element in determining an amount to be ordered in lieu of reinstatement. Such an assessment is often difficult, but it must be done. As the Full Bench observed in *Sprigg*:

‘... we acknowledge that there is a speculative element involved in all such assessments. We believe it is a necessary step by virtue of the requirement of s.170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law.’

[34] Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the ‘*anticipated period of employment*’...”

[10] The identification of this starting point amount ‘necessarily involves assessments as to future events that will often be problematic,’ but, as the Full Bench observed in *McCulloch v Calvary Health Care Adelaide*, ‘while the task of determining an anticipated period of employment can be difficult, it must be done.’

[11] Once this first step has been undertaken, various adjustments are made in accordance with s.392 and the formula for matters including monies earned since dismissal, contingencies, any reduction on account of the employee’s misconduct and the application of the cap of six months’ pay. This approach is however subject to the overarching requirement to ensure that the level of compensation is in an amount that is considered appropriate having regard to all the circumstances of the case.” (references omitted)

**[368]** The *Sprigg* formula was discussed and refined in *Ellawala v Australian Postal Corporation*<sup>305</sup> as follows:

“[31] The principles applicable to determining an amount to be ordered in lieu of reinstatement are dealt with in *Sprigg*. In that case the Full Bench endorsed the following approach:

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination.

Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

[32] Any amount provisionally arrived at by application of these steps is subject to whether offsetting weight is given to other circumstances, including those that need now to be taken into account under paragraphs 170CH(7)(a), (b) and (c). The legislative cap on the amount able to be ordered is then applied pursuant to ss.170CH(8) and (9).

[33] The first step in this process - the assessment of remuneration lost - is a necessary element in determining an amount to be ordered in lieu of reinstatement. Such an assessment is often difficult, but it must be done. As the Full Bench observed in *Sprigg*:

*“...we acknowledge that there is a speculative element involved in all such assessments. We believe it is a necessary step by virtue of the requirement of s.170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law.”*

[34] Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the “*anticipated period of employment*”. This amount is then reduced by deducting monies earned since termination. Only monies earned during the period from termination until the end of the “*anticipated period of employment*” are deducted. An example may assist to illustrate the approach to be taken.

[35] In a particular case the Commission estimates that if the applicant had not been terminated then he or she would have remained in employment for a further 12 months. The applicant has earned \$3,000 a month for the 18 months since termination, that is \$54,000. Only the money earned in the first twelve months after termination - that is \$36,000 - is deducted from the Commission’s estimate of the applicant’s lost remuneration. Monies earned after the end of the “*anticipated period of employment*”, 12 months after termination in this example, are not deducted. This is because the calculation is intended to put the applicant in the financial position he or she would have been in but for the termination of their employment.

[36] The next step is to discount the remaining amount for “*contingencies*”. This step is a means of taking into account the possibility that the occurrence of contingencies to which the applicant was subject might have brought about some change in earning capacity or earnings.

...



[45] In relation to the fourth step set out in *Sprigg* we note that the usual practice is to settle a gross amount and leave taxation for determination.” (my emphasis, references omitted)

[369] In *Balaclava Pastoral Co Pty Ltd t/a Australian Hotel Cowra v Darren Nurcombe*,<sup>306</sup> the Full Bench stated that in quantifying compensation, it is necessary to set out with some precision the way in which the various matters required to be taken into account under s.392(2) (and s.392(3) if relevant), and the steps in the *Sprigg* formula, have been assessed and quantified. The Full Bench also proffered that the way in which a final compensation amount has been arrived at should be readily apparent and explicable from the reasons of the decision-maker.

[370] I will assess compensation having regard to these matters.

***Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed – s.392(2)(c)***

[371] As stated by a majority of the Full Court of the Federal Court, “[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive... the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination.”<sup>307</sup>

[372] When calculating the remuneration that the Applicant would have received or would have been likely to receive if the Applicant had not been dismissed, the intention is to put the Applicant in the financial position they would have been in but for the unfair dismissal.

[373] While the reason for the dismissal was poor performance and this constituted a valid reason, I have earlier found that the the Applicant was not provided with the details of what particular aspects of the PIP he had not met so that he could consider and provide a response to the specific concerns that the Respondent still had about his performance at the time the Show Cause Letter was provided to him. The Applicant would have reasonably held a belief at the mid-point review of the PIP that he was on track for successful completion of the PIP. The feedback after the mid-point review did not make clear that he was ‘off-track’ and at risk of having his employment terminated prior to the 4 October 2023 meeting and the show cause process would have come as a shock to him. If the Respondent’s assessment of the Applicant’s performance had changed following the mid-point review such that he was off-track and at risk of having his employment terminated this should have been clearly communicated to him. I consider it likely that if the Respondent did so, the Applicant would have shown some degree of improvement during the second half of the PIP and this would have given rise to continued employment for a further period of time, particularly considering the Applicant had shown an uplift in performance during the first half of the PIP.

[374] However the Respondent submitted that to the extent that the PIP included specific tasks, these tasks were not an exhaustive statement of the duties the Applicant was required to

perform and he was also expected to continue to perform all other duties of the Role set out in the Position Description. It does appear that, particularly after the mid-point review of the PIP, the Respondent has raised concerns about matters falling outside the specific PIP requirements. These include:

- concerns raised in the meeting on 15 August 2023 about two labour hire services agreements reaching their expiry, and the Applicant being ‘uncertain’ about these;
- concerns raised in the meeting on 15 August 2023 about the Applicant’s uncertainty in relation to progress towards the establishment of and the Respondent’s potential participation in the Whole of Australian Government People Panel;<sup>308</sup>
- concerns raised in the meeting on 23 August 2023 that a significant high profile project was looking like it was delayed;<sup>309</sup>
- concerns at the 20 September 2023 meeting that the Applicant was not meeting expectations in relation to the development of a handover document and process maps to support the fleet services transition. I have earlier found that this requirement was only clearly communicated to the Applicant on 13 September 2023 and it was not clear that this was a requirement of the PIP as asserted by the Respondent. Particular concerns were raised during the meeting on 20 September 2023 that the fleet service transition items due to be delivered by 15 September 2023 had been delivered in draft on 18 September 2023 with no advanced notice of the delay and that the items were incomplete and required a significant amount of further work;
- concerns expressed in a meeting on 22 September 2023 that Mr Hunter was having to provide too much guidance to the Applicant in the development of a handover document.

[375] It is apparent that the Respondent had expectations of the Applicant that extended beyond the PIP and had concerns that the Applicant was not meeting them. If the Applicant had shown uplift in performance during the second part of PIP, this would likely have resulted in a further period of employment and continued performance management. However the Respondent’s ongoing concerns suggest that the gap between the Applicant’s performance and Respondent’s expectations was going to be a difficult one for the Applicant to bridge. It is apparent that the Respondent wanted the Applicant to work in a more self-directed way in his capacity as a manager, there was a continued lack of alignment between the Applicant and Respondent about what work needed to be prioritised and how it needed to be undertaken, and it is unlikely that this would have been remedied without further performance management or that the level of improvement would have been so substantial such that the Applicant would not have been terminated at some time by another means following further performance management measures. In these circumstances it finds that the Applicant’s employment was likely to continue for a further period of eight weeks.

### *Findings*

[376] Having regard to the above matters I find that:

- the Applicant’s employment was likely to continue for a further period of eight weeks (i.e. up until 6 December 2023); and

- the remuneration likely to have been received by the Applicant during that period would have been **\$23,643.85**. This has been calculated by dividing the Applicant's annual salary of \$153,685 by 52 (\$2,955.48) and multiplying this by eight.

[377] I am satisfied that the Applicant has suffered some financial loss as a result of his dismissal between the period that he was dismissed and the end of the eight week period across which I anticipate his employment would have continued.

***Remuneration earned – s.392(2)(e) and income reasonably likely to be earned – s.392(2)(f)***

[378] Remuneration earned from the date of dismissal to the date of any compensation order is required to be taken into account under s.392(2)(e) of the FW Act. Remuneration reasonably likely to be earned from the date of any compensation order to the date the compensation is paid is also required to be taken into account under s.392(2)(f) of the FW Act. Any remuneration likely to be earned after that date to the end of the period of anticipated employment determined for the purpose of s.392(2)(c) is a relevant amount to be taken into account under s.392(2)(g) in accordance with the *Sprigg* formula.

[379] The Applicant indicated during the determinative conference that he had earned \$18,270.00, being earnings received from ad hoc work between November 2023 and January 2024 and secured full-time employment on 8 January 2024 and as at the date of the hearing had received a net payment of \$8,999.00 from this ongoing full-time employment. This was not challenged by the Respondent. The salary in respect of the Applicant's new employment is \$195,000 per annum exclusive of superannuation. Applying a divisor of 52, this equates to \$3,750 per week. Assuming the Applicant continues to receive \$3,750.00 per week, I find that the amount of remuneration earned by the Applicant from employment or other work during the period since the dismissal is \$142,020 until the date of the order, comprised of \$123,750 (earned between 8 January and 23 August 2024) in earnings from his new role and \$18,270 in other earnings, excluding payment of notice.

[380] Based on the Applicant securing alternative employment and having been paid an amount of \$3,750.00 per week, I am satisfied that the amount of income reasonably likely to be earned by the Applicant between the making of the order for compensation and the payment of compensation is a further \$7,500.

[381] As the Applicant commenced receiving remuneration from work in or around November 2023 and this is before the time when his employment would, in my view, have ended (i.e. 6 December 2023 being a period of 8 weeks from the time of dismissal), earnings between 11 October 2023 and 6 December 2023 should reduce the amount of compensation ordered. Income was earned in respect of the period between 27 November 2023 and 3 December 2023 in the amount of \$3,480. Further income was earned between the period 4 December 2023 and 10 December 2023 in the amount of \$4,350 (equating to \$870 a day for a period of 5 working days). The income earned between 4 and 6 December 2023 inclusive is therefore calculated to amount to \$2610. The total amount earned between 27 November 2023 and 6 December 2023 was **\$6,090**.

[382] In mathematical terms, this means deducting the actual and likely income for the Applicant for the 8 week period from the date of his dismissal (\$6,090) from the amount

calculated for the purpose of s.392(2)(c) (\$23,643.85), which leaves \$17,553.85 gross in compensation. The Applicant was also paid four weeks in lieu of notice, further reducing the amount by \$11,821.92, leaving **\$5,731.92** gross in compensation.

***Length of service – s.392(2)(b) and any other matters – s.392(2)(g)***

[383] The Applicant was a long serving employee with approximately 14 years service.

[384] I do not consider there is any basis for any deduction for length of service or contingencies in this matter and it will be left to the Respondent to deduct taxation required by law.

***Effect of the order on the viability of the Respondent’s enterprise – s.392(2)(a)***

[385] The evidence before the Commission does not establish that an order for compensation would have an effect on the viability of the employer’s enterprise.

***Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal – s.392(2)(d)***

[386] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.<sup>310</sup> What is reasonable depends on the circumstances of the case.<sup>311</sup>

[387] The Applicant submitted that following his dismissal he applied for three roles and had six interviews in total for those roles. The Applicant obtained work on an ad hoc basis in or around November 2023. The Applicant was successful in obtaining alternative employment on a full time ongoing basis on 8 January 2024.

[388] I am satisfied that the Applicant took reasonable steps to mitigate his loss by actively seeking and ultimately obtaining alternative employment.

***Misconduct – s.392(3)***

[389] I am not satisfied that the Applicant engaged in misconduct so no deduction is required under s.392(3) of the FW Act.

***Compensation cap – s.392(5) & (6)***

[390] I find that the total amount of the remuneration received by the Applicant and to which he was entitled during the 26 weeks immediately before the dismissal was \$76,842.50.

[391] The high income threshold immediately before the dismissal was \$167,500. Half of that amount is \$83,750.00.

[392] The amount of compensation ordered by the Commission must therefore not exceed \$76,842.50 in wages.

***Instalments – s.393***

[393] I do not consider that there is any reason for compensation to be made by way of instalments.

*Shock, Distress – s.392(4)*

[394] The amount of compensation calculated must not and will not include a component for shock, distress, humiliation or other analogous hurt caused to the Applicant by the manner of his dismissal.

**Conclusion**

[395] I am satisfied that the Applicant was protected from unfair dismissal, that the dismissal was unfair and that an order for compensation equating to **\$5,731.92**, less taxation to be deducted as required by law, is appropriate having regard to all the circumstances of the case.

[396] An order requiring the payment of this amount within 14 days will be issued with this decision.



COMMISSIONER

*Appearances:*

Mr *R McLean* on his own behalf.

Ms *K Korbel* and Ms *N Linton* on behalf of the Respondent.

*Hearing details:*

2024.

February 12.

Sydney (in person).

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<sup>1</sup> *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

<sup>2</sup> Respondent's Outline of Submissions at [9].

<sup>3</sup> Applicant's outline of argument: merits.

<sup>4</sup> Applicant's outline of argument: merits.

<sup>5</sup> Applicant statement of evidence at [2].

<sup>6</sup> Hunter at [2], [12].

<sup>7</sup> Tomaras at [9].

<sup>8</sup> Hunter at [13].

<sup>9</sup> Tomaras at Annexure A.

<sup>10</sup> Hunter at [3].

<sup>11</sup> Hunter at [4], Tomaras at [10].

<sup>12</sup> Hunter at [2].

<sup>13</sup> Hunter at [2].

<sup>14</sup> Hunter at [4].

<sup>15</sup> Hunter at [5].

<sup>16</sup> Tomaras at [10].

<sup>17</sup> Tomaras at [10].

<sup>18</sup> Hunter at Annexure B.

<sup>19</sup> Hunter at [19].

<sup>20</sup> Hunter at [20].

<sup>21</sup> Hunter at [21].

<sup>22</sup> Hunter at [2], [11].

<sup>23</sup> Hunter at [13].

<sup>24</sup> Hunter at [14].

<sup>25</sup> Hunter at [15].

<sup>26</sup> Tomaras at [11].

<sup>27</sup> Tomaras at [11].

<sup>28</sup> Tomaras at [11].

<sup>29</sup> Tomaras at [11].

<sup>30</sup> Tomaras at [12].

<sup>31</sup> Tomaras at [13].

<sup>32</sup> Tomaras at [13].

<sup>33</sup> Tomaras [14].

<sup>34</sup> Tomaras at Annexure C.

<sup>35</sup> Tomaras at Annexure C.

<sup>36</sup> Tomaras at [15].

<sup>37</sup> Hunter at [16].

<sup>38</sup> Hunter at [16].

<sup>39</sup> Hunter at [16].

<sup>40</sup> Hunter at [16].

<sup>41</sup> Hunter at [17].

<sup>42</sup> Hunter at [17].

<sup>43</sup> Hunter at Annexure A.

- 
- <sup>44</sup> Hunter at [18].
- <sup>45</sup> Hunter at [18].
- <sup>46</sup> Hunter at Annexure A.
- <sup>47</sup> Hunter at [24].
- <sup>48</sup> Tomaras at [17].
- <sup>49</sup> Tomaras at [18].
- <sup>50</sup> Tomaras at Annexure D.
- <sup>51</sup> Tomaras at Anexure D.
- <sup>52</sup> Hunter at [25], Tomaras at [20].
- <sup>53</sup> Hunter at [27].
- <sup>54</sup> Hunter at [27].
- <sup>55</sup> Hunter at [27].
- <sup>56</sup> Hunter at [28].
- <sup>57</sup> Tomaras at [22].
- <sup>58</sup> Hunter at [31].
- <sup>59</sup> Hunter at [32].
- <sup>60</sup> Hunter at [32].
- <sup>61</sup> Hunter at [33].
- <sup>62</sup> Hunter at [34].
- <sup>63</sup> Applicant at [4].
- <sup>64</sup> Applicant at [5].
- <sup>65</sup> Applicant at [4].
- <sup>66</sup> Tomaras at [23].
- <sup>67</sup> Tomaras at [24].
- <sup>68</sup> Tomaras at [25].
- <sup>69</sup> Tomaras at [25].
- <sup>70</sup> Tomaras at [27].
- <sup>71</sup> Tomaras at [27].
- <sup>72</sup> Tomaras at Annexure F.
- <sup>73</sup> Tomaras at [28].
- <sup>74</sup> Tomaras at [28].
- <sup>75</sup> Tomaras at [29].
- <sup>76</sup> Tomaras at [29].
- <sup>77</sup> Tomaras at Annexure G.
- <sup>78</sup> Tomaras at Annexure G.
- <sup>79</sup> Tomaras at [32].
- <sup>80</sup> Tomaras at [32].
- <sup>81</sup> Hunter at [35].
- <sup>82</sup> Hunter at [35].
- <sup>83</sup> Hunter at [36].
- <sup>84</sup> Hunter at [37].
- <sup>85</sup> Hunter at [38].
- <sup>86</sup> Huner at [40].
- <sup>87</sup> Tomaras at [35].

- <sup>88</sup> Hunter at [41].
- <sup>89</sup> Applicant at [6], Tomaras at [36].
- <sup>90</sup> Applicant at [6], Tomaras at [36].
- <sup>91</sup> Tomaras at [36].
- <sup>92</sup> Applicant at Annexure C, Tomaras at Annexure H.
- <sup>93</sup> Applicant at [8].
- <sup>94</sup> Applicant at [8].
- <sup>95</sup> Applicant at [9], Document 4; Tomaras at Annexure I.
- <sup>96</sup> Tomaras at [38].
- <sup>97</sup> Tomaras at [39].
- <sup>98</sup> Tomaras at [39].
- <sup>99</sup> Hunter at [41], Applicant at [10], Tomaras at [41].
- <sup>100</sup> Hunter at [42].
- <sup>101</sup> Applicant at [11].
- <sup>102</sup> Tomaras at [48].
- <sup>103</sup> Applicant [11].
- <sup>104</sup> Tomaras at [48].
- <sup>105</sup> Applicant at [11].
- <sup>106</sup> Tomaras at [44].
- <sup>107</sup> Tomaras at [48].
- <sup>108</sup> Tomaras at [48].
- <sup>109</sup> Tomaras at [48].
- <sup>110</sup> Tomaras at [48].
- <sup>111</sup> Tomaras at [48].
- <sup>112</sup> Applicant at [11].
- <sup>113</sup> Applicant at [11].
- <sup>114</sup> Applicant at [11].
- <sup>115</sup> Applicant at [11].
- <sup>116</sup> Applicant at [11], Tomaras at [50].
- <sup>117</sup> Tomaras at [49].
- <sup>118</sup> Tomaras at [50].
- <sup>119</sup> Applicant at [11].
- <sup>120</sup> Tomaras at [51].
- <sup>121</sup> Tomaras at [51].
- <sup>122</sup> Tomaras at [51].
- <sup>123</sup> Hunter at [43].
- <sup>124</sup> Hunter at [43].
- <sup>125</sup> Hunter at Annexure E.
- <sup>126</sup> Hunter at Annexure E.
- <sup>127</sup> Applicant at [11].
- <sup>128</sup> Hunter at [44].
- <sup>129</sup> Hunter at [51].
- <sup>130</sup> Applicant at [11].
- <sup>131</sup> Applicant at [11].



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- <sup>132</sup> Hunter at [46], Tomaras at [52].
- <sup>133</sup> Hunter at [46], Tomaras at [52].
- <sup>134</sup> Hunter at [53].
- <sup>135</sup> Tomaras at [52].
- <sup>136</sup> Hunter at [11].
- <sup>137</sup> Hunter at [11], Tomaras at [54].
- <sup>138</sup> Hunter at [49].
- <sup>139</sup> Tomaras at [54].
- <sup>140</sup> Tomaras at [54].
- <sup>141</sup> Tomaras at [54].
- <sup>142</sup> Tomaras at [54].
- <sup>143</sup> Hunter at [48].
- <sup>144</sup> Hunter at [50].
- <sup>145</sup> Hunter at [50].
- <sup>146</sup> Hunter at [52].
- <sup>147</sup> Hunter at [52].
- <sup>148</sup> Hunter at [52].
- <sup>149</sup> Hunter at [53].
- <sup>150</sup> Hunter at [54].
- <sup>151</sup> Applicant at [11].
- <sup>152</sup> Applicant at [11].
- <sup>153</sup> Applicant at [11].
- <sup>154</sup> Hunter at [55] and [56], Tomaras at [57].
- <sup>155</sup> Tomaras at [57].
- <sup>156</sup> Tomaras at [57].
- <sup>157</sup> Tomaras at [58].
- <sup>158</sup> Tomaras at [59].
- <sup>159</sup> Hunter at [57].
- <sup>160</sup> Hunter at [57].
- <sup>161</sup> Tomaras at [56].
- <sup>162</sup> Tomaras at [61].
- <sup>163</sup> Hunter at [59].
- <sup>164</sup> Hunter at [60].
- <sup>165</sup> Hunter at [60].
- <sup>166</sup> Hunter at [61].
- <sup>167</sup> Hunter at [61].
- <sup>168</sup> Hunter at [63].
- <sup>169</sup> Hunter at [64].
- <sup>170</sup> Hunter at [64].
- <sup>171</sup> Hunter at [65], Annexure F.
- <sup>172</sup> Hunter at [66].
- <sup>173</sup> Hunter at [66].
- <sup>174</sup> Hunter at [67].
- <sup>175</sup> Hunter at [67].

- <sup>176</sup> Hunter at [68].
- <sup>177</sup> Hunter at [68].
- <sup>178</sup> Hunter at [70].
- <sup>179</sup> Applicant at [12].
- <sup>180</sup> Applicant at [12].
- <sup>181</sup> Applicant at [12].
- <sup>182</sup> Applicant at [13], Hunter at [70].
- <sup>183</sup> Applicant at [13].
- <sup>184</sup> Applicant at [13].
- <sup>185</sup> Applicant at [13].
- <sup>186</sup> Hunter at [70].
- <sup>187</sup> Hunter at [71].
- <sup>188</sup> Hunter at [75].
- <sup>189</sup> Hunter at [72] – [73].
- <sup>190</sup> Applicant at [14].
- <sup>191</sup> Tomaras at [62].
- <sup>192</sup> Tomaras at Annexure L.
- <sup>193</sup> Hunter at [76].
- <sup>194</sup> Hunter at [77].
- <sup>195</sup> Hunter at [78], Annexure H; Tomaras at [65].
- <sup>196</sup> Applicant at [16].
- <sup>197</sup> Applicant at [16].
- <sup>198</sup> Applicant at [17].
- <sup>199</sup> Applicant at [18].
- <sup>200</sup> Applicant at [19].
- <sup>201</sup> Applicant at Annexure F.
- <sup>202</sup> Applicant at Annexure F.
- <sup>203</sup> Hunter at Annexure I.
- <sup>204</sup> Hunter at [79].
- <sup>205</sup> Applicant at Annexure F.
- <sup>206</sup> Applicant at Annexure F.
- <sup>207</sup> Applicant at Annexure F.
- <sup>208</sup> Hunter at [80].
- <sup>209</sup> Tomaras at [67].
- <sup>210</sup> Tomaras at [67].
- <sup>211</sup> Applicant at [23], [4].
- <sup>212</sup> Applicant at [23].
- <sup>213</sup> Hunter at [81].
- <sup>214</sup> Hunter at [84].
- <sup>215</sup> Hunter at [85].
- <sup>216</sup> Tomaras at [68].
- <sup>217</sup> Tomaras at [69].
- <sup>218</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- <sup>219</sup> *Ibid.*

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- <sup>220</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- <sup>221</sup> Respondent’s outline of submissions at [9].
- <sup>222</sup> [\[2021\] FWCFB 533](#) at [42].
- <sup>223</sup> *Syed Rizvi v Salini Australia Pty Ltd* [\[2023\] FWC 3112](#); *A v The Commonwealth of Australia, represented by Centrelink* [\[2011\] FWA 3532](#); *Shane McGrath v Waco Kwikform Limited* [\[2021\] FWC 1414](#); *Quttrocchi v Monsanto Australia Limited* [\[2009\] FWA 882](#).
- <sup>224</sup> Hunter at [17].
- <sup>225</sup> Hunter at [18].
- <sup>226</sup> Tomaras at [12] – [13].
- <sup>227</sup> Tomaras at [18].
- <sup>228</sup> Hunter at [27].
- <sup>229</sup> Hunter at [27].
- <sup>230</sup> Hunter at [31].
- <sup>231</sup> Hunter at [33].
- <sup>232</sup> Tomaras at [32].
- <sup>233</sup> Applicant at [11], Tomaras at [50].
- <sup>234</sup> Hunter at Annexure E.
- <sup>235</sup> Applicant at [11].
- <sup>236</sup> Tomaras at [57].
- <sup>237</sup> Tomaras at [57].
- <sup>238</sup> Tomaras at [58].
- <sup>239</sup> Hunter at [67].
- <sup>240</sup> Hunter at [67].
- <sup>241</sup> Hunter at [72] – [73].
- <sup>242</sup> Hunter at Annexure E.
- <sup>243</sup> Hunter at Annexure F.
- <sup>244</sup> Respondent’s submissions at [23].
- <sup>245</sup> Respondent’s submissions at 27(a).
- <sup>246</sup> Hunter at [11], Tomaras at [54].
- <sup>247</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].
- <sup>248</sup> *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.
- <sup>249</sup> *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- <sup>250</sup> Applicant’s outline of submissions.
- <sup>251</sup> Respondent’s submissions at [33].
- <sup>252</sup> Respondent’s submissions at [34].
- <sup>253</sup> Respondent’s submissions at [35].
- <sup>254</sup> Respondent’s submissions at [36].
- <sup>255</sup> Hunter at [77].
- <sup>256</sup> Hunter at [78], Annexure H; Tomaras at [65].
- <sup>257</sup> Tomaras at [64].
- <sup>258</sup> Applicant at [16].
- <sup>259</sup> Applicant at [17].
- <sup>260</sup> Applicant at Annexure F.
- <sup>261</sup> Hunter at Annexure I.
- <sup>262</sup> Hunter at [79].

- <sup>263</sup> *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.
- <sup>264</sup> *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFCB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- <sup>265</sup> *RMIT v Asher* (2010) 194 IR 1, 14-15.
- <sup>266</sup> *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
- <sup>267</sup> Applicant at Annexure F.
- <sup>268</sup> Respondent's submissions at [38] – 41].
- <sup>269</sup> Tomaras at [64].
- <sup>270</sup> Hunter at Annexure I.
- <sup>271</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].
- <sup>272</sup> *Annetta v Ansett Australia* Print S6824 (AIRCFCB, Giudice J, Williams SDP, Cribb C, 7 June 2000), [16].
- <sup>273</sup> *McCarron v Commercial Facilities Management Pty Ltd t/a CFM Air Conditioning Pty Ltd* [\[2013\] FWC 3034](#), [32].
- <sup>274</sup> *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRCFCB, Ross VP, Williams SDP, Blair C, 21 August 2000), [43]-[44].
- <sup>275</sup> *Ibid.*
- <sup>276</sup> Applicant's outline of submissions.
- <sup>277</sup> Applicant's outline of submissions
- <sup>278</sup> Respondent's submissions at [47].
- <sup>279</sup> Respondent's submissions at [48].
- <sup>280</sup> Respondent's submissions at [48], Tomaras at [36].
- <sup>281</sup> Respondent's submissions at [48].
- <sup>282</sup> Respondent submissions at [48].
- <sup>283</sup> Respondent submissions at [48].
- <sup>284</sup> Respondent submissions at [48].
- <sup>285</sup> Respondent submissions at [49].
- <sup>286</sup> Respondent submissions at [50].
- <sup>287</sup> *Jetstar v Meetson-Lemkes* [\[2013\] FWCFCB 9075](#), [68].
- <sup>288</sup> Respondent's submissions at [54].
- <sup>289</sup> Respondent's submissions at [55].
- <sup>290</sup> Respondent's submissions at [55].
- <sup>291</sup> Respondent's submissions at [59].
- <sup>292</sup> Respondent's submissions at [60].
- <sup>293</sup> Respondent's submissions at [61].
- <sup>294</sup> Respondent's submissions at [61].
- <sup>295</sup> Respondent's submissions at [57], [36].
- <sup>296</sup> *Kioa v West* [1985] HCA 81, [11] (per Gibbs CJ).
- <sup>297</sup> *Ibid.*, [22] (per Wilson J).
- <sup>298</sup> *Telstra Corporation v Streeter* [2008] AIRCFB 15, [27].
- <sup>299</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]-[7].
- <sup>300</sup> *Taylor v C-Tech Laser Pty Ltd* [\[2013\] FWC 8732](#), [58].
- <sup>301</sup> *Seitz v Ironbay Pty Ltd t/a City Beach IGA* [\[2018\] FWCFCB 1341](#), [24].
- <sup>302</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFCB 7198](#), [9].
- <sup>303</sup> *Vennix v Mayfield Childcare Ltd* [\[2020\] FWCFCB 550](#), [20]; *Jeffrey v IBM Australia Ltd* [\[2015\] FWCFCB 4171](#), [5]-[7].

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<sup>304</sup> [\[2018\] FWC 679](#).

<sup>305</sup> Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000)

<sup>306</sup> [\[2017\] FWCFB 429](#) at [43].

<sup>307</sup> *He v Lewin* [2004] FCAFC 161, [58].

<sup>308</sup> Tomaras at [54].

<sup>309</sup> Hunter at [52].

<sup>310</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* [PR908053](#) (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

<sup>311</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.