[2024] FWC 703

The attached document replaces the document previously issued with the above code on 18 March 2024.

Removing duplicated paragraphs.

Associate to Vice President Asbury

19 March 2024

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Lainie Chait
v
The Church Of Ubuntu Inc
(U2021/9704)

VICE PRESIDENT ASBURY BRISBANE, 18 MARCH 2024

Application for an unfair dismissal remedy – whether the dismissal was harsh, unjust or unreasonable within the meaning in s. 387 of the Fair Work Act 2009.

Background

[1] This Decision concerns an application made by Ms Lainie Chait (Applicant) in respect of the termination of her employment by the Church of Ubuntu (the Church / Respondent). The application was made pursuant to s. 394 of the *Fair Work Act 2009* (the FW Act) and the Applicant seeks compensation for unfair dismissal. The Applicant's employment with the Church commenced on 6 October 2020 and her dismissal took effect on 11 October 2021.

[2] The Constitution of the Church[1] states that it is an incorporated Association pursuant to the *Associations Incorporation Act 2009* (NSW) and that the Church of Ubuntu is registered as a business name on the Australian Business Register. The objectives of the Association include, in Part 2 at 1.5: "*to combat illness and disadvantage in our communities through establishing self-managed community wellness clinics.*" Part 3 deals with membership of the Association and provides for written notification that a nomination for membership has been accepted and for a member to be requested to pay the sum payable under the Constitution as entrance fee and annual subscription, within 28 days of receipt by the nominee of the notification of approval of nomination for membership. Appended to the Constitution are membership forms for persons and companies which provide for the signatory to agree to be bound by the Constitution of the Association upon becoming a member.

[3] The Applicant's duties were related to the sale of cannabis products for medicinal purposes. The Applicant's role involved contacting clients and conducting consultation appointments to discuss health circumstances and the use of cannabis as part of a management plan. The Applicant's role also involved taking cannabis orders from clients and dispatching those orders, known as a "*care package*", through the Church's intranet.

[4] The Applicant states that she was dismissed because she received a vaccination against COVID-19 in circumstances where the Church asserted that receiving a COVID-19

"*inoculation*" was contrary to its Constitution and beliefs and that it would not employ anyone who had received any of the current or future "*planned injections purported to protect against the COVID-19 / Sars Cov 2 virus*". The Applicant contends that this was not a reasonable basis for dismissal, that her dismissal was unfair, and seeks compensation.

Procedural History

[5] The Applicant filed three versions of a Form F2 Application for an unfair dismissal remedy. The first and second versions were filed on 29 October 2021 within the time required in s. 394(2)(a). Both the first and second version of the application named Ms Karen Margaret Burge and/or Ubuntu Wellness Clinic (Clinic) as the Respondent. The second version also attached a letter of termination which was referred to, but was omitted, in the first version. The termination letter was on the letterhead of the Church and signed by Ms Burge as Vice President of the Church and Owner Operator/Manager of the Ubuntu Wellness Clinic. The third version, which named the Church of Ubuntu as the Respondent, was filed on 9 November 2021, 29 days from the asserted date of dismissal on 11 October 2021.

[6] In response to the application, the Church raised jurisdictional objections, contending that the Applicant was engaged as an independent contractor by the Clinic, which was said to be an entity separate from the Church. In a Decision issued on 29 August 2022[2] (Jurisdictional Decision) and the Reasons provided to the parties on 7 November 2022[3], I dismissed the jurisdictional objections and found that the Applicant was not an independent contractor, was an employee of the Church rather than the Clinic, and the Church dismissed the Applicant on 11 October 2021.

[7] On 18 September 2022, the Church lodged an appeal against the Jurisdictional Decision. In a Decision issued on 30 January 2023[4], a Full Bench of the Commission found no error in the Jurisdictional Decision or the finding that the Applicant was an employee of the Church. The Full Bench granted permission to appeal the Jurisdictional Decision finding that before determining the Applicant was an employee of the Church, the matter of whether the application was filed within the time required in s. 394(2) of the Act should have been considered. That matter was referred to me to decide whether the application was made within the required time and if not, whether a further period should be granted for the application to be made.

[8] In a Decision[5] issued on 18 September 2023 (the Extension of Time Decision), I found that the application was made on 29 October 2021 within the time required by s. 394(2)(a) and the two later versions of the Form F2 filed by the Applicant were amendments to the first application. In the alternative, I indicated that I was satisfied, having considered the matters in s. 394(3), that there were exceptional circumstances that justified the grant of a further period until 9 November 2021 for the Applicant to make her application. An Order[6] to that effect was issued with the Decision on 18 September 2023, for the avoidance of doubt.

[9] On 20 September 2023, Directions were issued for a hearing in relation to the merits of the application. The Applicant was directed to file and serve, by 4 October 2023, an outline of submissions and witness evidence in relation to whether the dismissal was unfair within the meaning of s. 387 of the FW Act and the issue of remedy if the dismissal was found to be unfair. The Church was provided with a 2-week period, upon receiving the material from the Applicant, to file any material in response by 18 October 2023. On 20 September 2023, Pastor Paul Burton

corresponded with the Commission on behalf of the Church, indicating that the Church intended to lodge an appeal against the Extension of Time Decision and Order, and requesting that the Directions issued on 20 September 2023 be vacated until the conclusion of any appeal to be lodged by the Church.

[10] On 21 September 2023, I caused correspondence to be sent informing the parties that the request for vacating the Directions was refused on the basis that the Church had not lodged a Notice of Appeal and the Applicant did not seek to have the Directions vacated or otherwise indicate that she would be unable to comply with them in circumstances where the Directions required the Applicant to put on her material prior to the Church being required to provide its responsive material by 18 October 2023. On 3 October 2023, the Applicant filed an outline of submissions and witness evidence as directed. On 6 October 2023, the Church lodged an appeal under s. 604 of the FW Act against the Extension of Time Decision and Order and sought a stay of that Decision and Order. In addition, Pastor Burton sent an email to my Chambers attaching a Form F7 Notice of Appeal and stating:

> "Dear Deputy President Asbury and Parties please find attached our appeal of your decision on the 18th Sept 2023 noting you yourself can have the matter set aside and further noting that other than either yourself, or the appeal bench setting the matter aside, the appellant the Church of Ubuntu has no further legal requirement to engage with the fair work commission in this matter as the order is void *ab initio*".

[11] On 6 October 2023, Mr Mark Swivel, legal representative for the Applicant, corresponded with the Commission in response to Pastor Burton's email. Relevantly, Mr Swivel requested that as the Church seemed to be disengaging and did not intend to file evidence and submissions, that the matter be listed for hearing at the earliest opportunity.

[12] On the same day, Pastor Burton replied to Mr Swivel's email stating that the Church was not disengaging but had file an appeal and requested a stay of proceedings until "*the matter is set aside*" and further indicting that if I chose to proceed, the Church would not be engaging other than for the matter to be set aside because it is void *ab initio*.

[13] After receiving these communications, I caused correspondence to be sent to the parties indicating that I intended to await the outcome of the stay application made by the Church in its Notice of Appeal before proceeding with the merits hearing, but that unless the stay was granted, the Directions remained in effect and were not vacated so the matter could proceed as listed, if the appeal did not succeed.

[14] In a Decision[7] issued on 11 October 2023, Deputy President Millhouse refused the application for a stay, stating that the outcome as to whether permission would be granted would be known within two weeks and that ongoing compliance with the Directions would have the benefit of ensuring that the substantive unfair dismissal application would be ready, or substantially ready, for hearing if permission to appeal was refused.

[15] On 9 November 2023, a differently constituted Full Bench issued a Decision[8] finding that the grounds of appeal advanced by the Church did not disclose any arguable error in the Extension of Time Decision. Permission to appeal against the Extension of Time Decision and Order was refused. In its Decision, the Full Bench found that the contention advanced by the Church that the Jurisdictional Decision and the Extension of Time Decision were "*void ab initio*" and need not be "*obeyed*"[9], rested upon a mistaken understanding of the Commission's

jurisdiction and other logical fallacies[10].

[16] After the Full Bench released its Decision on 9 November 2023, Pastor Burton sent an email on behalf of the Church to the chambers of the Presiding Member of the Full Bench and copied in my chambers to the correspondence. In that email, Pastor Burton argued that the Full Bench Decision issued on 9 November 2023 was also "*void*" and further stated that the Church considers this matter is at an end and "*will not be entertaining these charades any further and we will deal with this matter if and when it comes before a competent court of law*."

Merits hearing

[17] On 14 November 2023, correspondence was sent to the parties, and they were informed of my intention to list the Applicant's unfair dismissal application for a hearing to determine its merits and the remedy that should be granted if the dismissal was found to be unfair. I proposed to conduct the hearing at 10:00 am on Wednesday, 22 November 2023 by video link using Microsoft Teams and requested that the parties confirm their availability for a hearing at the proposed date and time. The correspondence to the Church also stated:

> "It is noted that the Church of Ubuntu (the Respondent) did not file material that complies with the Vice President's directions issued on 20 September 2023. It has also indicated in an email of 9 November 2023 that it does not intend to take part in this matter any further.
>
> The Respondent should note that notwithstanding its failure to comply with Directions for filing material, it has the right to cross-examine the Applicant to test her evidence. The hearing is an opportunity for the Respondent to exercise this right, but it is a matter for the Respondent whether it chooses to avail itself of that opportunity.
>
> If the Respondent does not make itself available for the hearing on 22 November 2023, the hearing will proceed in the Respondent's absence, the evidence of the Applicant will be uncontested, and a decision adverse to the interest of the Respondent may be made without further notice."

[18] On 14 November 2023, Mr Swivel confirmed the availability of the Applicant for a hearing on 22 November 2023. On the same day, Pastor Burton sent an email to my chambers attaching a copy of an outline of submissions that were filed in the appeal against the Extension of Time Decision. The email from Pastor Burton stated:

> "As you are aware The Church of Ubuntu will not be appearing in the Fair Work Commission matter U2021/9704 Chait v Church of Ubuntu on Wednesday the 22nd of November as this matter was and is "void ab initio".
>
> As a matter of respect and for completeness their position is summarised in the document they provided on the 16th October 2023 (attached) that they will also rely on if and/or when this matter is raised before a competent court of law.
>
> The Church believes you will find in Ms Chait's favour irrespective of all the facts, the evidence, and the TRUTH, and we forgive you all for this as that is ultimately a matter between each of you and the nameless formless imperishable absolute that we call Almighty God, whom created all of you.
>
> The Church and the Wellness Clinic wish you all well and note that the Ubuntu Wellness Clinic has a very affordable intake process (link below) and that they may be able to assist people struggling with the now well known and well documented side effects to the COVID-19 inoculation, in the worlds largest ever untested medical experiment forced upon millions and millions of innocent people globally and actively encouraged by governments all over the world whom are largely controlled by giant multi

national corporations and 'pharmakeia'.

We pray for immediate retribution in this lifetime and for salvation for all who are suffering and in need."

[19] A hearing was conducted on 22 November 2023 by video link using Microsoft Teams, in accordance with a notice of listing issued to the parties on 16 November 2023. At the hearing, the Applicant was represented by Mr Swivel. As it had foreshadowed, the Church did not attend the hearing and the hearing proceeded in its absence. In support of her case, the Applicant tendered into evidence two affidavits sworn by her on 12 April 2022[11] and 3 October 2023[12]. In addition, the Applicant tendered an affidavit of Ms Jessica Mountford[13] who stated that she was a former employee of the Church. The Applicant's affidavit of 12 April 2022 and Ms Mountford's affidavit were also tendered into evidence at the hearing of the jurisdictional objections, and both were cross-examined by Pastor Burton at that hearing. Mr Swivel indicated that for the purpose of this hearing the Applicant continues to rely on the evidentiary case that she had advanced in relation to the jurisdictional objections.

[20] Although the Church did not attend the merits hearing, sworn evidence was given at an earlier jurisdictional hearing by Mr Barry Futter (President of the Church) and Ms Karen Burge (Vice President of the Church and Owner/Operator of the Clinic) on behalf of the Church. The evidence was given by way of Affidavit and orally. Both Mr Futter and Ms Burge were crossed-examined by Mr Swivel at that hearing. Insofar as their evidence relates to the issue of the merits of the application, I have had regard to that evidence. I have also had regard to the submissions made by the Church in the jurisdictional hearing.

Initial matters

[21] Before considering the merits of the application, s. 396 of the FW Act requires the Commission to decide the following matters:

(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.

[22] The matters in (a) and (b) were determined in the Jurisdictional Decision and the Extension of Time Decision. I am satisfied that the application was made within the period required in s. 394(2) and the Applicant was a person protected from unfair dismissal. The dismissal was not on the grounds of redundancy and was therefore not a case of genuine redundancy.

[23] The Church did not provide any material to assist me to decide whether it was a small business employer as defined in s. 23 of the FW Act, at the time the Applicant was dismissed. The Applicant referred in her evidence to the Church having affiliates which are employers and maintained that the Church was not a small business. The Applicant was unable to state how many employees the Church had. Through no fault of the Applicant, the state of the evidence is such that I am unable to be satisfied that the Church was not a small business employer. This is an antecedent finding that must be made for the purpose of deciding whether the dismissal was consistent with the Small Business Fair Dismissal Code (Code), which is a matter I must consider as required by s. 396(c). Given the Church's attitude to engaging with the Commission,

there is no utility giving it a further opportunity to provide evidence or submissions. I have decided in the circumstances to consider whether the Applicant's dismissal was consistent with the Code as required by s. 396(c). I commence by considering the evidence in the merits hearing and the jurisdictional hearing.

Evidence

[24] The Applicant stated that her employment was terminated on 11 October 2021 and that she first learned of her dismissal through a third party, Ms Jessica Mountford who was associated with the Church. Ms Mountford said in her evidence that she was vaccinated against COVID-19 on 22 September 2021 and seven days later, took time off from her duties with the Church due to rare vaccination symptoms, which resolved. According to Ms Mountford, a week later, Mr Futter advised via the Church Facebook chat that he had become aware that the Applicant had been vaccinated and said in relation to persons who had been vaccinated that: "*I don't know what you are all going to do, but you can't work for us.*" Ms Mountford said that she was shocked, and that this decision was not discussed by the Executive Committee members of the Church before it was made. Ms Mountford also said that she advised the Applicant of this statement knowing that she was not in the Church Facebook chat group. Ms Mountford's evidence places the date the Facebook Messenger audio statement was made, at or around the time the Applicant was informed of her dismissal.

[25] An audio recording of the statement made by Mr Futter was tendered and played to Mr Futter during cross-examination at the hearing in relation to the jurisdictional objection. The text of that recording is in the following terms:

> "I thought I made it quite clear recently, guys, in a discussion, a verbal discussion on your message from me that I wanted people, I needed people to tell me if they want to get vaccinated. Hmm… Jessica was the one that had done it and brought up the subject. I've just been told that Lainie has been vaccinated. Ah… nobody can work for us if he's vaccinated. It's that simple. So I don't know how you guys are gonna work that out but nobody can work for the Church of Ubuntu and it…what it stands for that has been vaccinated. See you guys later."

[26] Mr Futter did not dispute that he was the person speaking during the recording. After receiving the recording, the Applicant attempted to call Mr Futter by telephone to discuss this matter, Mr Futter replied by text message stating: "*Hey, if this is about you getting jabbed. I wish well. Talking to you won't assist atm*" (sic) and provided the Applicant with that same voice recording. The text message is undated, and the Applicant does not give evidence about when she received it. I assume that the text message was received by the Applicant at some point prior to 11 October when the Applicant was dismissed.

[27] When Mr Futter was asked about the recording in cross-examination, he said:

> "Absolutely. I gave that recording. I put the message out at the time. I'm quite shocked that people would – maybe we should hear the recording from a week before, but, anyway, that people would go ahead and do this. When I refer to her as working for the Church of Ubuntu, she's a member of the Church of Ubuntu and anybody that's a member of the Church of Ubuntu is not to be inoculated was my intention, okay? That was my meaning. The fact that she was basically disregarding my request, as well, was part of the – you know, it's probably the incorrect wording on the day, but the fact that she was a member of what it is we do here and what we represent is more important than the fact that she was paid by the clinic, not by me."[14]

[28] The proposition was also put to Mr Futter that in the moment he made the recording, Mr Futter assumed responsibility for the termination of the Applicant's contract. Mr Futter's response was as follows:

> "My intention with that message was to let people know that they wouldn't be able to function if they were to be jabbed, okay? Okay, there's no blueprint around this thing. It has never been done before, so if I have not totally correctly by legal terms proceeded exactly the way I was supposed to so I can exactly terminate her in the exact way I'm supposed to do it when this has never been addressed before - and we're all walking on rocky ground except for good scripture and follow that, then - I'm not going to apologise. I'm just going to admit that I probably would not have done things absolutely – cross every dot – dot every 'i' and cross every 't' correctly, but my intention was to let the staff and people who were associated with us to know that this is our stance.
>
> Thank you, Mr Futter?---I will add to that that the understanding of the people not then functioning and working for the church – in Lainie's case there was an ability for her to work with an associate with us who she had been training with for some time and she even turned that down. I mean, at the end of the day we didn't actually kick her out into the street. There was something that was there for her and she would have been moving into that organisation, anyway, so – you know, this all very weird, anyway.[15]"

[29] Mr Futter was also cross-examined about his assertion that the Applicant was a full member of the Church. Mr Futter said that as far as he was concerned the Applicant was a member of the Church. When asked to clarify how it was that the Applicant became a member, Mr Futter said that it is part of the Church's Constitution that people who work for the Church understand: "*how we operate and what we do, and our belief structures*".[16] In response to the proposition that the Constitution of the Church requires that a member of the Church must apply or consent to becoming a member, Mr Futter said that it was his belief that the Applicant was a member at the time and he did not know that the Applicant did not want to be a member of the Church.[17] Mr Futter then had the following exchange with Mr Swivel:

> "Okay, well, I'll give you one last opportunity to explain the membership application process to the Commission bearing in mind that, as I say, a member of an organisation needs to apply to become a member as an ordinary course of business? --- I don't fully agree with a person having to apply. There is a set of circumstances that we have that are very different to most people's and they are very out there, and they're very controversial. Everybody that wishes to be associated with us should understand what it is they're doing and what is we stand for. Therefore, if they were to be – you know, if they were going to go and play rugby for New South Wales but they were sitting on the sideline deciding whether they were going to do something else, then they're not actually – they shouldn't actually be there, so they either commit to the situation that the body of people were doing or they just become a – you know, not taking on the ethics and the morals and the principles by which we do what we do. The red tape around this can be argued until kingdom come, on the legalities of wording and who and whatever, but when we are such an out there organisation, anybody who has a position with us should actually understand that they're part of that. I mean, that's 'lay down misère' in my concern – in my understanding. It's not red tape stuff, it's just the moral ethics in your head and your conscience."[18]

[30] In response to the further proposition that the statement he made on the group chat was intended to end the working relationship with the Applicant, Mr Futter said:

> "I will bring to the court's attention a message a week before on that same chat when Jessica had let us know that she had the vaccination and I put it very clearly that I wanted everybody in the organisation to please – and an organisation meaning church members and also subcontractors for the Ubuntu Wellness Clinic – have a chat with me if they wanted to get vaccinated. Lainie went straight behind my back. She said nothing, didn't ask me, didn't talk to me, didn't do anything and proceeded to ask some of my associates in the committee to not tell me. Come on, this is an up-front, truthful organisation that has morals, ethics and standards and within a few days of me just putting a simple request, 'Just have a chat

> to me, please,' she goes behind my back and does all the stuff. I'm sorry, that doesn't wash with me and, yes, that message that you have put up then might be a red tape on committing me to actual wording and whatever that I've said in there, but at the end of the day I think I've made myself clear on the subject right now."[19]

[31] The Applicant was informed that her employment was terminated by letter sent to her in October 2022. The undated letter, set out on the letterhead of the Church, was in the following terms:

> "To whom it may concern
>
> Lainie Chait has been a subcontractor with the Ubuntu Wellness Clinic Newcastle since October 2020.
>
> As with all of our consultant subcontractors she was also recognised as a full member of the Church of Ubuntu (COU) Inc for the same period of time.
>
> Lainie has been and continues to be a highly valued and respected subcontractor.
>
> Her dedication to clients and her support and assistance have been exemplary, her knowledge and skills in holistic health and wellbeing have been and continue to be highly appreciated by all those who she has and no doubt will continue to assist.
>
> As of Monday the 11th of October 2021, due to external contract frustration in regards to the NSW State Governments enforced medical apartheid and what we consider a highly disproportionate response to the Sars Cov 2 virus, the Church of Ubuntu Inc has had to make some significant changes in keeping with our constitution and founding moral and ethical principles.
>
> As a consequence of this and the outcome of an urgent Committee Meeting on the 12th of October 2021 The Church Of Ubuntu has taken a position that no committee members or full members can be accepted if they consciously chose to, and then complete injections, with any of the current or future planned injections purported to protect from the COVID-19/Sars Cov 2 virus.
>
> The Church Constitution Philosophy/Vision Statement at 1(3)(4) states:
>
> *"(4) We aim to peacefully contest the manipulation of creation for greed or selfish intent, believing this to be a violation of Sacred Lore. To us, all of Creation in its natural form is Sacred. "The Earth Is Therefore I Am" (Genesis 1:29 - Then God said, "I give you every seed-bearing plant on the face of the whole earth and every tree that has fruit with seed in it. They will be yours for food.")"*
>
> It is the position of the COU that to receive the COVID-19/Sars Cov 2 injection consciously and deliberately with intent is in contradiction with our Constitution and contrary to our position on what is required of us by our Lord God and Creator.
>
> As a consequence Lainie can no longer be a full member of the COU. She can however in keeping with the Ubuntu Philosophy still remain as an associate member if she chooses.
>
> The COU is currently making arrangements to assist Lainie by offering her alternative work arrangements as a subcontractor through our affiliates.
>
> If you would require any further information please feel free to contact me any reasonable time on [mobile telephone number] or by email at [email address].[20] (emphasis added)

[32] Mr Futter made a sworn Affidavit in the jurisdictional proceedings setting out the reasons for the Church's opposition to vaccination against COVID – 19 which included the following:

> "Around October 2021 the NSW State Government introduced further public health directions that created a type of 'medical apartheid', whereby individuals who were not inoculated against COVID-19 were treated not unlike the early segregation and treatment of the Jews before the Second World War. Un-inoculated people were refused entry into many places, they were refused access to public transport, courts, churches, pubs and clubs, most public buildings, shops, and even in some cases, health care and medical facilities. In my view these mandates were and are a highly disproportionate response and more importantly contrary to section 51 23(a) of the Australian Constitution, as they use force and coercion to create division and enforce a type of medical civil conscription, this is unlawful and illegal.
>
> It was only through the government's decision above in October 2021 that The Church and The Wellness Clinic were both forced into a position of setting clearly defined boundaries around their inoculation policies.
>
> The government introduced mandates that effectively closed or at the very least, seriously disrupted many Churches and many small to medium businesses for around two years.
>
> The government's response to Sars Cov 2 was highly disproportionate in the circumstances and the governments both state and federal are in my view in breach of section 44(1) of The Aust Constitution as their allegiance and obedience is to foreign powers.
>
> It appears that the State and Territory governments have introduced unconstitutional mandates without any national referendum and they have, as a consequence, removed many constitutional rights from the people, this is unlawful." (emphasis added)

[33] Mr Futter's affidavit contained the following statement in relation to the position of the Church and the Clinic with respect to the hiring of contractors and volunteers:

> "Both The Church and Wellness Clinic do not believe they should hire anyone as either a subcontractor or a volunteer who has received the COVID-19 inoculations because we believe it is contrary to God's teachings, it is evil and demonic in its construct, a small number of people profit enormously from it, and more and more indisputable evidence is coming to light that it harms people.
>
> With so many reports of adverse reactions including death from the COVID-19 inoculations we cannot take the risk of hiring anyone (either through the Church or The Wellness Clinic) who has knowingly received the inoculation, we mean no disrespect, but we do not know how it may impact them and their health and possibly even the health of others".[21]

[34] In his oral evidence in the jurisdictional hearing, Mr Futter confirmed that the Church's opposition to the COVID – 19 vaccination is based on its views about the restrictions placed on unvaccinated persons by Government and other entities and a belief about the nature of the vaccination itself. In this regard, the Church maintains that the vaccination is not effective as such, has significant health implications and is foreign to the human body and molecular structure. This view is not held by the Church in relation to other vaccinations commonly received by Australians. In response to a question about where the Constitution of the Church or its teachings or rules, mention vaccination, Mr Futter said that the COVID-19 injections are not vaccinations because "*they do not stop you from getting something*". While the Church was not against vaccinations of the kind that have been going on for decades, this was said to be a different situation.[22]

[35] Ms Burge was also a co-founder of the Church and had served in this volunteer position for some seven years. Ms Burge shared the views expressed by Mr Futter about COVID-19 vaccinations and essentially contended that they are not effective, are poison and that anyone who condones them and uses any kind of force or coercion to make individuals receive them, is engaged in criminal activities and should be treated as such.

[36] Ms Burge said that she was informed in September 2021 that Ms Mountford had been vaccinated against COVID – 19. Following this, all contractors and volunteers were informed of the Church's position that its full members must not be inoculated, and that the Clinic would also only engage unvaccinated volunteers and contractors. Ms Burge said that this was communicated by Mr Futter to all contractors and volunteers via a private Ubuntu messenger chat group. Ms Burge stated that as of October 2021, all full members of the Church were not inoculated and that all contractors and volunteers of the Clinic were full members of the Church and thus not inoculated.

[37] Ms Burge said that after becoming aware of Ms Mountford's vaccination status, a discussion was held between Ms Mountford, the Clinic and the Church. Ms Mountford was offered the opportunity to "*subcontract with our affiliate theportal.life*", an opportunity that was also later offered to the Applicant. Ms Burge stated that the Applicant declined to become a contractor with theportal.life but was nevertheless paid 2 weeks of subcontracting.

[38] According to Ms Burge, the Applicant was fully aware of the position of the Church and the Clinic on vaccination against COVID – 19, but the Applicant chose to be vaccinated. Ms Burge said that notwithstanding that the Applicant was engaged as a contractor, she was concerned that the Applicant's vaccination may expose her to the risk of liability were the Applicant to get very sick or die while Ms Burge hired her. Ms Burge also said she could not risk having vaccinated contractors because there could be adverse health issues that could have negative ramifications for her clients.

[39] The Applicant maintained that prior to receiving Mr Futter's voice recording and the above letter, she had never been told by anyone associated with the Church or the Clinic that being unvaccinated against COVID – 19 was a condition of her employment. The Applicant maintained that the Church's Constitution is silent on the issue of vaccination and that in any event, she was never a member of the Church and was never asked to accept the Church's Constitution. The Applicant conceded that she had heard that "*there was an issue*" about COVID-19 vaccination at the senior level of the Church about four weeks before her dismissal but maintained that no one from the Church spoke to her about the Church's position or beliefs in relation to COVID-19 vaccination and that she was not permitted to be vaccinated against COVID-19 or that she could no longer work for the Church if she became vaccinated.

[40] The Applicant pointed to a comment reported in the Sydney Morning Herald as being made by a spokesperson for the Church after her dismissal, stating that the Church was not "*anti-vax*" but "*pro-choice*". The Applicant stated that if that were true, she could not understand why her choice to be vaccinated was not respected or why she could no longer work for the Church.[23]

[41] In relation the Applicant's assertion that she was not a member of the Church, the Applicant pointed to the Constitution of the Church appended to her first witness statement in the jurisdictional hearing,[24] which provides that persons other than those who are nominated by the Church for registration under the *Associations Incorporation Act 2009* (NSW), may become members of the Church upon being nominated by an existing member. The Constitution prescribes a membership form which provides for nominations. The Applicant said that she has never joined the Church.

[42] The Applicant said that she decided to become vaccinated against COVID-19 because it was in the interests of her health, and she wanted to travel within New South Wales. In response to evidence from Mr Futter about the risk she may have posed to others, the Applicant said that she worked remotely and sold products online and had no physical contact with clients.

[43] The Applicant did not seek reinstatement on the basis that it was not practicable given the views and attitude of the Church. In response to the submission of the Church that it had attempted to find work for her with an affiliated organisation, the Applicant said that she did not want to work for any organisation affiliated with the Church because of the way she had been treated and her view that she could be dismissed again without valid reason.

[44] The Applicant also said that she did not want to make money for the Church, through working for theportal.life, in circumstances where she had been disrespected. In this regard, the Applicant said that theportal.life is a business of the Church. In re-examination, the Applicant clarified her evidence on this point and said that while theportal.life is a completely separate organisation from the Clinic and the Church, she would have had to pay to be part of theportal.life and would have been using products held and made by the Church.

[45] In addition, the Applicant said that she was unable to find other employment for a period of approximately 12 months following her dismissal in October 2021 and was on Jobseeker subsidies during that time while dealing with issues relating to her mental health. She found employment in October 2022 and has been in employment since. In relation to an amount of $8,000 she sought in compensation which is equivalent to approximately 12 weeks' pay, the Applicant confirmed that the sum of $8,000 was calculated on the basis of her daily rate of $220 working three days, and sometimes four days, per week. The Applicant confirmed that the sum of $8,000 did not include components of any unpaid superannuation or leave entitlements.

Submissions

[46] The Applicant submitted that she was dismissed by the Church for no other reason than because she received a vaccination against COVID-19 and the Church did not believe in vaccination. The Applicant said this could not constitute a valid reason for dismissal as it was not sound, defensible or well-founded, but rather, it was capricious, fanciful and prejudiced[25]. The evidence of Mr Futter and the purported letter of termination demonstrate that the Church took the position that vaccination against COVID-19 is not consistent with its beliefs, rules or Constitution and this position was described by the Applicant as "*political opposition*" to COVID-19 vaccination. The Applicant submitted that the decision to terminate her employment was announced in a voice recording made by Mr Futter and shared with other workers at the Church and she was summarily dismissed through this recording.

[47] In addition, the Applicant submitted that the dismissal was "*harsh, unjust or unreasonable*" for several reasons. Firstly, she stated that it is extraordinary that an employer could punish an employee for following a public policy which was followed by all public health authorities and reflected in the public health orders in New South Wales and other jurisdictions. Vaccination policies were prevalent in workplaces across Australia and regarded as a good workplace health and safety practice, with many workplaces privately mandating vaccination even if not required by law. Secondly, exercising a choice to be vaccinated against COVID-19

cannot be a reasonable ground for terminating an employment contract. The Applicant stated that the suggestion that an employer could retain the right to punish an employee for following public health policy was "*unarguable*". It was submitted that an employer does not retain the right in the context of an employment relationship to tell an employee not to be vaccinated.

[48] Further, the Applicant submitted that without criticising the Church's policies or beliefs, the unreasonableness of the employer's actions may be tested in this way – how is it that the Applicant breached any duty of confidence or fidelity to the employer by merely becoming vaccinated? The Applicant said that it could not be argued that she breached any duty or fidelity in that context. Further, the Applicant submitted that the dismissal was unjust or unreasonable because vaccination is not mentioned in the Constitution of the Church and the basis for its religious opposition to vaccination has not been made clear nor was it ever discussed with the Applicant prior to the dismissal. The unreasonableness of the dismissal was said to be compounded by the public statements made by the Church in the media or to its workers that the Church is "*pro-choice*", yet after the choice was exercised by the Applicant, the Church chose to terminate her employment.

[49] The Applicant submitted that the dismissal was also harsh because she was left without a job after her dismissal, and the harshness was compounded in circumstances where the Applicant had been committed to the values of the Church and its efforts to provide alternative health care. In oral submissions, Mr Swivel said that while the Church's position was that COVID-19 vaccination was against its beliefs, those beliefs had never been clearly articulated to the Applicant and had no bearing on the role performed by the Applicant.

[50] In response to the Church's argument in the jurisdictional hearing that there were risks arising from the physical contacts between a vaccinated person and its clients, the Applicant submitted that her job was performed remotely without any physical contact with clients or customers. It was also relevant that when the Applicant was dismissed in October 2021, it was a period of widespread discussions in the community around public health responses to COVID-19, vaccination and the exclusion of unvaccinated people from public places, but the Church chose not to engage in communication with the Applicant around those issues prior to dismissing the Applicant.

[51] In summary, the Applicant said that there was no valid reason for the dismissal related to her capacity or conduct, she was not notified of the position of the Church with respect to COVID-19 vaccination prior to her dismissal, and she was given no opportunity to respond to that position before the dismissal was effected. In all the circumstances, the Applicant said that the Commission would find that there were no reasonable grounds for the employer to believe that the Applicant had done anything that justified immediate dismissal.

[52] As to remedy, the Applicant considers reinstatement to be inappropriate as her relationship with the Church has broken down. Instead, she seeks compensation for loss arising from being unfairly dismissed. The amount sought is $8,000 based on a daily rate of $220, calculated from around September 2021, which is the equivalent of slightly more than 12 weeks' pay before tax. In relation to an amount of $4,000 said to be unpaid superannuation sought in her Form F2 Application, the Applicant stated that this claim is withdrawn.

[53] With respect to compensation in s. 392 of the FW Act, the Applicant submitted that even taking into account the fact that the Applicant was only employed for twelve months, this is an appropriate case for a "*mid-range order of compensation*" for an amount equivalent to just over 12 weeks' pay, taking into consideration the following circumstances: the egregiousness of the employer's conduct, the amount sought is reflective of what the Applicant would have expected to earn in approximately 3 months with a reasonable expectation that her employment would continue into the future; the compensation being sought is not a large sum of money and there is no suggestion that it would affect the viability of the Church; and the Applicant had been unable to find work after her dismissal.

[54] Mr Swivel also stated that given the approach taken by the Church in these proceedings and the prospect of further enforcement actions with respect to any compensation order of the Commission, the Applicant has not sought to revise the amount and does not seek any amount greater than 12 weeks' pay.

The Church's religious belief

[55] In addition to political views about the legality of Government vaccination mandates, Mr Futter on behalf of the Church indicated that the Applicant's dismissal was based on his views about following "*good Scripture*" and a belief that vaccination is contrary to God's teachings and is "*evil and demonic in its construct*". The rationale for this belief was not explained in the evidence of Mr Futter or Ms Burge. The Church's Constitution makes no mention of its opposition to vaccination and members of the Church have received vaccinations other than for COVID-19. It is also apparent from the evidence of Mr Futter that the opposition of the Church to vaccination crystallised in October 2021 in response to several issues including mandates imposed by the NSW Government and that a small number of people were profiting from vaccinations. The Church also believed that there was evidence coming to light that vaccination harms people.

[56] In *Hozack v Church of Jesus Christ of the Latter-Day Saints*[26] Madgwick J considered a case involving the alleged unlawful termination of a receptionist employed by a Church. The Applicant in that case was a member of the Church and her contract of employment provided that she remain "*Temple-worthy*" by obtaining an annual "*Temple recommend*" during her employment. The Applicant's employment was terminated on the ground that she had breached an express condition of her contract of employment by losing her "*Temple-worthiness*" as a result of engaging in an adulterous relationship while she was separated from her husband but was not divorced and subsequently demonstrating an unrepentant attitude towards her conduct.

[57] The question Madgwick J was required to determine was whether the Applicant was terminated for a reason prohibited by then s. 170DF(1)(f) of the former *Workplace Relations Act 1996* and if so, whether an exemption in s. 170DF(3) applied. The relevant provisions were in the following terms:

> "(1) An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:
>
> ...
>
> (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, *religion*, political opinion, national extraction or social origin.
>
> …

> (3) Subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the employer terminates the employment in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed." (Emphasis added.)

[58] His Honour noted that the Respondent in the case conceded, indeed asserted, that the Applicant's employment was terminated for the reason of religion and that it would have acted in breach of s. 170DF(1)(f) but for the effect of s. 170DF(3), and that the latter provision concluded the case in the Church's favour. His Honour observed that those subsections deal with conflicting values: on the one hand, an individual's right to employment secure from termination on grounds which offend notions of human rights; and on the other, effective freedom of religious belief and practice.[27] Madgwick J accepted that to satisfy the conditions of the exemption in s. 170DF(3), the Church need only demonstrate that the decision to terminate the Applicant's employment was made in good faith for the purpose of avoiding injury to the religious susceptibilities of its adherents, not that any were actually injured in such susceptibilities. His Honour went on to state:

> "It is however necessary that avoidance of *injury* to *religious* susceptibilities be the Church's object. Action aimed at the avoidance of mere offence to the presumed social mores of church members, or of alarm to a faction not clearly amounting to 'injury''injury' to religious susceptibilities, would not suffice. It is not, of course, the Court's role, nor should it be, to pass upon the basis or the nature of the faith practised by or within a church, or to comment on the cogency of a church's doctrines. In *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 174, Wilson and Deane JJ said that the question of whether a belief can be characterised as 'religious' should be '…approached and determined as one of arid characterisation not involving any element of assessment of the utility, the intellectual quality, or the essential 'truth' or 'worth' of tenets of the claimed religion". As Mason ACJ and Brennan J put it at 134, "the State has no prophetic role in relation to religious belief". Such an approach, in my opinion, stems not only from a court's obligation to give full effect to the plain language employed by Parliament, it also embodies the full meaning of respect for religious observance: if a court (part of the State) can choose which religions, or which beliefs of a religion, are entitled to respect under a statute such as the present, the road to Salem or, at least, to serious communal disharmony, may be a short one. It is to be observed also that, if there be an institution conducted in accordance with the tenets of what, as a matter of "arid characterisation", could be called a "creed" and which opposed established religions, its adherents too would be entitled to the same broad protection."[28]

[59] The former *Workplace relations Act* also provided at s. 170DE(1) that:

> "An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected to the employee's capacity or conduct or based on the operational requirements of the undertaking."

[60] Madgwick J concluded that the exemption in s. 170DF(3) did not completely override the requirement in s. 170DE(1), determining the interaction between the provisions as follows:

> "In a nutshell, what s 170DF(3) does, in relation to s 170DE(1), is to preserve the capacity of a religious institution (which otherwise it would have lost under s 170DF(1)) to show, if it can, that a religious etc reason for terminating an employee's services may be a valid reason based on the operational requirements of the undertaking. Thus understood, there is no conflict between ss 170DF(3) and 170DE(1). Contrary to the Church's submission, therefore, no question of a general statutory provision giving way to a particular one, nor of avoidance of an absurd or embarrassing result, arises.
>
> I conclude that the Church must prove that it had a valid reason in accordance with s 170DE(1) to terminate Ms Hozack's employment."[29]

[61] The Church in that matter argued that rather than the Applicant's conduct, the dismissal was related to the Applicant's capacity to work as a result of losing her "*Temple recommend*" and her non-membership of the Church meant that she could not fulfil its operational requirements. In relation to this consideration, Madgwick J said:

> "It will be observed that my conclusion is that, even though the Church based its reason for the termination on the ground of "religion" within s 170DF(1), the task of the Court is to determine whether such a reason is a valid one based on the operational requirements of the undertaking, etc in accordance with s 170DE(1). There is no inconsistency here with my recognition, based upon constitutional doctrine, that it is inappropriate for the Court to enter upon a prophetic or critical role in relation to any religious doctrine of the Church or its adherents. The point may be illustrated in this way. Section 170DF(1)(f) refers to a number of matters other than religion. If a church argued, for example, that its reason for terminating an employee's employment had been that the employee was one-legged (cf 'physical disability' in s 170DF(1)(f)), the Court would nevertheless investigate whether that was a valid reason, based on the operational requirements of the undertaking, establishment or service (s 170DE(1)). The Court need not question the worth or wisdom of the religious doctrine (as distinct from its actuality) which might impel the church in question to raise such a claim. Likewise, here, it is not for the Court to question the worth or wisdom of any religious doctrine of the Church, and no such questioning is involved in determining whether the Church's religious reason was a valid one, based on the operational requirements of the Church as employer."[30]

[62] His Honour went on to conclude that it was not a requirement of the Church that only members be employed and that:

> "No moral requirement of repentance or acceptance of the religious authority of the Church was or could reasonably be required of an employee who was not a member of the Church. It was the Church's preference to employ members, wherever available and qualified, and its practice only to employ non-members where no such member-applicant could be found. Nevertheless, it could not, in my view, reasonably be concluded that it was a ''requirement'' of the Church, in the sense used in s 170DE(1), that only members be employed. In contemporary Australia it seems clear that a religious institution as employer, which did not or could not reasonably 'require' (in the s 170DE(1) sense) of a particular employee adherence to the employer's religion, could not validly terminate the services of such an employee whose personal position as to a matter of faith became, during the course of the employment, inconsistent with that religion."

[63] In concluding that the Church did not have a valid reason to terminate the Applicant's employment based on operational requirements his Honour considered that the Applicant's work was not intrinsically religious in nature and it was not her primary task to propagate or defend the Church's faith. In relation to capacity as the reason for termination, his Honour observed that:

> "It means capacity for the work the employee was engaged to do. If nuance be needed, it is provided by the remainder of s 170DE(1) itself and by the entirety of the Convention and the subject Division of the Act. It would be very strange if an employer, religious or otherwise, could self-define 'capacity' so as to undo the cogency for an employment relationship, demanded by s 170DE(1) in its reference to 'operational', of an employer's requirements. It would be equally incongruous if the entire scheme of the Division, which is to protect aspects of an employee's economic position from the effects of arbitrary, unjustified or unreasonably unmitigated termination of employment (cf ss 170DB, 170DD, 170FA, 170GA), could be undermined by an employer's merely idiosyncratic notions of capacity. The reference to 'performance' in s 170DC, since it is there referred to as an alternative to 'conduct', also, in my view, confirms the approach I take to the matter. That the attempt to define 'capacity' itself was made by the Church in the express statement of employment which it prepared for its member-employees does not improve or alter matters: the parties cannot contract out of s 170DE(1). Ms Hozack was not a minister of

> her religion. No one doubted her ability to do her work as a receptionist. Her 'capacity' within the meaning of s 170DE(1) was not wanting.[31]

[64] In the present FW Act, the successor provision to s. 170DE(1) is s. 387(a), albeit the reference to operational requirements is now found in the exception to the unfair dismissal provisions on the ground of "*genuine redundancy*". There is no equivalent provision to s. 170DF(1)(f) or s. 170DF(3) in the Part of the FW Act dealing with unfair dismissal. There is a similar provision in s. 351(2) in Part 3 – 1 of the FW Act concerning general protections, with respect to institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular institution or creed. A similar provision is also found in s. 772(2)(b) dealing with unlawful termination.

[65] While the legislative provisions which were dealt with by Madgwick J in *Hozack* are not identical, some of the principles in relation to capacity are relevant and can be applied by analogy to cases concerning conduct. From *Hozack* the following principles can be distilled:

- Where the reason for dismissal is that conduct of the employee is inconsistent with the doctrines, tenets, beliefs or teachings of a particular religion or creed of an institution that is the employer, the Commission will not assess the utility, intellectual quality, essential truth, worth or wisdom of tenets of the claimed religion.
- Notwithstanding that a dismissal may be on the ground of religion, the Commission is required to determine whether there was a valid reason for the dismissal based on the conduct or capacity of the employee applying the established principles relevant to s. 387(a).
- Where the reason for dismissal is related to the conduct of the employee, the question will often be whether a requirement that an employee adhere to the religious tenets or beliefs of the employer or comply with doctrines or teachings, was reasonable, based on the job the employee was engaged to do. Depending on the job the employee was engaged to do, conduct that would not justify dismissal outside the context of employment by a religious institution, may justify dismissal from employment with a religious institution, where, for example, the employee is engaged to preach or otherwise promulgate the beliefs of the religious institution or is employed to do work that is intrinsically religious in nature, and the conduct is directly inconsistent with the purpose for which the employee is engaged.
- Similar considerations may apply when a dismissal is because an employee is not able to comply with a religious requirement which are said to go to capacity to do the job the employee is engaged to do. As was the case in *Hozack*, where an employee's job is not intrinsically religious, persons who were not church members were employed in similar jobs and the employee was not required to promulgate or preach the beliefs of the church, her capacity to do her job remained although she was barred from being a member of the church.

[66] In the present case, the Applicant was not a member of the Church of Ubuntu. The Church has a particular process for nominating persons to be members which had not been completed in the Applicant's case. Any requirement that the Applicant adhere to its teaching was not reasonable in those circumstances. The Applicant did her job for a year with no issue relating to her non-membership of the Church. The job involved selling cannabis products online and by telephone to clients of the Church. It was not an intrinsically religious job. Without judging the views of the Church about the potential for clients or other persons working

for the Church to be injured by exposure to the Applicant due to her being vaccinated, there was no prospect that this would occur given the way the Applicant carried out her work.

[67] It was also the case that the Church's position that no-one who was vaccinated against COVID-19 could work for it, was adopted in October 2021 and applied retrospectively, which is of itself, inherently unreasonable. The Constitution of the Church makes no mention of vaccination being forbidden and members of the Church have received vaccinations other than the COVID-19 vaccination without issue being taken by the Church. The fact that the services provided by the Church include assisting those suffering adverse effects of vaccination, does not remove the capacity of vaccinated persons to provide those services.

[68] I have applied these conclusions in the present case.

Small Business Fair Dismissal Code

[69] In unfair dismissal cases where the employer is a small business employer, the Commission must first consider whether the dismissal was consistent with the Code. The Code has two limbs: "*summary dismissal*" dealing with dismissal without notice or warning and "*other dismissal*". The Code is not located in the FW Act or the Regulations. Rather it is governed by a Ministerial Declaration pursuant to s. 388(1) of the FW Act. The terms of the Code are as follows:

> "***Small Business Dismissal Code***
>
> *Commencement*
>
> The Small Business Fair Dismissal Code comes into operation on 1 July 2009.
>
> *Summary Dismissal*
>
> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.
>
> *Other Dismissal*
>
> In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.
>
> The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.
>
> The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements."

[70] In the present case, I am satisfied that the Applicant was summarily dismissed without notice or warning and that the summary dismissal part of the Code applies. As a Full Bench of the Commission explained in *TIOBE Pty Ltd T/A TIOBE v Cathy (Yaqin) Chen*[32] the Summary dismissal part of the Code operates in the following way:

"(1) If a small business employer has dismissed an employee without notice - that is, with immediate effect - on the ground that the employee has committed serious misconduct that falls within the definition in reg.1.07, then it is necessary for the Commission to consider whether the dismissal was consistent with the 'Summary dismissal' section of the Code. All other types of dismissals by small business employers are to be considered under the "Other dismissal" section of the Code.

(2) In assessing whether the 'Summary dismissal' section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal, and second whether the employer's belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element."

[71] In this regard, a Full Bench of the Commission in *Gainbridge Limited v Mrs Diane Wiburd,*[33] a Full Bench of the Commission observed that the Code focuses attention on the employer's belief which must be based on reasonable grounds, not on whether the employee's conduct as a matter of fact and law justified immediate dismissal.

[72] In relation to serious misconduct, Regulation 1.07 relevantly provides:

"(1) For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.

(2) For subregulation (1), conduct that is serious misconduct includes both of the following:

(a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;

(b) conduct that causes serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer's business.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

> (a) the employee, in the course of the employee's employment, engaging in:
>
> (i) theft; or
>
> (ii) fraud; or
>
> (iii) assault; or
>
> (iv) sexual harassment;
>
> (b) the employee being intoxicated at work;
>
> (c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment."

[73] Accordingly, there are two issues to be considered in determining whether the requirements in the Code dealing with Summary Dismissal are met: *first*, whether the employer held the subjective belief at the time of the dismissal that the employee's conduct was sufficiently serious to justify immediate dismissal and, *second*, whether that belief was based on grounds that were, objectively speaking, reasonable.[34]

Whether the Applicant's dismissal was consistent with the Code

[74] I accept that the Mr Futter who appears to have a leadership role in the Church, has strong views against vaccination. While not clearly articulated, those views appear to be based on broad grounds that can be described as social and scientific grounds. In relation to social grounds, the Church is opposed to its members being vaccinated against COVID-19 on the basis that it asserts that State and Federal Governments breached the legal and constitutional rights of citizens by placing restrictions upon them in the form of mandates preventing persons who were unvaccinated from working in certain roles and occupations, travelling or visiting public places such as hospitals, hotels and restaurants. It is also apparent that the Church is opposed to vaccination on grounds relating to the nature of the vaccination itself including its molecular structure and its impact on the human body.

[75] If I accept, for the purpose of the present argument, that Mr Futter and the Church held that subjective belief at the time that the Applicant's conduct was sufficiently serious to justify instant dismissal, I am unable to accept that this belief is based on grounds that are objectively reasonable for the following reasons. The Church has not advanced objectively reasonable grounds for its belief that Ms Chait becoming vaccinated was sufficiently serious misconduct to warrant summary dismissal. There is nothing apparent in the teachings or beliefs of the Church that indicate that vaccination against COVID-19 is contrary to those teachings or beliefs. The Constitution of the Church does not prohibit vaccination.

[76] It does not follow that because the Bible states that God gave seed bearing plants and trees with fruit and seed, for food, that vaccination is contrary to the teachings in the Bible. The cannabis products provided by the Church are medicinal rather than food. It is also apparent from the evidence of Mr Futter and Pastor Burton that the Church is not against other types of vaccination but objects to the COVID-19 vaccination on the basis that it does not prevent disease. As has been well-established, vaccination against COVID-19 does prevent serious

disease and mitigates the effect of disease and continues to be effective.[35] In any event, this appears to be a philosophical rather than a religious objection.

[77] The medical conscription argument based on s. 51(xxiiiA) of the *Constitution* advanced by the Church in this case has been rejected by every Court and the Fair Work Commission and as the Supreme Court of NSW – Court of Appeal put the matter in *Kassam v Hazzard; Henry v Hazzard*[36] – is untenable as it applies to the provision of medical services and no doctor is being forced to vaccinate anyone. This argument was comprehensively put to bed on 12 August 2022, when the High Court refused special leave to appeal to the *Kassam* applicants.[37] Even if Mr Futter and Pastor Burton maintained that view about vaccination, then there is no reason why that view should be imposed on employees of the Church. This argument is also a philosophical/legal argument rather than a religious objection.

[78] Further, while Mr Futter and Pastor Burton may be genuinely concerned about the possible effects on the health of employees who receive a vaccination, that is not a basis to dismiss employees who choose to be vaccinated. There is no basis for a view that a vaccinated person can cause adverse impacts to unvaccinated persons and neither Mr Futter nor Pastor Burton explained their views in this regard. In any event, even if there was some genuine belief on the part of Mr Futter or Pastor Burton that vaccinated persons emit something that could cause illness or injury to non-vaccinated persons, Ms Chait's uncontested evidence was that she did not work with other persons and performed her work for the Church remotely. Mr Futter could not have reasonably believed on an objective basis that Ms Chait could have affected any other member, employee, or contractor of the Church, by being vaccinated.

[79] While requiring employees to be vaccinated may be a lawful and reasonable direction, requiring them to refrain from being vaccinated is not. Employers have a right to impose policies on employees where those policies are a reasonable response to managing risk in a workplace or because they must comply with legislation that does not permit work to be performed by persons who do not meet particular criteria, such as vaccination, and the policies are otherwise lawful. Employers do not have a right to prevent employees from taking a step to protect themselves from disease where the step is lawful and reasonable and does not impact on the employee's ability to carry out duties in the manner required by their contract of employment.

[80] I also do not accept that Mr Futter's belief that the Applicant's conduct was serious enough to warrant dismissal was based on reasonable grounds when the belief was formed after the Applicant had engaged in the relevant conduct. It is apparent from Mr Futter's evidence, as set out in his affidavit and stated in his oral evidence, that Mr Futter formed his views in opposition to vaccination in October 2021, after the Applicant and Ms Mountford had been vaccinated. Further, at that point, Mr Futter had simply asked anyone who wanted to be vaccinated to talk to him first. Leaving aside whether that was a lawful or reasonable request, there is nothing about what Mr Futter said to give any indication that he had decided that anyone who became vaccinated could not work for the Church at the time the Applicant received a vaccination against COVID-19. In circumstances where Mr Futter did not hold a subjective belief on reasonable grounds that being vaccinated for COVID-19 was conduct sufficiently serious to justify immediate dismissal at the time the conduct occurred, such a belief could not be objectively reasonable in relation to the Applicant's dismissal, when that dismissal was carried out.

[81] Finally, the Church could not have believed on reasonable grounds that Ms Chait receiving a vaccination for COVID-19 was sufficiently serious to justify dismissal, when on its own Constitution, Ms Chait was not a member of the Church and was not bound by its teachings or beliefs. As I have previously noted, the Church did not have a clearly articulated policy or belief in relation to COVID-19 vaccination. To use Mr Futter's analogy in his oral evidence in the jurisdictional hearing, Ms Chait was not a member of a team bound by rules that she accepted on joining to conduct herself in a particular way. Ms Chait was an employee who sold products on behalf of the Church because she believed there was a symbiotic relationship between the services provided by the Church to clients and those that the Applicant wished to provide. At no point did Ms Chait implicitly or explicitly agree not to become vaccinated.

[82] For these reasons, the Applicant's dismissal was not consistent with the Code and it is necessary to consider whether it was unfair, based on the matters in s. 387 of the FW Act.

Whether the dismissal was unfair

Approach to considering and weighing matters in s. 387

[83] Section 387 of the FW Act requires that in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account each of the matters set out in paragraphs (a)-(h) of the section. That requirement is applicable to each element of the trilogy – that is, a finding that a dismissal is or is not harsh, is or is not unjust, or is or is not unreasonable, must in each case be founded on a consideration of all the matters set out in ss. 387(a)-(h).[38] Section 387 provides that in considering whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account the following matters:

(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.

[84] The matters in s. 387 go to both substantive and procedural fairness and it is necessary to weigh each of those matters in any given case, and decide whether on balance, a dismissal is harsh, unjust, or unreasonable. A dismissal may be:

- *Harsh* - because of its consequences for the personal and economic situation of the employee, or because it is disproportionate to the gravity of the misconduct;
- *Unjust* - because the employee was not guilty of the misconduct on which the employer acted; and/or
- *Unreasonable* - because it was decided on inferences that could not reasonably have been drawn from the material before the employer.[39]

Whether there was a valid reason for the Applicant's dismissal – s. 387(a)

[85] Section 387(a) principally deals with substantive fairness but is relevant to whether procedural fairness is afforded with respect to the notification of, and response to, the reasons for dismissal referred to in ss. 387(b) and (c). It is well-established that a valid reason for dismissal is sound, defensible, and well-founded[40], the focus of the enquiry is whether facts existed at the time a dismissal was carried out that justified dismissal[41] and if conduct is found to have occurred, whether it was of sufficient gravity or seriousness that dismissal was a justified response.[42]

[86] At the time the Applicant was dismissed there were no facts that existed which justified dismissal and the Applicant receiving a vaccination against COVID-19 was not a sound, defensible or well-founded reason for dismissal. At the point the Applicant received a vaccination, neither Mr Futter, nor anyone in a position of authority with the Church, had determined that unvaccinated persons could not work for the Church. At the point Mr Futter decided to dismiss the Applicant, on his own account, he knew that she had been vaccinated before he made the decision and had not directly conveyed that decision to the Applicant.

[87] As the President of the Church, Mr Futter knew, or should reasonably have known, that the Applicant was not a member of the Church in accordance with the process set out in its rules and that she had not been employed contingent on complying with any rules he decided to make in relation to her personal health decisions. I do not accept his evidence to the contrary. For the reasons set out above, there was no valid reason for the Applicant's dismissal. This is a matter that weighs in favour of a finding that the dismissal was unfair.

Whether the Applicant was notified of the reason for dismissal – s. 387(b)

[88] Paragraph (b) of s. 387 relates to procedural fairness. Proper consideration of s 387(b) requires a finding to be made as to whether the applicant has been notified of "*that reason*" – that is, the reason for dismissal relating to the capacity or conduct of the applicant found to be valid under s 387(a) – prior to the decision to dismiss being made.[43] As a Full Bench of the Commission put the matter in *Crozier v Palazzo Corporation Pty Ltd*[44]:

> "As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG (3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."[45]

[89] Procedural fairness is an integral aspect of natural justice. In *Allesch v Maunz*[46], Justice Kirby stated the principle that a decision maker (in that case on exercising public power) must

afford a person whose interests will be adversely affected by the decision, the ability to present relevant information and material before a decision is made. His Honour observed that the principle long preceded common law and statute law and cited the judgement of Byles J in *Cooper v Wandsworth Board of Works*,[47] which referred to Genesis III:11. to the effect that: "*Even the Almighty reportedly afforded Adam such an opportunity before his banishment from Eden*".[48]

[90] The Applicant in the present case was given no such opportunity. Mr Futter, on his own account, decided to implement a policy to the effect that no-one who was vaccinated against COVID-19 could work for the Church, and to apply that policy retrospectively. Mr Futter was apparently motivated by his disagreement with the policy of the New South Wales Government in relation to vaccination requirements and lockdowns. Ms Chait's evidence which I accept, was that she was informed of the policy after she was vaccinated and received this information via an audio recording of Mr Futter on Facebook Messenger, provided to her by a fellow employee, Ms Mountford. Further, it is unarguable that Mr Futter refused to even have a discussion with the Applicant when she attempted to contact him after being provided with the recording. Instead, the Applicant was sent a dismissal letter.

[91] I do not accept Mr Futter's evidence in the jurisdictional hearing that the Applicant knew about the Church's policy in relation to COVID-19 vaccination prior to her dismissal and in my view, that evidence is contradicted by Mr Futter's voice recording on Facebook Messenger.

[92] I find that the Applicant was not provided with an opportunity to respond to the reasons for her dismissal, based on her conduct and/or capacity, to the extent that it could be said that the dismissal was based on capacity. This is a matter that weighs in favour of a finding that the dismissal was unfair.

Whether the Applicant was given an opportunity to respond to reason – s. 387(c)

[93] Proper consideration of s. 387(c) requires a finding to be made as to whether the applicant has been given a real opportunity to respond to the reason for dismissal. As a matter of logic, unless the applicant has been notified of the reason, it is difficult to envisage that it could be found that the applicant has been afforded an opportunity to respond to that reason.[49]

[94] As the evidence makes clear, the Applicant was given no opportunity to respond to the reason for her dismissal and Mr Futter specifically rejected an attempt on her part to have such a discussion. This is a matter that weighs in favour of a finding that the dismissal was unfair.

Whether there was an unreasonable refusal in relation to a support person – s. 387(d)

[95] Section 387(d) requires the Commission to consider whether there was an unreasonable refusal for the Applicant to have a support person to assist in any discussions relating to the dismissal. There were no discussions relating to the decision to dismiss and no refusal for the Applicant to have a support person. This is a neutral factor, given that if the dismissal was carried out fairly, there would have been a discussion with the Applicant about the reason for her dismissal.

Whether the Applicant was informed about unsatisfactory performance – s. 387(e)

[96] The dismissal of the Applicant did not relate to unsatisfactory performance and this criterion is not relevant.

Impact of size of the Respondent's enterprise – s. 387(f) and (g)

[97] I have given consideration to the fact that the Respondent may be a small business as defined in s. 23 of the FW Act and that it lacks dedicated human resource management specialists. While I do not doubt that these matters impacted on the procedures followed in effecting the dismissal, they do not excuse the lack of fairness afforded to the Applicant and are counter balanced in some respects by the fact that it would be expected that as a Church, professing to follow the Christian faith, it would be expected that the Applicant would have been fairly treated and at least shown more compassion. These matters are neutral.

Other relevant matters – s. 387(h)

[98] It is also relevant that the Respondent is a Church professing Christian beliefs and values and has treated the Applicant unfairly by imposing a requirement on her retrospectively, and denying her natural justice. There was no evidence of any other relevant matters for consideration.

Conclusion in relation to whether the dismissal was unfair

[99] On balance, I am satisfied and find that the Applicant's dismissal was unfair. The dismissal was harsh because of its economic consequences for the Applicant who had limited means and was out of work as a result of being dismissed for a period of some 12 months. The dismissal was unjust because the Applicant was not guilty of deliberately flouting rules of the Church. Rather the Applicant made a decision in her own interests, without any knowledge of the consequences of that decision. The employee was not guilty of misconduct by simply becoming vaccinated and there was no reasonable basis for the Church to conclude that this was misconduct. The dismissal was unreasonable because Mr Futter had no reasonable basis to find that the Applicant had gone behind his back and been deceptive or dishonest about receiving a COVID-19 vaccination.

[100] The Applicant had no warning of the Church's adoption of a view that no one vaccinated against COVID-19 could work for it and that this prohibition would be applied retrospectively. While I accept that COVID-19 provided challenges for employers trying to manage their way through a constantly changing environment, the way that the Church managed this issue vis a vis the termination of the Applicant's employment, was unfair.

Remedy

Legislation

[101] Section 390 of the FW Act provides:

> "**390 When the FWC may order remedy for unfair dismissal**

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies."

[102] As to any order for reinstatement, s. 391 provides:

"**391 Remedy—reinstatement etc.**

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."

[103] The matters to be considered in determining any order for compensation are provided at s. 392 as follows:

"**392 Remedy—compensation**

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

Whether reinstatement is appropriate

[104] I am satisfied and find that reinstatement is not appropriate in this case. The Church maintains the view that it did not employ the Applicant in the first place and given its entrenched attitude, it is doubtful that reinstatement could be effected. The Applicant also has a distrust of the Church and for that reason it is not practicable to attempt to restore that relationship.

Compensation

[105] Section 390(3)(b) of the FW Act provides that the Commission may only issue an order for compensation if it is appropriate in all the circumstances. A remedy of compensation is

designed to compensate an unfairly dismissed employee in lieu of reinstatement for losses reasonably attributable to the unfair dismissal within the bounds of the statutory cap on compensation that is to be applied.[50]

[106] Having regard to all the circumstances of the case, including the findings I have made about unfairness, I consider an order for payment of compensation to the Applicant to be appropriate. It is therefore necessary for me to assess the amount of compensation that should be ordered to be paid to the Applicant. In assessing compensation, I am required by s. 392(2) of the FW Act to take into account all the circumstances of the case including the specific matters identified in paragraphs (a) to (g) of this subsection.

[107] The established approach to assessing compensation in unfair dismissal cases was set out in *Sprigg v Paul Licensed Festival Supermarket*[51] (*Sprigg*) and applied and elaborated upon in the context of the current Act by Full Benches of the Commission in a number of cases,[52] as follows:

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.

Step 5: Apply the legislative cap on compensation.

[108] Applying step one of *Sprigg*, I accept that the Applicant would have remained in employment for a period of at least 12 weeks had her employment not been terminated in the way that it was. I accept that the Church may have had a discussion with the Applicant and others who worked for it, and explained the position it has adopted with respect to COVID-19 vaccinations. It is possible that had the Applicant been afforded procedural fairness, or even the courtesy of Mr Futter having a discussion with her about options to work for affiliates, the Applicant may have accepted that position.

[109] In a 12-week period, the Applicant would have earned the amount of $660 when she worked three days per week and $880 when she worked four days per week. I accept the Applicant's calculation that it would be reasonable to assume that in that 12-week period she would have earned an amount of $8,000. The Applicant earned no monies in the 12-week period following her dismissal and I make no deduction in that respect. Given the time frame over which compensation has been calculated, I make no deduction in that respect. In the circumstances of this case, I adopt the position that taxation is a matter for the Applicant, given that is the approach that the parties appear to have taken. The amount is not near the legislative cap.

[110] I understand that the Applicant has maintained her claim for $8,000 consistently and, given the Church's attitude to the proceedings to date, does not wish to increase her claim in circumstances where the Church may have relied on the fact that the Applicant only claimed this amount, and may appeal any Decision and Order I make. I observe that the Church is fortunate that the Applicant and her representative have taken this approach and had they not done so, I may have awarded a higher amount of compensation.

[111] The Church has not given any indication that it lacks the capacity to pay what, in my view, is a modest amount of compensation, considering the unfairness with which the Applicant was treated. For the same reason, I do not intend to allow for the payment of the compensation amount in instalment.

Conclusion

[112] I have determined to award the Applicant an amount of $8,000 as compensation for lost wages to be paid into the account into which the Applicant's wages were previously paid. An Order will issue with this Decision requiring that the amount be paid within 7 days of this Decision.

VICE PRESIDENT

Appearances:

M Swivel for the Applicant.
No appearance, Respondent.

Hearing details:

2023.
Brisbane (via Microsoft Teams):
November 22.

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[1] Exhibit A1– Statement of Lainie Chait dated 12 April 2021 – Annexure D.

[2] PR745276; *Chait v Church of Ubuntu* [2022] FWC 2947.

[3] *Chait v Church of Ubuntu* [2022] FWC 2947.

[4] [2023] FWCFB 20.

[5] [2023] FWC 2405.

[6] PR766345.

[7] [2023] FWC 2618.

[8] [2023] FWCFB 198.

[9] Ibid at [15]-[16].

[10] Ibid at [25].

[11] Exhibit A1– Statement of Lainie Chait dated 12 April 2021.

[12] Exhibit A2.

[13] Exhibit A3.

[14] Transcript of the hearing in relation to jurisdictional objection on 30 May 2022 at PN120.

[15] Transcript of the hearing in relation to jurisdictional objection on 30 May 2022 at PN154.

[16] Transcript of the hearing in relation to jurisdictional objection on 30 May 2022 at PN128.

[17] Transcript of the hearing in relation to jurisdictional objection on 30 May 2022 at PN129.

[18] Transcript of the hearing in relation to jurisdictional objection on 30 May 2022 at PN131.

[19] Transcript of the hearing in relation to jurisdictional objection on 30 May 2022 at PN132.

[20] Exhibit A1 – Statement of Lainie Chait dated 12 April 2021 – Annexure E.

[21] Exhibit R2 – Affidavit of Barry John Futter at paragraphs 13-17, 19-20, tendered at the hearing in relation to the jurisdictional objection.

[22] Transcript of the hearing in relation to jurisdictional objection on 30 May 2022 at PN144.

[23] Exhibit A1 – Statement of Lainie Chait dated 12 April 2021 – Annexure F.

[24] Exhibit A1 – Statement of Lainie Chait dated 12 April 2021 – Annexure D.

[25] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333 (7 July 1995), (1995) 62 IR 371.

[26] (1997) 76 IR 465.

[27] Ibid at p. 467.

[28] Ibid at p. 467.

[29] Ibid at p. 471.

[30] Ibid at p. 473.

[31] Ibid p. 475.

[32] [2018] FWCFB 5726

[33] [2017] FWCFB 6732 at [14].

[34] *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359, 219 IR 128 at [29]; *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 5264 at [39]-[40]

[35] *CFMMEU v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 at [29].

[36] [2021] NSWSC 1320.

[37] *Al-Munir Kassam and Others v Bradley Hazzard and Others* No. S3 of 2022 [2022] HCATrans 131.

[38] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373 at [23].

[39] *Stewart v University of Melbourne* (U No 30073 of 1999 Print S2535) Per Ross VP citing *Byrne v Australian Airlines* (1995) 185 CLR 410 at 465-8 per McHugh and Gummow JJ.

[40] *Selvachandran v Pteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

[41] *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457; *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1 at 14.

[42] *Raj Bista v Glad Group Pty Ltd t/a Glad Commercial Cleaning* [201] FWC 3009 at [40] citing *Edwards v Giudice* (1999) 94 FCR 561.

[43] *Bartlett v Ingleburn Bus Services Pty Ltd t/as Interline Bus Services* [2020] FWCFB 6429. *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [27], [64]-[73], [75]; *Chubb Security Australia Pty Ltd v Thomas* [2000] AIRC 822 at [41]; *Wadey v YWCA Canberra* [1996] IRCA 568.

[44] (2000) 98 IR 137.

[45] Ibid at [73].

[46] *Allesch v Maunz* [2000] HCA 40; 203 CLR 172; 173 ALR 648; 74 ALJR 1206 (3 August 2000).

[47] [1863] EngR 424; (1863) 14 CB (NS) 180 at 195 [143 ER 414 at 420].

[48] *Allesch v Maunz* Op. cit. at [73].

[49] *Bartlett v Ingleburn Bus Services Pty Ltd t/as Interline Bus Services* [2020] FWCFB 6429 at [19].

[50] *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512 at [17].

[51] (1998) 88 IR 21.

[52] *Tabro Meat Pty Ltd v Heffernan* [2011] FWAFB 1080; *Read v Golden Square Child Care Centre* [2013] FWCFB 762; *Bowden v Ottrey Homes Cobram* [2013] FWCFB 431.