DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

John Tamaliunas

v

Alcoa of Australia Limited
(U2023/11059)

DEPUTY PRESIDENT BINET PERTH, 2 APRIL 2024

Application for an unfair dismissal remedy

[1] On 10 November 2023, Mr John Tamaliunas (**Mr Tamaliunas**) filed an application (**Application**) pursuant to section 394 of *Fair Work Act 2009* (Cth) (**FW Act**) with the Fair Work Commission (**FWC**) alleging he was unfairly dismissed by Alcoa of Australia Limited (**Alcoa**).

[2] Mr Tamaliunas was dismissed after an investigation into an allegation that he inappropriately touched a female colleague (**Incident**) while employed as an Advanced Mechanical Tradesperson at Alcoa's Pinjarra Alumina Refinery (**Refinery**).

[3] On 27 November 2023, Alcoa filed a *Form F3 - Employer's response to unfair dismissal application* stating that it had no jurisdictional objections to the Application.

[4] On 21 December 2023 the parties participated in a conciliation conference. The matters in dispute could not be resolved.

[5] Taking into account the parties wishes and circumstances, a hearing, rather than a determinative conference, was determined to be the most effective and efficient way to determine the Application. Consequently, the Application was listed for a hearing in Perth on 6 February 2024 (**Hearing**).

[6] Directions for the filing of materials in advance of the Hearing were issued to the parties on 22 December 2023 (**Directions**).

Permission to be represented

[7] The Directions invited the parties to make submissions as to whether the FWC should grant permission to the parties to be represented. A determination of this issue is necessary to ensure that the manner in which any hearing is conducted is fair and just.[1]

[8] Both parties sought permission to be represented at the Hearing.

[9] Having considered the submissions of the parties, leave was granted to both parties to be represented, pursuant to section 596(2)(a) of the FW Act, on the grounds that it would enable the matter to be dealt with more efficiently taking into account the complexity of the matter.

[10] At the Hearing, Mr Milo Bronleigh (**Mr Bronleigh**) a lawyer from Fogliani Lawyers represented Mr Tamaliunas and Alcoa was represented by Mr Mark Vallence (**Mr Vallence**) of Heelan & Co.

Evidence

[11] The Directions required the parties to file their witness evidence in chief in advance of the Hearing.

[12] In accordance with the Directions, Mr Tamaliunas filed a witness statement setting out his evidence in chief.[2]

[13] At the Hearing, Mr Tamaliunas gave further oral evidence and was cross examined by Mr Vallence.

[14] In accordance with the Directions, Alcoa filed witness statements setting out the evidence in chief of the following witnesses:

a. Mr Ashley Simmons (**Mr Simmons**)[3] – Mr Simmons is the Maintenance Supervisor at the Refinery. Mr Tamaliunas and the female employee he was alleged to have inappropriately touched both reported though their Leading Hand Mr Giles to Mr Simmons.
b. Ms Hayley Mellor (**Ms Mellor**)[4] – Ms Mellor is a Human Relations Consultant at the Refinery. She conducted the investigation into the Incident.
c. Mr Nicolas Bacon (**Mr Bacon**)[5] – Mr Bacon is the Human Resources Manager at the Refinery and a decision maker in relation to Mr Tamaliunas' dismissal.

[15] Both of the Alcoa witnesses gave further oral evidence at the Hearing and were cross examined by Mr Bronleigh.

[16] Witness A, the female employee allegedly inappropriate touched by Mr Tamaliunas did not make a formal complaint about the Incident. She participated in the investigation into the Incident but did not make a formal complaint about the Incident and declined to voluntarily give evidence at the Hearing. Consequently, Alcoa sought an order for Witness A to attend Hearing. The order was granted on 16 January 2024 in Print PR770315 and Witness A attended the Hearing. She was examined by Mr Vallence and by Mr Bronleigh. My observations of her in the witness box were that she appeared to be a credible and truthful witness who was significantly affected by the Incident and its aftermath. Alcoa sought an order that she not be identified in this Decision. Submissions in support of this application were included in Alcoa's closing submissions. An order to this effect was issued on 11 March 2024 in Print PR772198. Consistent with this order Witness A's name and any evidence which might identify her has been redacted from this Decision.

[17] The parties jointly prepared and filed a digital court book containing the evidence and submissions of the parties prior to the Hearing date (**DCB**). The DCB was admitted at the Hearing as a single exhibit and marked 'Exhibit DCB'.[6]

[18] Final written submissions were filed on behalf of Mr Tamaliunas on 22 February 2023. Final written submissions were filed by Alcoa on 29 February 2023.

[19] In reaching my decision, I have considered all the submissions made and the evidence tendered by the parties, even if not expressly referred to in these reasons for decision.

Background

[20] Mr Tamaliunas commenced employment with Alcoa at the Refinery on 26 April 2004.[7] On 13 January 2005 he was offered permanent employment as a mechanical tradesperson pursuant to a written contract of employment (**Contract**). The Contract included a term requiring Mr Tamaliunas to comply with Alcoa policies, procedures and Code of Conduct (**Code**).[8]

[21] Mr Tamaliunas was subsequently promoted to the position of Advanced Tradesperson.[9]

[22] At the time of the events which led to his dismissal Mr Tamaliunas' employment was covered by the *Alcoa of Australia WA Operations (Mechanical Trades) Agreement 2023* (**Agreement**).[10]

[23] Prior to the events which ultimately led to his dismissal Mr Tamaliunas had been the subject of coaching and disciplinary action. On 26 November 2009 a record of discussion was made of counselling received by Mr Tamaliunas in relation to allegations that he touched, grabbed and shoved other employees.[11] On 19 February 2010 he was counselled for failing to wear personal protective equipment and on 7 September 2010 he received a first and final warning for not wearing personal protective equipment.[12]

[24] Alcoa's records indicate that Mr Tamaliunas completed Alcoa's compulsory Code training on 11 January 2019 and 23 August 2020 and the Equal Employment Opportunity and Harassment (**EEO**) training on 22 April 2023.[13] Mr Tamaliunas says that his leading hand, Mr Jason Giles (**Mr Giles**) completed his training for him in 2020.[14]

[25] The Code training reminds employees of expected workplace behaviour and discusses harassment in the workplace. In particular, the training reminds employees of their obligation to create a safe place for co-workers and to treat others with respect, whilst also highlighting that harassment is not determined by the intent of the person who engages in such conduct but by the impact it has on the recipient. Employees were, as part of the training package, advised that violations of the Code would not be tolerated and may result in disciplinary action up to and including termination of employment.[15]

[26] The EEO training, and the associated Learning Guide and Training Package, refers to Alcoa's policies relating to the equal employment opportunity, bullying and harassment, which include:[16]

a. the Code
b. Harassment and Bullying Free Workplace Policy;
c. EEO Policy; and
d. Fair Treatment Policy.

[27] During EEO training, employees are made aware and reminded that harassment includes unwelcome physical or other conduct that creates an intimidating, humiliating, offensive or hostile work environment and that sexual harassment is unacceptable within the workplace and violations may result in disciplinary action up to and including termination.[17]

[28] On 15 September 2023, shortly before 11:45am Mr Tamaliunas, and a number of Alcoa employees, were gathered in an office at the Refinery with dimensions of approximately 4m x 5m (**Office**).[18]

[29] In the middle of the Office was a large L-shaped desk at which Mr Giles was sitting. The L-shaped desk dominates the floor space of the Office. To get to the L-shaped desk it is necessary to walk between the L-shaped desk and another desk located in the corner of the room (**Corner Desk**).[19]

[30] At the time of the Incident, Witness A was standing between the L-shaped desk and the Corner Desk leaving a narrow gap. Witness A was talking to a colleague sitting at the Corner Desk. Mr Tamaliunas wished to make his way to Mr Giles so he turned his back to Witness A and pushed between Witness A (who had her back to him as he passed her) and the L-shaped desk. Mr Tamaliunas did not ask Witness A to move. Mr Tamaliunas' hands made contact with the lower torso of Witness A. It appears that no one else in the room witnessed the contact. After speaking to Mr Giles Mr Tamaliunas left the office. [20]

[31] Mr Tamaliunas has variously described the location of the contact as the buttocks or hip area. Witness A gave evidence at the Hearing that Mr Tamaliunas touched her in an intimate location in a central area 'underneath her buttocks' close to her anus.[21]

[32] Witness A's partner subsequently entered the office. He observed that Witness A looked distressed, so he asked her what had happened. She reported to him what had occurred.[22]

[33] Five or ten minutes after the Incident Witness A's partner approached Mr Tamaliunas and accused him of grabbing Witness A's buttocks and squeezing it. Mr Tamaliunas denied grabbing doing so, asserting that he had just tapped her.[23]

[34] Around 11:50am, Mr Tamaliunas proceeded to the workshop where he discussed the Incident with Mr Simmons. Mr Simmons says that Mr Tamaliunas informed him that Witness A's partner was annoyed at him because he had tapped Witness A on the side of her upper bottom in the hip area and asked her to move out of the way. Mr Simmons suggested that Mr Tamaliunas apologise to Witness A. [24]

[35] After Witness A's partner left the area Mr Tamaliunas approached Witness A and apologised to her.[25] Mr Tamaliunas says Witness A responded "Its alright"."[26] Witness A says

that notwithstanding this exchange she still felt 'weird' and had 'an awful gut feeling" that she should report the Incident.[27]

[36] Around 12 noon Mr Simmons approached Witness A's partner and asked him about the Incident. Mr Simmons says that Witness A's partner informed him that he had noticed immediately after the Incident that his partner looked distressed and when he queried why, she broke down in tears and explained that Mr Tamaliunas had grabbed and squeezed her bottom 'in a place which was low and central'.[28]

[37] Around 12:10pm, Mr Simmons saw Witness A and recalls noticing that she looked visibly upset. Around 12:45am after the lunch break he approached her to check how she was and to discuss the Incident. He says that she informed him that Mr Tamaliunas had apologised but that she felt that he was not sincere and had endeavoured to play down what had occurred. Mr Simmons asked Witness A if she wished to make a formal complaint about the Incident. She indicated to him that she was concerned that her work colleagues would treat her different if she complained about Mr Tamaliunas.[29]

[38] Witness A requested time off work following the Incident. On 16 September 2023 at 6:15pm Mr Giles discussed the Incident with Mr Simmons, and both agreed that the Incident should be escalated. Mr Simmons called Witness A to conduct a welfare check at 6:30pm. Again, Mr Simmons asked Witness A if she wished to make a formal complaint. As Witness A was still hesitant to do so Mr Simmons asked her to reconsider her decision over the weekend.[30]

[39] On 19 September 2023, Mr Simmons called Witness A who remained off work still distressed following the Incident. Witness A remained reluctant to report the incident afraid of backlash from colleagues. [31] Mr Simmons informed her that he believed it was necessary to inform human resources about the Incident and that he intended to do so.[32]

[40] On 19 September 2023, Mr Simmons reported the Incident to Ms Mellor and asked that an investigation be undertaken into the Incident (**Investigation**).[33]

[41] Mr Simmons and Ms Mellor met with Witness A offsite on 22 September 2023 to conduct a welfare check and investigate the Incident further. Ms Mellor took notes of the meeting. Witness A reported that she was talking to another colleague as Mr Tamaliunas squeezed past her and that Mr Tamaliunas had placed his hands low and underneath her bottom causing her to jump and make a noise from the unexpected contact. Witness A told the Investigators that she did not wish to 'make a scene' and therefore stood uncomfortably in silence feeling 'yuk'. Witness A reported that when her partner entered the room he asked if she was ok and she informed him what had just occurred.[34]

[42] When asked by Mr Simmons and Ms Mellor whether she had been the recipient of any other inappropriate conduct by Mr Tamaliunas she reported that:[35]

a. On numerous occasions, Mr Tamaliunas had grabbed her by the shoulders and physically moved her out of the way whilst working together.
b. Mr Tamaliunas had previously positioned the front of his body up against her back and placed his chin on her shoulder.

c. Mr Tamaliunas had previously lifted her jacket to grab a rag from her back pocket.

[43] Mr Simmons and Ms Mellor also interviewed Witness A's partner who was present in the office where the Incident occurred. He reported that he recalled noticing that Witness A looking visibly upset and when he asked her what was wrong she told him that Mr Tamaliunas had groped her. He said that he then spoke to Mr Tamaliunas demanding to know why he had 'groped her ass'. He said Mr Tamaliunas denied he groped her and said that he had patted Witness A's bottom to move her out of his way.[36]

[44] Both Witness A and her partner reported that Mr Tamaliunas tended to have more physical contact with his colleagues than other male and female employees however, his interactions with Witness A 'crossed the line'.[37] Witness A's partner reported that:[38]

> *"John's a grabby guy, he will move you and snatch you, he's unconscious, he's a boofhead and he's our boofhead. Everyone's uncomfortable, he snatches things, moves you. John will grab you by the shoulders and physically move you around…*
>
> *Have had to chat to John before, the way he speaks to Witness A a couple of times … John hacking at Witness A about having babies and children, its no appropriate behaviour"*

[45] On 22 September 2023, Mr Simmons and Ms Mellor met with Mr Tamaliunas and his support person and informed Mr Tamaliunas that he would be stood down immediately pending an investigation into allegations that he had engaged in sexual harassment. This was confirmed in writing (**Stand down Letter**) [39]

[46] On 29 October 2023, Mr Simmons and Ms Mellor held a meeting with Mr Tamaliunas and his support person to provide Mr Tamaliunas with an opportunity to respond to the allegations. Ms Mellor took notes of the meeting. During that meeting Mr Tamaliunas says he told Mr Simmons and Ms Mellor that Witness A had been facing away from him as he squeezed past her and that he had put his hands on her upper bottom near the side of her hip giving her a slight push. He reported that he did not notice Witness A make a noise or otherwise react to the contact.[40] Mr Tamaliunas denied the other instances of inappropriate conduct reported by Witness A during her interview other than to admit that he had physically moved male colleagues in the way reported by Witness A.[41]

[47] Ms Mellor determined that it was not necessary to interview any of the other employees present during the Incident because both Mr Tamaliunas and Witness A had indicated that no other employee had witnessed the Incident.

[48] On 5 October 2023, Mr Simmons and Ms Mellor met with Mr Tamaliunas to provide him with a show cause letter inviting him to respond to the allegation that on 15 September 2023 he "made unwelcomed and socially inappropriate physical contact" with Witness A which made Witness A "feel uncomfortable in the workplace." (**Show Cause Letter**). The Show Cause Letter explained that the allegations were believed to constitute a breach of:[42]

a. the Sex Discrimination Act 1984;
b. Alcoa's EEO Policy;

c. Alcoa's Code
d. Alcoa's Fair Treatment Policy.

[49] Mr Tamaliunas responded to the Show Cause Letter in a letter dated 11 October 2023. Mr Tamaliunas did not contest that he had touched Witness A but explained that the room was crowded, he did not intend to behave in any sexual manner, he did not intend to distress Witness A and he had apologised to Witness A as soon as he became aware that she was upset.[43]

[50] On 25 October, Ms Mellor and Mr Nel met with Mr Tamaliunas and his union representative to inform Mr Tamaliunas in writing of Alcoa's decision to terminate his employment summarily. This decision was confirmed in writing the same day (**Termination Letter**). The Termination Letter described the reasons for dismissal as:[44]

> *"On the 15 September 2023 you have made unwelcome and socially inappropriate physical contact with Witness A in the workplace. This unwanted physical contact to her buttocks has made her feel uncomfortable in the workplace and had a negative impact on her."*

[51] Witness A reports that she feels upset and uncomfortable about the Incident. It was clearly apparent during the proceedings that any visual contact with Mr Tamaliunas was deeply distressing to Witness A. She also reports that since the Incident she has felt ostracised at work and does not enjoy work anymore.[45]

[52] At the time of his dismissal Mr Tamaliunas' annual salary was $154,722.[46]

[53] Mr Tamaliunas seeks reinstatement and orders that his service be deemed continuous from the date of his termination. He also seeks orders that he be paid an amount for the remuneration lost because of the dismissal.[47]

[54] In the absence of an order for reinstatement Mr Tamaliunas seeks an order for compensation.[48]

Is Mr Tamaliunas protected from unfair dismissal?

[55] An order for reinstatement or compensation may only be issued if Mr Tamaliunas was unfairly dismissed and Mr Tamaliunas was protected from unfair dismissal at the time of his dismissal.

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

a. the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
b. one or more of the following apply:

    i. a modern award covers the person;
    ii. an enterprise agreement applies to the person in relation to the employment; and

iii. the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the *Fair Work Regulations 2009* (Cth) (**Regulations**), is less than the high income threshold.

[57] For the purposes of Part 3-2 of the FW Act an 'employee' means an employee of a national system employer. There is no dispute[49] and I am satisfied that Alcoa is a national system employee and Mr Tamaliunas is therefore a national system employee.

[58] If the employer is not a small business, the 'minimum employment period' is six months ending at the earlier of the following times:[50]

a. the time when the person is given notice of the dismissal; or
b. immediately before the dismissal.

[59] There is no dispute,[51] and I am satisfied, that Alcoa is not a small business employer for the purposes of section 383 of the FW Act.

[60] Mr Tamaliunas commenced employment with Alcoa on 26 April 2004. Mr Tamaliunas was dismissed on 25 October 2023. [52]

[61] I am therefore satisfied that, at the time of dismissal, Mr Tamaliunas was an employee who had completed a period of employment of at least the minimum employment period.

[62] There is no dispute, and I am satisfied, that the Agreement applied to his employment at the time of his dismissal.[53] Consequently, I am satisfied that Mr Tamaliunas was protected from unfair dismissal.

Was Mr Tamaliunas unfairly dismissed?

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

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

Was Mr Tamaliunas dismissed?

[64] Section 386(1) of the FW Act provides that a person has been dismissed if the person's employment was terminated at the employer's initiative or the person resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by their employer.

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

[66] There was no dispute[54], and I find, that Mr Tamaliunas' employment with Alcoa was terminated at the initiative of Alcoa.

[67] I am therefore satisfied that Mr Tamaliunas has been dismissed within the meaning of section 385 of the FW Act.

Was Mr Tamaliunas' dismissal a case of genuine redundancy?

[68] Pursuant to section 389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

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

[69] It was not in dispute,[55] and I find, that Mr Tamaliunas' dismissal was not due to Alcoa no longer requiring his job to be performed by anyone because of changes in Alcoa's operational requirements.

[70] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

Was Mr Tamaliunas' dismissal consistent with the Small Business Fair Dismissal Code?

[71] Section 388 of the FW Act provides that a person's dismissal is consistent with the SBFD Code if:

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

[72] It was not in dispute,[56] and I find, that Alcoa was not a small business employer within the meaning of section 23 of the FW Act at the relevant time, having in excess of fourteen (14) employees.

[73] As Alcoa is not a small business employer within the meaning of the FW Act, I am satisfied that the SBFD Code does not apply to Mr Tamaliunas' dismissal.

Was the Application made within the period required?

[74] Pursuant to section 396 of the FW Act, the FWC is obliged to decide whether an application was made within the period required in subsection 394(2) of the FW Act before considering the merits of an application.

[75] Section 394(2) of the FW Act requires that the Application is to be made within twenty-one (21) days after the dismissal took effect.

[76] It is not disputed[57], and I find, that Mr Tamaliunas was dismissed from his employment on 5 October 2023[58] and made the Application on 10 November 2023[59]. I am therefore satisfied that the Application was made within the period required in subsection 394(2) of the FW Act.

Was the dismissal harsh, unjust or unreasonable?

[77] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd* by McHugh and Gummow JJ as follows:

> *"…. It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."*[60]

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

a. whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees);
b. whether the person was notified of that reason;
c. whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;
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;
e. if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal;
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;
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.

[79] Each of these criteria must be considered to the extent they are relevant to the factual circumstances of the Application.[61]

Was there a valid reason for the dismissal related to Mr Tamaliunas' capacity or conduct?

[80] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[62] and should not be "capricious, fanciful, spiteful or prejudiced."[63] It is not

the role of the FWC to stand in the shoes of the employer and determine what the FWC would do if it was in the position of the employer.[64]

[81] The employer carries the onus of establishing a valid reason.[65]

[82] The Termination Letter describes the reason for termination as follows:[66]

> *"On the 15 September 2023 you have made unwelcome and socially inappropriate physical contact with [WITNESS A]in the workplace. This unwanted physical contact to her buttocks has made her feel uncomfortable in the workplace and had a negative impact on her."*

[83] Where a dismissal relates to an employee's conduct, the FWC must be satisfied that the conduct occurred and justified termination.[67] The question of whether the alleged conduct took place and what it involved is to be determined by the FWC on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.[68]

[84] The standard of proof to be applied by the FWC is that set out in *Briginshaw v Briginshaw*[69] as follows:

> *"The standard of proof remains the balance of probabilities but 'the nature of the issue necessarily affects the process by which reasonable satisfaction is attained' and such satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' or 'by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion."*

[85] Mr Tamaliunas was summarily dismissed. To justify summary dismissal there must be a breach of the terms of employment by the dismissed employee and the conduct in question must be sufficiently serious to justify summary dismissal.[70]

Did the conduct occur?

[86] There is no dispute that Mr Tamaliunas touched Witness A's lower torso in the region of her buttocks and that evidence suggests that he applied force to push her out of his way. In relation to how and where Mr Tamaliunas touched Witness A, I prefer the evidence of Witness A over the evidence of Mr Tamaliunas.

[87] On his own evidence, Mr Tamaliunas had his back turned to Witness A when he passed her so he could not have seen what part of her anatomy he actually touched.

[88] Furthermore, Mr Tamaliunas' description of what occurred is inconsistent:

a. During the Investigation Mr Tamaliunas admitted placing his hands on Witness A's bottom and giving a push: "I do not deny that I placed my hand on her buttocks. Just placed and gave a slight push and said scuse". Both Ms Mellor's and Mr Tamaliunas' own support person's notes corroborate this. In cross

examination Mr Tamaliunas asserted both sets of notes were inaccurate in this regard.[71]

b. Mr Tamaliunas made no mention of the location of the contact in the Show Cause Response.[72]
c. In his Form F2 the location of the contact had changed to 'hips or buttocks'.[73]
d. In his witness statement the location of the contact had changed to 'hip near the top of the buttocks'.[74]

[89] In addition, Mr Tamaliunas has provided other inconsistent information. Notwithstanding that he confirmed that the content of the Form F2 was accurate, an assertion that he had an unblemished employment record (an assertion that was repeated in his Show Cause Response) is factually untrue.[75]

[90] My observations of Witness A in the witness box was that she appeared to be a credible and truthful witness who was significantly affected by the Incident and its aftermath.

[91] I accept Witness A's evidence that Mr Tamaliunas 'groped her' touching underneath between her buttocks. That the contact occurred in sexualised location is consistent with her reaction on the day and since. It is also consistent with the multiple witnesses to her distress on the day of the incident and the following days.[76] Witness A's reluctance to make a formal complaint or participate voluntarily in the Hearing discounts any suggestion that she fabricated or over dramatized the event maliciously to place Mr Tamaliunas at risk of disciplinary action.

[92] Sadly, Mr Tamaliunas' representatives chose to follow a well worn but discredited path of blaming the victim for the contact by asserting that: [77]

> *"[WITNESS A] consciously decided to stand in the narrow walkway …. It ought to have been reasonably foreseeable to [WITNESS A] that standing in narrow walkway may lead to someone accidentally contacting her as they moved around the office"*.

[93] The evidence is clear that Witness A along with other colleagues had congregated in an office. Her location at the time of the incident cannot be fairly characterised as a 'narrow walkway' as described by Mr Tamaliunas' representatives. Witness A like her colleagues was simply occupying the available space in the room. It cannot be said that by merely joining her male colleagues in a small office she invited 'accidental' contact.

[94] Nor on the evidence before me was the contact 'accidental' rather the evidence is that during the Investigation Mr Tamaliunas conceded that he placed his hands on Witness A's lower torso and applied some force to move her out of the way.[78]

[95] There is no evidence that the communication Mr Tamaliunas wished to have with Mr Giles was so critically urgent that physically pushing his way towards Mr Giles could be justified. It is unclear why Mr Tamaliunas would force his way through a gap he could not fit which would require him to physically touch another employee, particularly a female employee. Regardless of company policy, civil manners alone would dictate he would not push through other people. If Witness A did not move immediately when asked the request could have been repeated or directed to the person to whom Witness A was speaking. Alternatively, Mr Tamaliunas could have waited until there was sufficient space for him to pass. While any

unnecessary touching of a work colleague particularly of the opposing gender is fraught with risk, Mr Tamaliunas might have gained her attention by gently touching her arm. However, there was simply no justification for him to turn his back then have his hands at Witness A's buttocks level, touch her buttocks and consciously push her out of his way.

Did the conduct justify termination?

[96] It is submitted on Mr Tamaliunas' behalf that:

> *"If it was contact [that] would not make out a common claw [SIC] caim for battery, then it would be somewhat extraordinary for the FWC to find that there was a vaid readon for dismissal.*
> *...*
> *... if the facts are insufficient to ground an action in battery ... then it ought to follow that there is no valid reason for dismissal"*

[97] I do not accept that this submission accurately reflects the current state of the law.

[98] The Contract included a term requiring Mr Tamaliunas to comply with Alcoa policies, procedures and Code.[79]

[99] Alcoa's records indicate that Mr Tamaliunas completed Alcoa's compulsory Code training on 11 January 2019 and the EEO training on 22 April 2023.[80]

[100] Through completion of the above training, Mr Tamaliunas was made aware and reminded of the following:

a. the relevant policies in relation to harassment in the workplace;
b. the expected behaviour of employees within the workplace; and
c. that disciplinary consequences will flow if an employee engages in harassment.

[101] The Code training reminds employees of expected workplace behaviour and discusses harassment in the workplace. In particular, the training reminds employees of their obligation to create a safe place for co-workers and to treat others with respect, whilst also highlighting that harassment is not determined by the intent of the person who engages in such conduct but by the impact it has on the recipient. Employees were, as part of the training package, advised that violations of the Code would not be tolerated and may result in disciplinary action up to and including termination of employment.[81]

[102] The EEO training, and the associated Learning Guide and Training Package, refers to Alcoa's policies relating to the equal employment opportunity, bullying and harassment, which include:[82]

a. the Code
b. Harassment and Bullying Free Workplace Policy;
c. EEO Policy; and
d. Fair Treatment Policy.

[103] During EEO training, employees are made aware and reminded that harassment includes unwelcome physical or other conduct that creates an intimidating, humiliating, offensive or hostile work environment and that sexual harassment is unacceptable within the workplace and violations may result in disciplinary action up to and including termination.[83]

[104] The physical contact engaged in by Mr Tamaliunas was inconsistent with the:

a. The Code which provides that unwelcome physical conduct that creates an intimidating, humiliating, offensive or hostile work environment is unacceptable, that harassment is determined by the impact on those subjected to it and that breaches of the Code will result in disciplinary action up to and including termination of employment.[84]

b. EEO Policy which provides that people should be treated in line with the Alcoa's values and expectation of a trusting workplace that is safe, respectful and inclusive.[85]

c. The Harassment and Bullying Free Workplace Policy, which provides at paragraph 4 that sexual harassment includes unwanted touching or physical conduct that makes someone feel uncomfortable; and that sexual harassment may result in termination of employment.[86]

d. The Fair Treatment Policy, which states that any form of harassment is unacceptable and at paragraph 3.3 defines harassment as unwelcome, offensive, humiliating or intimidating behaviour or comments. The Fair Treatment Policy describes sexual harassment as unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances.[87]

[105] The *Fair Work Act 2009* at section 387 states that:

> *"For* the *purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:*
>
> *(a) the person sexually harasses another person; and*
> *(b) the person does so in connection with the person's employment."*

[106] The *Fair Work Regulations 2009* at regulation 1.07 provides that:

> *"…conduct that is serious misconduct include 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…"*

[107] Pursuant to s.28A of the *Sex Discrimination Act 1984* (Cth), a person engages in conduct that constitutes sexual harassment if:

> *"(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
> *(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*
>
> *in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated."*

[108] The FW Act, pursuant to s.527D, prohibits sexual harassment in connection with work and pursuant to section 527E, the employer may be vicariously liable for the act of sexual harassment if it is in connection with the employment of the employee.

[109] Sexual harassment in breach of the company's code of conduct and policy may be a valid reason for dismissal.[88]

[110] In *Lindsay Swift v Highland Pine Products Pty Ltd*[89] Commissioner McKinnon, in considering whether the applicant in that matter had engaged in sexual harassment, at paragraph [63] had regard for the observations of the Full Court in *Hughes trading as Beesley and Hughes Lawyers v Hill*[90] paragraphs [21] to [27] which contemplated three elements of the identification of sexual harassment, which can be summarised as follows:

a. The Court must decide whether there has been any sexual advance, request for sexual favours, or other conduct of a sexual nature (as defined in section 28A(2) of the *Sex Discrimination Act 1984*);
b. The Court must then decide if such conduct was unwelcome. This is a question of fact which is subjective and involves the attitude (state of mind) of the allegedly harassed person at the time. Ordinarily, this will be proved by the person who has been allegedly harassed giving evidence that the conduct was unwelcome; and
c. An objective standard is applied such that the 'circumstances' (broadly defined in section 28A(1A) of the *Sex Discrimination Act 1984*) lead to the conclusion that a reasonable person would have anticipated the possibility that the person allegedly harassed would be offended, humiliated or intimidated by the conduct.

[111] Collier J in *Ford v Inghams Enterprises Pty Ltd (No 3)*[91] at paragraph [708] stated that:

> *"sexual harassment is unlawful regardless of the sex, sexual orientation or gender identity of the parties. It is unlawful even where the person committing the harassment had no sexual interest in the complainant."*

[112] Furthermore, Collier J explored other decisions in relation to whether touching someone on the bottom constituted sexual harassment and observed the following:

> *"In Von Schoeler v Alan Taylor and Company Ltd t/as Boral Timber [2018] FCCA 3932 at [77], Jarrett FCCJ observed that any intentional touching by one adult of another adult on the buttocks, regardless of whether it is a light slap or a distinct grope, is generally understood to be of a sexual nature.*

> *Similarly, in McGuire v Reyes t/as Entrance Lakehouse [2017] NSWCATAD 50, the Tribunal found that an employee placing his hands on the buttocks of a female employee constituted sexual harassment. However, in Morton v Commonwealth Scientific and Industrial Research Organisation (No 2) [2019] FCA 1754 , Rangiah J found that tapping on the buttocks with a riding crop was not conduct of a sexual nature in the circumstances of that case, as the applicant herself had engaged in the conduct."*

[113] I am not convinced that Mr Tamaliunas' conduct was intended to be entirely without a sexual nature. There is no evidence that the communication Mr Tamaliunas wished to have with Mr Giles was so critically urgent that physically pushing his way towards Mr Giles was necessary. It is unclear why Mr Tamaliunas would force his way through a gap he could not fit which would require him to physically touch a female employee. Mr Tamaliunas could have asked Witness A to move and if Witness A didn't move when asked Mr Tamaliunas could have repeated the request or waited patiently until there was sufficient space for him to pass. While any unnecessary touching of a work colleague particularly of the opposing gender is fraught with risk Mr Tamaliunas might have gained her attention in a non sexualised way by touching her arm.

[114] That Mr Tamaliunas chose to:

a. turn his back;
b. hold his hands out behind him at Witness A's buttocks level; and
c. touch her buttocks and consciously push her buttocks

suggests a sexualised nature to the touch.

[115] Even if Mr Tamaliunas' conduct occurred without any sexual intent, I am satisfied that its nature and effect was of a sexual nature consistent with the decisions considered by Collier J. There is no evidence that Witness A had previously engaged in any 'horseplay' that might form a basis for characterising the conduct as non sexual.

[116] In relation to the second element considered by Commissioner McKinnon *Lindsay Swift v Highland Pine Products Pty Ltd*,[92] Commissioner McKinnon applied the observations of the Full Court in *Hughes trading as Beesley and Hughes Lawyers v Hill*[93] at paragraph [30] to [32] and Collier J in *Ford v Inghams Enterprises Pty Ltd (No 3)*[94] at paragraph [713] where it was held that:

a. the intention of the person engaging in the conduct constituting sexual harassment;
b. whether the conduct has not been unwelcome to others; or
c. has been a previously accepted feature of the workplace;

is irrelevant to the question of whether the conduct was unwelcome, offensive, humiliating or intimidating.

[117] Deputy President Colman in *Heesom* at paragraph [31] stated that:

"The fact that the target of sexual harassment may respond stoically does not mean that the conduct somehow ceases to be harassment."

[118] During the meeting with Ms Mellor and Mr Simmons on 22 September 2023, Witness A reported that she felt 'yuk', uncomfortable and uneasy about what had occurred and that it continued to bother her such that it was necessary to take two days off work.[95] Other witnesses reported observing her distress both on the day of the Incident and subsequently. Her distress was still apparent at the Hearing when asked to describe where she was touched and how it made her feel. She also reports that since the Incident she has felt ostracised at work and does not enjoy work anymore.[96]

[119] Regardless of the intention of Mr Tamaliunas to engage in conduct that was unwelcome to Witness A the conduct was unwelcome.

[120] Mr Tamaliunas' conduct viewed objectively was such that a reasonable person would have anticipated that Witness A would be offended, humiliated or intimidated by the conduct. The contact was entirely unnecessary. Touching a colleague's buttocks involves deliberately touching a private and sensitive part of another person's body, which a reasonable person can anticipate will be unwelcome or unwanted causing the recipient to be offended, humiliated or intimidated by the conduct.

[121] Mr Tamaliunas' conduct was clearly in breach of Alcoa's Code and policies governing behaviour in the workplace. Mr Tamaliunas should have been aware of those policies. He had a contractual obligation to read and comply with them and he was provided with opportunities to undertake training in them. In any event, Alcoa's policies merely reflect modern day societal expectations about behaviour. The bar as to what constitutes consent for physical and sexual interactions has been significantly raised in the broader community. An even higher bar has been set for interactions occurring in work related environments. The media coverage and social discourse in relation these issues has been extensive, placing those in Australian workplaces on notice that their behaviour will attract greater scrutiny and face higher standards than in the past. This is particularly so in the mining industry in Western Australia where a parliamentary inquiry focused community attention on the odious frequency of sexual harassment and assault of women in the mining industry.

[122] Based on the evidence before me, and the submissions of the parties, for the reasons above, I find that valid reasons existed for Mr Tamaliunas' dismissal.

Was Mr Tamaliunas notified of the valid reason?

[123] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[97] and in explicit,[98] plain and clear terms.[99]

[124] It is not in dispute[100] and I am satisfied that Mr Tamaliunas was notified of the reasons for his dismissal before the decision was made to terminate his employment.

Was Mr Tamaliunas given an opportunity to respond to any valid reason related to his capacity or conduct?

[125] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[101]

[126] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.[102] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[103]

[127] It is not in dispute[104] and I am satisfied, that Mr Tamaliunas was given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

Did Alcoa unreasonably refuse to allow Mr Tamaliunas to have a support person present to assist at discussions relating to the dismissal?

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

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

> *"This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."*[105]

[130] It is not in dispute[106] and I am satisfied that Alcoa did not unreasonably refuse to allow Mr Tamaliunas to have a support person present at discussions relating to his dismissal.

Was Mr Tamaliunas warned about unsatisfactory performance before the dismissal?

[131] As the dismissal did not relate to unsatisfactory performance, this consideration is not relevant to this Application.[107]

To what degree would the size of Alcoa's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[132] Where an employer is substantial and has dedicated human resources personnel, and access to legal advice, there will likely be no reason for it not to follow fair procedures.[108]

[133] Alcoa is a large business.[109]

[134] I am satisfied that the procedures followed by Alcoa were appropriate having regard to the size of its enterprise. This consideration is therefore neutral in this Application.

To what degree would the absence of dedicated human resource management specialists or expertise in Alcoa's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[135] The absence of dedicated human resource management specialists does not relieve an employer extending an appropriate degree of courtesy to its employees "even when implementing something as difficult and unpleasant as the termination of a person's employment."[110]

[136] Alcoa's enterprise did not lack dedicated human resource management specialists and expertise.[111]

[137] I am satisfied that the procedures followed by Alcoa were appropriate having regard to the fact that it had access to dedicated human resource management specialists and expertise. This consideration is therefore neutral in this Application.

What other matters are relevant?

[138] Section 387(h) of the FW Act requires the FWC to take into account any other matters that the FWC considers relevant to determining whether the dismissal was harsh, unjust or unreasonable.

[139] Mr Tamaliunas submits that the following matters are relevant to determining whether his dismissal was harsh, unjust or unreasonable:[112]

a. He was 65 years old at the time of his dismissal.
b. He had worked for Alcoa for around 19.5 years.
c. This was the first and only time in his life he has come under notice for allegedly making inappropriate contact with a work colleague – or anyone for that matter.
d. He did not intend to make contact with Witness A's hip or buttocks. He was trying to pass her in a confined office.
e. Alcoa terminated his employment summarily – denying him an entitlement to any notice or payment in lieu of notice.

[140] There is no doubt that Mr Tamaliunas' age, length of service and termination without notice combine to make his dismissal harsher than for someone younger, with less service who is paid notice.

[141] The impact of a dismissal is typically harsher on an older employee because normally it is more difficult for them to secure alternative employment. While finding alternative employment may generally be more difficult for an older work, in the current job market where unemployment is at its lowest levels and the demand for labour in the mining sector is at its highest, the employability of experienced workers regardless of their age is much higher than it might normally be.

[142] While Mr Tamaliunas did have a lengthy period of service with Alcoa the evidence reveals that Mr Tamaliunas did not have an exemplary employment record and in fact had previously come under notice for making inappropriate contact with other employees.

[143] Mr Tamaliunas insists that he does not engage in inappropriate contact in the workplace. His employment record would suggest otherwise. Both Witness A and her partner reported that Mr Tamaliunas had engaged in further inappropriate physical contact with work colleagues. In the Investigation process Mr Tamaliunas conceded that he had made physical contact with other colleagues, although he asserts that such contact was appropriate. I am inclined the view on the evidence before me, particularly the evidence that Mr Tamaliunas was willing to push past a female employee with his back to her and his hands low, that his perception of what is appropriate contact differs materially from the view of his colleagues, his employer and society more generally.

[144] The evidence suggests that the contact that occurred was not entirely unintentional. Mr Tamaliunas who is a man of solid build turned his back then tried to squeeze through a gap that did not have sufficient space. Without looking to see what he was touching he applied force to move Witness A out of his way. The application of force to move someone out of the way suggests an intention to have contact. There is no evidence of genuine urgency for his conversation to occur or that he could not have spoken across the desk rather than pushed past it. The contact was unnecessary and entirely avoidable.

[145] Regardless of his intention the location of the contact was in an intimate sexual location. Its impact on Witness A was immediate and ongoing.

[146] Sexual harassment within the workplace is categorised as serious misconduct within the *Fair Work Regulations*, is unlawful pursuant to s.527D of the *Fair Work Act 2009* and is noted in s.387 as conduct that can amount to a valid reason for dismissal.

[147] The recent amendments to the FW Act which specifically identify sexual harassment as a valid reason for dismissal reflect a societal recognition that sexual harassment has no place in the workplace in the same way as violence or theft don't. These are types of conduct for which the provision of, and service of, a notice period is not appropriate because the conduct goes to the heart of trust and confidence the employer has in the employee and because of the risk posed to others in the workplace.

[148] I am satisfied that conduct engaged in by Mr Tamaliunas was sufficient to constitute serious misconduct and therefore the decision to dismiss Mr Tamaliunas was not disproportionate to such conduct albeit the adverse consequences which flow from the decision to terminate his employment.

[149] The mining industry has a particularly odious record of the treatment of women in its workplaces. Women should be able to attend their workplaces without fear of being touched inappropriately. It is a sad inditement of the positive work that has been undertaken by employers, unions and regulatory bodies in the mining industry that young women like Witness A are still frightened to report incidents of harassment for fear of being ostracized. Hopefully the efforts that are being undertaken will eventually stamp out harassment of all employees

regardless of their age or gender and provide a supportive environment for those who experience it to report it.

Conclusion

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

[151] I have considered and given due weight to each factor as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.

[152] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of Mr Tamaliunas was not harsh, unjust or unreasonable.

[153] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that Mr Tamaliunas was unfairly dismissed within the meaning of section 385 of the FW Act. The Application is therefore dismissed.

[154] An Order[113] to this effect will be issued with this Decision.

DEPUTY PRESIDENT

Appearances:
Mr M Bronleigh, for the Applicant.
Mr M Vallence, for the Respondent.

Hearing details:
2023
PERTH
6 February

Final written submissions:
Applicant's final written submissions filed 22 February 2024.
Respondent's final written submissions filed 29 February 2024.

Printed by authority of the Commonwealth Government Printer
<PR772763>

[1] *Warrell v Walton* (2013) 233 IR 335, 341 [22].

[2] Digital Court Book (**DCB**).

[3] Ibid 1717 – 1726.

[4] Ibid 1727.

[5] Ibid 1892.

[6] FWC Transcript of Proceedings (**Transcript**), 6 February 2023, 22 at [PN198] (Binet DP).

[7] DCB (n 2) 30.

[8] Ibid 35.

[9] Ibid 1728.

[10] Ibid 30.

[11] Ibid 1895.

[12] Ibid 1895-1896.

[13] Ibid 1732.

[14] Ibid 1764.

[15] Ibid 1733.

[16] Ibid 1733.

[17] Ibid 1733.

[18] Ibid 1037-1038, Transcript (n 6) at PN208 and PN405.

[19] Ibid 1037-1038.

[20] Ibid 1037-1038, Transcript (n 6) at PN90 and PN109, PN583.

[21] Transcript (n 6) PN117-PN121, PN170-PN173.

[22] DCB (n 2) 1750.

[23] Ibid 1038-1039, 1732.

[24] Ibid 1038-1039, 1718.

[25] Ibid 1038-1039, 1750.

[26] Ibid 1038-1039.

[27] Ibid 1750.

[28] Ibid 1718.

[29] Ibid 1719.

[30] Ibid 1719.

[31] Ibid 1719.

[32] Ibid 1719.

[33] Ibid 1719-1720.

[34] Ibid 1720-1721, 1750.

[35] Ibid 1721.

[36] Ibid 1730.

[37] Ibid 1730.

[38] Ibid 1754, 1754.

[39] Ibid 38, 1721, 1731.

[40] Ibid 1731-1732.

[41] Ibid 1721-1722, 1731, 1732.

[42] Ibid 39- 40, 1723.

[43] Ibid 41.

[44] Ibid.

[45] Transcript (n 6) PN146-PN154, PN174.

[46] DCB (n 2) 30.

[47] Ibid 4, 54-55.

[48] Ibid 54-55.

[49] Ibid 30.

[50] *Fair Work Act 2009* (Cth) s 383.

[51] DCB (n 2) 30.

[52] Ibid 30.

[53] Ibid 30.

[54] Ibid 48.

[55] Ibid 30.

[56] Ibid 30.

[57] Ibid 30.

[58] Ibid 30.

[59] Ibid 14.

[60] (1995) 185 CLR 410, 465 (McHugh and Gummow JJ).

[61] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, 4 [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB), (Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[62] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[63] Ibid.

[64] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[65] *Culpeper v Intercontinental Ship Management Pty Ltd* (2004) 134 IR 243.

[66] DCB (n 2) 1037.

[67] *Edwards v Justice Giudice* (1999) 94 FCR 561, 565 [7] (Moore J).

[68] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23] – [24].

[69] (1938) 60 CLR 336 at 361-362.

[70] *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2012] WASC 425 at [46] to [49]. The decision was upheld on appeal in *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2014] WASCA 29.

[71] DCB (n 2) 1722, 1760, 15.

[72] Ibid 1044.

[73] Ibid 6.

[74] Ibid 1038.

[75] Ibid 7, 1895-1896; Transcript (n 6) at PN358, 361 and 365.

[76] See for example Mr Tamaliunas' support person's notes of the Investigation meeting where he reports that he saw Witness A in tears DCB (n 2) 14.

[77] DCB (n 2) 52.

[78] Ibid 1722.

[79] Ibid 35.

[80] Ibid 1732, Alcoa's records indicate that Mr Tamaliunas also undertook Code training on 23 August 2020. Mr Tamaliunas asserts that this was completed on his behalf by Mr Giles.

[81] DCB (n 2) 1733.

[82] Ibid 1733.

[83] Ibid 1733.

[84] Ibid 1827, 1866.

[85] Ibid 1816-1817.

[86] Ibid 1821.

[87] Ibid 1873.

[88] in *Peter Heesom v Vego Pty Ltd t/a One Harvest* [2019] FWC 1664.

[89] [2023] FWC 1997.

[90] [2020] FCAFC 126.

[91] [2020] FCA 1784.

[92] [2023] FWC 1997.

[93] [2020] FCAFC 126.

[94] [2020] FCA 1784.

[95] DCB (n 2) 1720-1721, 1750.

[96] Transcript (n 6) PN146-PN154, PN174.

[97] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151 [73] .

[98] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[99] Ibid.

[100] DCB (n 2) 53.

[101] *Crozier* (n 97), 151 [75].

[102] *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1, 14 – 15 [26] quoting *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7 (Wilcox CJ).

[103] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7 (Wilcox CJ).

[104] DCB (n 2) 53.

[105] Explanatory Memorandum, *Fair Work Bill 2008* (Cth), [1542].

[106] DCB (n 2) 53.

[107] Ibid 53.

[108] *Jetstar v Meetson-Lemkes* (2013) 239 IR 1, 21–22 [68].

[109] DCB (n 2) 53.

[110] *Sykes v Heatly Pty Ltd t/a Heatly Sports* PR914149 (AIRC, Grainger C, 6 February 2002), [21].

[111] DCB (n 2) 53.

[112] Ibid 54.

[113] PR772939