DECISION

Fair Work Act 2009
s 394—Unfair dismissal

Cassandra Cooke
v
National Jet Express Pty Ltd
(U2025/10141)

DEPUTY PRESIDENT BEAUMONT PERTH, 10 FEBRUARY 2026

Unfair dismissal – valid reason – reinstatement – evidential onus that reinstatement not appropriate not met

1 Issue and outcome

[1] Ms Cassandra Cooke (the **Applicant**) has made an unfair dismissal application under s 394 of the *Fair Work Act 2009* (Cth) (the **Act**) regarding her dismissal as a First Officer (E190 Pilot) with National Jet Express Pty Ltd (the **Respondent**).

[2] At the time of her dismissal, the Applicant had worked for the Respondent for 27 years, and, according to the Applicant in her first witness statement, she had no previous disciplinary or performance issues. However, in her witness statement in reply, the Applicant provided detail of the disciplinary issues that had arisen over her long tenure.

[3] The Applicant's dismissal arose after a conversation with a work colleague on 21 March 2025. It is alleged that on that day, the Applicant was dropping off pilot attendance paperwork to the Resource Planning team at the Perth Airport Head Office. Whilst doing this, the Applicant is said to have engaged in a conversation with Victoria Portelli (**Portelli**), Crew Training Coordinator. It is Portelli's evidence that the Applicant made certain comments to her about Wayne Ovens (**Ovens**), Head of Flying Operations. Those comments were said to be about Ovens' work and personal life. This conversation, particularly the Applicant's alleged comments about Ovens, were reported to Ovens, presumedly by a member of the Resource Planning team. Ovens subsequently made a written complaint on 1 April 2025 to the Respondent about the Applicant's purported conduct after having asked Portelli to write a statement. The disparaging comments were said to include the following:

(a) 'he hates women';
(b) 'he is clearly having marital problems';
(c) 'he is obviously fighting with his wife'; and
(d) 'even the Union Member agreed with these statements'.

[4] After receipt of Ovens complaint, the Respondent instructed the Applicant not to attend work on 16 April 2025. An investigation ensued and the allegation was ultimately found to have been substantiated by the Respondent notwithstanding the Applicant's denial that the conduct occurred. The Applicant was dismissed for 'serious misconduct' on 26 May 2025. However, whilst the Applicant's conduct was characterised by the Respondent as 'serious misconduct', she was provided payment in lieu of notice.

[5] Before deciding the merits of the application, s 396 of the Act requires that I decide four matters. First, whether the application was made within the 21-day period required by s 394(2) of the Act. Second, whether the Applicant was a person protected from unfair dismissal, because she had served the minimum employment period and earned less than the high income threshold or was covered by an industrial instrument. Third, whether the dismissal was a case of genuine redundancy. Fourth, whether the Respondent is a small business employer, rendering the Small Business Fair Dismissal Code relevant to this matter. The Applicant made her application in the requisite timeframe and was protected from unfair dismissal. The Respondent was not a small business employer at the relevant time and there is no claim that the Applicant's position was made redundant, hence rendering these preliminary considerations of no further relevance.

[6] Having considered the evidence before me, I am of the view that the Applicant's dismissal was unfair notwithstanding that there was a valid reason for her dismissal based on her misconduct of 21 March 2025. The censure of dismissal was, however, harsh in all the circumstances and having weighed the factors favouring reinstatement against the factors which do not favour reinstatement, and noting that I am limited to the evidence adduced, I have concluded that I cannot be satisfied that reinstatement is not appropriate.

[7] However, I do not consider it appropriate, in the circumstances of the present matter, to put the Applicant into a position where she has suffered nothing out of this exercise. By not making an order for the restoration of lost pay, a very clear message is given to the Applicant as to the consequences that flow from her own conduct.

[8] Issued concurrently with this decision are orders for the reinstatement of the Applicant to take effect from 24 February 2026 and that the Respondent is to treat the period of employment of the Applicant with the Respondent to have not been broken by the dismissal.[1] The intervening period between the dismissal and reinstatement of the Applicant shall be counted for all purposes as the period of employment.[2] My detailed reasons follow.

2 Background and some initial factual findings

[9] Before turning to the consideration of s 387 of the Act, it is necessary to describe the factual background and to make findings in relation to contested matters. In respect of findings, it is trite to observe that when an employer alleges misconduct, it must establish, on the balance of probabilities, that the misconduct occurred.

[10] The background to the matter is structured in accordance with the some of the circumstances that ultimately led to the Applicant's dismissal.

[11] It is observed that, in support of her case, the Applicant gave evidence.

[12] The Respondent relied upon the evidence of:

(a) Portelli, Crew Training Coordinator and, prior to April 2025, Resource Planner;
(b) Mark Heal (**Heal**), Fleet Manager for the Embraer E190 – the aircraft operated by the Applicant, and the Applicant's manager for the 12 months prior to her dismissal;
(c) Robin Furber (**Furber**), Chief Operating Officer; and
(d) Shannyn Van Heerden (**Van Heerden**), Resource Planner.

[13] Before broaching the circumstances that gave rise to the Applicant's dismissal, it is timely to outline the responsibilities and duties of the Applicant within her former workplace. In addition, further context is provided about the work environment and some of the purported issues with the Applicant's behaviour that the Respondent drew upon to support its contention that there was a valid reason for the Applicant's dismissal.

[14] It appeared uncontroversial that the conduct of the Applicant and other employees of the Respondent was regulated by the Respondent's Code of Conduct (**Code**) in conjunction with its Harassment, Discrimination and Workplace Bullying Policy (**HDB Policy**). In its Show Cause Notice to the Applicant, the Respondent referred to its preliminary view that the Applicant's conduct on 21 March 2025, constituted a breach of the Code and obligations in the HDB Policy.[3]

[15] In particular, the Respondent relied upon clause 2 of the Code, which gave detail of the obligation that '[E]mployees are required to uphold the Code and any associated relevant policies and procedures'.[4] Clause 3.1 titled 'Corporate Regulation' set out the following:

> All Employees must behave in a professional manner at all times and not engage in any behaviour which brings the Group into disrepute, whether at work premises, in public or on social media.

[16] As to 'relevant' policies and procedures, the Respondent referred to its HDB Policy. Insofar as the Applicant was alleged to have breached certain requirements of that policy, the Respondent relied upon clauses 6.1 and 6.3. Whilst the Respondent relied upon clause 6.3 without more, it is unclear how the clause proved relevant. The Respondent referred to the requirement in clause 6.3 that an employee must not discriminate against someone on the grounds of their association with someone who has, or is assumed to have, a 'Protected Attribute'. The passage in question states:

> It is also unlawful to discriminate against someone on the grounds of their association with someone who has, or is assumed to have, a Protected Attribute.

[17] Clause 6.1, which perhaps was more on point given that which was alleged against the Applicant, was titled 'Harassment' and set out, amongst other matters, the following:

> Harassment is any form of behaviour that is not wanted, not welcome, unreciprocated and that is likely to create a hostile or uncomfortable work environment by seriously offending, humiliating or intimidating a person for any reason.
>
> Harassment can be:

- explicit or implicit;
- physical, spoken or written; and/or
- a singular act or a series of incidents that occur over a period of time.

Harassment does not require intent for the behaviour to be deemed as harassment.

Examples of behaviour that can constitute harassment include, but are not limited to:

- making and/or circulating offensive or disparaging remarks to or about staff about their work or capacity for work, personal life, absences, or clams for compensation;
- **destructively criticising or undermining staff publicly or privately….**

[18] The Respondent specifically relies upon that part of clause 6.1 of the HDB Policy that is in bold font.

[19] The Respondent referred to the *NJE Pilots Enterprise Agreement 2022-2026*[5] (the **Agreement**), noting that clause 13.2 of the instrument required those covered to comply with the Respondent's 'Operations Manuals and Procedure Manuals, systems and policies as communicated to Pilots from time to time'.[6]

[20] Regarding the context in which the Applicant performed her duties, Heal gave a detailed account of crew resource management. He explained that there is a working relationship between all parties involved in the operation of an aircraft. This involves interactions between flight crew members, cabin crew, ground crew and air traffic control. According to Heal operating in a dynamic environment and with many operational challenges, makes operating an aircraft a very high stress environment.

[21] The indefatigable view of Heal, the Applicant's manager although not responsibile for her dismissal, was that it was not appropriate for the Applicant to be operating the Respondent's aircraft.[7] Heal premised his reasons, in part, on the Applicant's lack of accountability in respect of a medical certificate about her injured toe, a subject that will be addressed shortly, and lack of accountability following a claim against a colleague in 2022 about cheating. It is the latter reason that is addressed first.

2.1 The Applicant's purported allegation that a colleague had cheated

[22] The Respondent's contention that it and the operating crew had lost trust in the Applicant, was, in part, premised on Heal's evidence that the Applicant had made an unsubstantiated claim during her training in Europe in July 2022, that a colleague had cheated in an exam.[8]

[23] Included in the Respondent's evidence was an email dated 3 July 2022 titled 'Record of conversation with FO Cass Cooke'. Ovens was copied to the email. The sender and recipient of the email were not called to give evidence, but it appeared to be accepted that the email constituted a business record. An abridged version of the email follows:

> The following is a short dot point recall of a conversation with FO Cass Cooke, regarding allegations of Capt XXXX XXXXXX cheating during a systems exam.

…

Cass stated that "XXXX XXXXXX has cheated on that morning's systems exam, as he knew the answers, which she perceived were ready prior to the start of the exam"

I stated that "how could he, as no one has any idea what questions were in the exam"

Cass stated "that he got them from Wayne Ovens HTD, as they wanted Ryan to pass.

…

Cass stated that "he never opened his IPad, and the only time he did he had the fifty answers ready to go"…[9]

[24] A further email chain dated 6 July 2022, commencing with an email from the pilot at the centre of the purported cheating allegation to Gavin Healy (**Healy**), Head of Flying Operations, Ovens and two further recipients, was included in the Respondent's evidence. The email was titled 'Training concerns' and outlined that the pilot was unsure of the best way to tackle the issue, that he understood that HR had briefed Healy about what had happened, and that the pilot's concerns had not been appreciated to the extent warranted. The responsive email to the pilot from Healy of that same date stated that he needed to have a group conversation so all knew that 'these behaviours will not be supported' and that Healy was 'aware of [the pilot's] concerns re the type of rating and am working through this at the moment'.

[25] In her witness statement dated 25 September 2025, the Applicant refers to Heal having provided examples as to why he had lost trust in the Applicant, including the example that the Applicant claimed in 2022 that a colleague was cheating.[10] The Applicant gave evidence in her second witness statement that she had a short meeting with Healy sometime in 2022. He informed her in the meeting that someone had complained that the Applicant claimed a colleague was cheating in an exam.[11] The Applicant stated that she informed Healy that the comment she made was a joke, and that after having provided Healy with her explanation, she never received any letter of allegation, confirmation of an investigation or outcome of investigation.[12]

[26] Of the Applicant's purported allegation that a colleague cheated, I make the following observations. The importance of approaching fact-finding based on the contemporaneous documentary record and objective circumstances was described by Lee J in *Transport Workers' Union v Qantas (No. 1)*.[13] His Honour, noting the industrial context before him, set out an approach to fact-finding, observing that what usually matters most is the proper construction of contemporaneous notes and documents and the probabilities that can be derived from those notes and any other objective facts.[14] Referring with approval to the judgment in *Gestmin SGPS SA v Credit Suisse (UK) Limited*[15] ('***Gestmin***'), His Honour extracted the following passage from paragraph 22 of *Gestmin*:

> … the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and

> conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

[27] Lee J went on, at paragraph 17, to set out that the approach is one premised on the assumption that contemporaneous notes and documents are the extemporaneous and unvarnished product of the conduct of internal dealings or communications between the contesting parties, and that confidence can be placed on the contemporaneous record, particularly where that record is unfiltered and sufficiently complete.

[28] The Respondent has adduced two business records in support of its assertion that the Applicant (falsely) claimed a colleague had been cheating during a systems exam. The Applicant's account is that she made a comment (presumedly about her colleague cheating) but that it was a 'joke'. Leaving aside why anyone, particularly a pilot of the Applicant's experience, would assert that their colleague had cheated on an exam as a 'joke', the Applicant's evidence clearly conflicts with the content of the email of 3 July 2022 titled 'Record of conversation with FO Cass Cooke'. However, the email from Healy to the pilot (presumedly the colleague against who the Applicant made the cheating allegation) references only that he would have a 'group conversation so all would know that these behaviours will not be supported'.[16]

[29] The limited documentary evidence is sufficient to draw doubt about the accuracy of the Applicant's recollection that her assertion that her colleague cheated was said as a joke. Nevertheless, there is no evidence before me indicative that the Applicant was subject to disciplinary action or that the Respondent investigated the pilot's complaint with the exception of what is disclosed in the Respondent's email from Healy to the pilot dated 6 July 2022. It follows that there is no evidence of a disciplinary record that evinces a record of counselling, a warning or the like. To thereafter submit the Respondent's loss of trust in the Applicant arose, in part, due to her unsubstantiated assertion that her colleague had cheated, is unreasonable in this context.

2.2 Injury and its impact on the Applicant's work prior to 21 March 2025

[30] Prior to the conversation between Portelli and the Applicant on 21 March 2025, the Applicant had sustained an injury to her toe. It appears that the Applicant initially injured her toe in a non-work-related injury, only to then re-injure it whilst undertaking simulator work in Japan on 26 March 2024.[17] The Applicant's evidence shows that in February 2025 the Applicant broke a toe again. The Applicant provided a medical certificate in relation to her injured toe, on 10 March 2025. The medical certificate of 10 March 2025 set out the following:

> This is to certify that
>
> Ms Cassandra Cooke has a medical condition and I have recommended a postponement of her simulator assessment for another four weeks from now.
>
> Ms Cook remains fit for active flying duties.[18]

[31] The Applicant gave evidence that the Designated Aviation Medical Examiner (**DAME**) requested that she return to work fit for flying duties and that she was trying to go back to work to go flying.[19] In the period in which she was trying to go back to work, the Applicant was

studying to be a 'human factors and non-technical skills instructor'. The Applicant achieved that 'assessment' on 21 March 2025, the day, according to the Applicant, that she received her allegation (presumedly concerning her purported comments about Ovens).[20]

[32] The injury of the Applicant's toe drew attention at hearing. Heal gave written evidence that accountability is an important aspect for a pilot to meet the standard required to operate a commercial aircraft.[21] At hearing, Heal stated that the requirement for a simulator assessment serves to check the key competency skills of a pilot (regulatory requirements), and one of those key competency-based scenarios is an engine failure, also referred to as a 'V1 cut'. This particular scenario is said to require a pilot to show competency in managing the aircraft with a power loss on take-off.[22] The pilot's response is said to require a sustained level of pressure on the rudder pedals which exerts pressure on the foot.[23] Heal explained that there had been a previous context where the Applicant had a broken toe, and in that scenario it was shown there was a potential that exerting pressure in the simulator session using an injured foot may cause either further damage or potentially show a limited ability to perform the task.[24]

[33] When asked about the purpose of including evidence about the Applicant's medical certificate from the DAME in his witness statement, Heal responded to the effect that to provide a doctor's note suggesting a pilot is not okay to participate in a simulator session but is competent to operate an aeroplane, when the above mentioned scenario is considered, demonstrated a lack of judgment (by the pilot – the Applicant) – regardless of what the DAME had to say.[25]

[34] Heal explained that a 'DAME' is a medical practitioner certified by the Civil Aviation Authority to make medical judgments on licensed pilots within Australia.[26]

[35] In cross examination, Heal acknowledged that following receipt of the Applicant's medical certificate dated 10 March 2025, the Applicant was asked to obtain a second medical certificate. The evidence suggests that the Applicant provided a further medical certificate to the Respondent on 26 March 2025. It reads in the same terms as the medical certificate of 10 March 2025.[27]

[36] Heal was asked further questions in cross examination about whether he questioned everyone that comes up with a fit to fly, to which he responded, 'no'.[28] When asked whether he interrogated the Applicant about the medical certificate, Heal explained that he had not, and in his time as a manager he had not (presumedly questioned others), because he had not previously seen a conditional medical clearance.[29] That is, a medical clearance that did not encompass every operational aspect of consideration of the Applicant's job.[30] It was proposed to Heal that the thrust of his evidence was that because of this accountability issue, the Applicant could not be trusted to return to work. Heal provided qualified agreement with this proposition, noting it was a component (as to why the Applicant could not be trusted), clarifying that the Applicant's unsubstantiated claim about others 'cheating' formed the other component.[31]

[37] It was Furber who said that in March 2025, he had received the letter from the DAME, stating that the Applicant was unfit to conduct simulated sessions but fit to fly.[32] That letter had, according to Furber, been provided to him as he was the accountable manager.[33]

[38] Furber said that the letter (presumedly one of the medical certificates) was reviewed by the Management Committee, but he made the decision to stand down the Applicant. Furber explained that he stood down the Applicant because, in his view, the question arose that if a pilot is not fit to fly a simulator which can be stopped at any time – then how can the pilot be deemed fit to fly an aircraft?[34] Furber stated that:

> So you're actually placing the aircraft – you're actually placing the airline, safety, everything else, at major risk, because if you're deemed not to be able to fit a simulator because it may do damage to your toe, then if you're in an incident where you're operating an aircraft and you have a very – I don't know, some adverse situation, and all of a sudden now, because of her injury, her toe is affected, and as a result the detriment of the aircraft and the crew is put at severe risk so that's why I made the decision to stand Ms Cooke down. That was the communication to me from Wayne Ovens, because he received the medical certificate for me himself and the management committee to review, and I took it – and I took it further to CASA, which when I spoke to Avmed – which, sorry, it's Aviation Medical – they agreed:
>
> Yes, you're right to – within your rights to stand Ms Cooke down...[35]

[39] An email between Furber and 'Matt' of the Civil Aviation Safety Authority (**CASA**) dated 4 April 2025, copying in Ovens was located at page 82 of the Digital Hearing Book. That email set out Furber's concerns relating to the DAME's medical certificate for the Applicant dated 10 March 2025. In the email, Furber referred to the DAME's recommendation to postpone the Applicant's recurrent simulator sessions rostered concurrently for 24 and 25 March for 30 days whilst also advising that the Applicant remains fit for active flying duties. Furber further described the similarities in requirements between flying and simulator sessions and outlined that he considered there had been a serious dereliction in the DAME's responsibilities.

[40] An email between Furber, Kim Hai and the Management Committee was also included at page 82 of the Digital Hearing Book. The email dated 11 April 2025, detailed that Furber had a call with Mr Hockberg from CASA Aviation Medicine and that 'the agree we [sic] our assessment and have started an investigation into this matter and will contact me to advise on their findings…'.

[41] As at 21 March 2025, the Applicant was not permitted to fly the Respondent's planes despite the Applicant stating that the DAME had requested she return to work fit for flying duties. According to the Applicant's evidence she was trying to return to flying and had provided the medical certificate dated 10 March 2025 to the Respondent to demonstrate her fitness to fly.

[42] The Respondent takes issue with the Applicant having not taken accountability in respect to the approach she took regarding the DAME's medical certificate. It is difficult to conceive why the Respondent frames its concept of 'accountability' insofar as the Applicant's behaviour is concerned, as comprising of the Applicant conducting a self-assessment of her fitness to the extent that her assessment would result in her deeming herself unfit to fly. Where the Respondent disagrees with the medical assessment of the DAME, it is open to the Respondent to provide further instruction to the DAME in respect of the duties and responsibilities of the Applicant's role and request a further medical examination based on that additional information. Alternatively, the Respondent may seek a further medical examination

from the DAME (a second opinion) and where conflicting reports arise, a further medical opinion may be warranted, or, as was the case here, the Respondent may challenge the veracity of the medical certificate with the relevant regulator who oversees the practice of the DAME.

[43] While a pilot's self-assessment of fitness for work and fatigue may form a requisite responsibility within their role, the context before me was one where the assessment of the Applicant's fitness to fly had been referred to a qualified and appropriate medical practitioner, namely the DAME. As was described by Heal, the DAME is certified by the Civil Aviation Safety Authority to make medical judgments on licensed pilots within Australia.[36] It was therefore neither appropriate nor required that the Applicant deviate from the DAME's assessment. The Applicant was simply not qualified to make that determination. To therefore attribute to the Applicant a lack of accountability because of her failure to deem herself unfit to fly in light of her lack of fitness to undertake simulator training, as determined by the DAME, was unreasonable.

[44] It is important to caution as an aside, that this did not in turn mean that the Applicant had no recourse in respect of a medical report with which she disagreed. As was the case for the Respondent, had the Applicant disagreed with the DAME's assessment then similarly it was open to her to request a further medical assessment or to agitate her consternation with the relevant regulatory body.

[45] However, returning to the issue at hand, there is no basis for finding that the Applicant demonstrated a lack of accountability when she persisted in trying to return to fly or failed to consider herself unfit to fly.

2.3 21 March 2025

[46] On 21 March 2025, Portillo was at her workstation in the Resource Planning office at the Respondent's Perth premises. At the relevant time, Portillo was a resource planner, responsible for writing the rosters for the E190 flight crew and the 146 flight crew.[37] Portillo explained that her work involved interacting with a few different departments including the management team, training and training facilitators, in addition to operations and the flight crew.[38]

[47] Portelli stated that in respect of roster requests, the crew received the opportunity to put in roster bids every month. Regarding the Applicant, Portelli said she had been quite accommodating of the Applicant's past requests and noted that the two had previously chatted about their personal lives and the Applicant's (roster) requests.[39] Expanding upon discussions broaching personal circumstances, Portelli's evidence disclosed that the two spoke of their children, and that at times Portelli instigated a work-related discussion that evolved into a 'chat'.[40]

[48] Regarding the interaction between Portelli and the Applicant on 21 March 2025, Portelli acknowledged that she instigated the chat when the Applicant entered into the office to congratulate the Applicant on achieving sign off as a HF Instructor (Human Factors Instructor).[41]

[49] Also present in the Resource Planning office that day was Van Heerden, a Resource Planner with the Respondent. Van Heerden commenced employment with the Respondent on 3 or 4 March 2025.[42]

[50] Van Heerden recalled sitting at her desk in the afternoon of 21 March 2025 and observing the Applicant talking to Portelli. Van Heerden stated in her witness statement that she overheard parts of the conversation in which the Applicant was talking (to Portelli) about their children (Portelli's and the Applicant's children).[43] Van Heerden further expressed the following in her witness statement:

> It caught my attention when they talked about the Medical Certificate stating that she was fit to fly but not to attend the simulator training. And the conversation further went into Wayne Ovens.[44]
>
> I knew it was about Wayne Ovens because I heard her say his name.
>
> The incident in question (the conversation pertaining to Wayne Ovens) is what stands out about this whole conversation. I sit about 1 meter away from Victoria. We have adjoining desks. The incident where Case Cooke mentioned Wayne Ovens started with the applicant stating, "he was in such poor form" and being "rude to everyone is because of conflict going on at home between him and his wife".
>
> I sit quite low in my chair; I face Victoria from a directional point of view. Caz Cooke was standing no more than half a metre from me. I can't remember the wording specifically. I just know that Wayne Ovens was the top of conversation.
>
> I peered through my screens and to see if Victoria was ok. She looked uncomfortable. I remember Victoria standing up after the conversation and she said that was uncomfortable and the conversation was weird…[45]

[51] It appears that on 14 April 2025, Van Heerden was interviewed by Anjali Walia (**Walia**), who is described in the Respondent's contemporaneous materials as its Head of HR and appeared at hearing as the Respondent's Chief Corporate Services Officer, and Jigna Panchal (**Panchal**), Human Resources Coordinator for the Respondent, was the notetaker.[46] The interview commenced with Walia explaining to Van Heerden that they were conducting a formal investigation into a matter concerning comments made by the Applicant about Ovens on 21 March 2025, and that Van Heerden had been listed as a witness.

[52] The interview notes scribed by Panchal (**Van Heerden interview notes**) recorded, amongst other things, the following:

> **SV** – Yes, In the afternoon she came in to our room, dropped some paperwork and she was then updating Vic on the same
> **AW** – Do you know what paperwork ?
> **SV**–I believe she was instructing a course , HF course and and then came to drop of the paperwork
> **AW –** Where were you at time of the conversation between Caz Cooke and Victoria
> **SV** – I was at my workstation opposite to Victoria.
> **AW** –can I confirm if you were you in a position to overhear the conversation between them**?**
> **SV** –Yes but I wasn't listening to the whole conversation. Cass was talking about her kids, maybe a birthday party.

> **AW** – At any point during the conversation, did you hear any rumours, gossip, or personal remarks made about anyone?
> **SV** – Yes towards the end, I know Cass brought something up. She was upset about something, that she has a medical certificate clearing her fit to fly or something but wayne is not letting her. She was talking about how he was having issues with his wife and said something like, "he's such a dick, that's why he is being rude to everyone."
> **AW** – So confirming you heard her say she was upset, and that wayne and his wife were fighting, and
> that's why he was being rude?
> **SV** – Yes. She said, "I know he is having problems with his wife at home". I couldn't believe that she said it about the head of flying operations and it was only my second or third week. It wasn't my place to get involved in the conversation.
> **AW** – What did Vic say in response?
> **SV** – Victoria, She looked very uncomfortable.
> **SV** – I don't remember her saying anything otherwise
> …
> **AW** – When Cass left, did anyone say anything?
> **SV** – After Cass left the room, Vic stood up and said, "That was weird"
> **AW** – Is there anything else that could help with this investigation?

[53] Van Heerden was questioned in cross examination about the evidence in her witness statement and the Van Heerden interview notes. Van Heerden confirmed that she was not listening to all of the conversation between the Applicant and Portelli.[47] Van Heerden was asked whether the Applicant and Portelli had discussed kid's birthday parties, to which Van Heerden responded that she was not 100 percent certain.[48] When Van Heerden was informed that she had told the Respondent about the conversation broaching birthday parties, she acknowledged that she had not included reference to the birthday parties in her witness statements as she was not certain of it.[49]

[54] In cross examination, Van Heerden confirmed that she had heard part of the conversation about the Applicant's medical certificate; her attention was drawn to that part of the conversation because she considered it weird that the Applicant was not able to go to the simulator (training) but was still able to fly.[50] Van Heerden further confirmed to Counsel for the Applicant, that she had heard:

> Wayne, he's such a dick, that's why he's being rude to everyone. He's having issues with his wife. I know he's having problems with his wife at home'.[51]

[55] When asked whether there was mention of 'Wayne's' surname, Van Heerden was unable to remember whether there was or not but accepted that she had inferred that it was 'Wayne Ovens' and that she could not rule out that the Applicant was talking about a different 'Wayne'.

[56] When asked what happened when the Applicant left the office, Van Heerden gave evidence that Portelli stood up, mentioned she was uncomfortable and that she did not know why someone did not say something, and that she thought Portelli said, 'that was, like, really weird' and then that was the end of it.[52] It was pointed out to Van Heerden that when interviewed by the Respondent she had not said that to the Respondent – Van Heerden was referred to the Van Heerden interview notes.[53]

[57] The Applicant was taken to page 127 of the Digital Hearing Book where the Van Heerden interview notes set out the following:

> AW – What did Vic say in response?
> SV – Victoria, She looked very uncomfortable.
> SV – I don't remember her saying anything otherwise.
> AW – Did she try to stop the conversation?
> V – I remember the conversation happening, and not long after that, Cass left the room.
> AW – When Cass left, did anyone say anything?
> SV – After Cass left the room, Vic stood up and said, "That was weird"
> AW – Is there anything else that could help with this investigation?
> SV – The next week, Vic spoke to Wayne.

[58] Counsel for the Applicant noted to Van Heerden that the evidence Van Heerden had given to the Commission is that Portelli had stood up, said that she felt that was uncomfortable, and asked why didn't anyone intervene, to which Van Heerden agreed.[54] Van Heerden acknowledged that when interviewed by the Respondent what she told the company was not in those words.[55]

[59] It was proposed to Van Heerden that the evidence she had given to the Commission was evidence that she thought she remembered but was actually a reconstruction of what happened – to which the Van Heerden responded: 'I wouldn't say it's a reconstruction. I would say this is just how I'm presenting it'.[56]

[60] Van Heerden was asked in cross examination whether she was asked by the Respondent to clarify whether the Applicant and Portelli were talking about Wayne Ovens.[57] Van Heerden confirmed that Paul Joyce (**Joyce**), Employee Relations Advisor for the Respondent, had asked her to confirm whether the conversation between the Applicant and Portelli concerned Wayne Ovens and not 'Wayne Revitt', to which Van Heerden replied 'yes',[58] acknowledging that it had been suggested to her that it was Wayne Ovens.[59]

[61] In re-examination, Van Heerden was asked how she had arrived at the conclusion that the Applicant and Portelli were talking about Ovens.[60] Van Heerden responded:

> …Ms Cooke and Victoria were discussing the medical certificate and her return to work, or whatever was going on. I didn't hear or - I didn't hear the conversation stay [sic] to anything else so when the conversation switched to Wayne, I didn't believe there could be anyone else they were talking about…[61]

[62] As to the Resource Planning office, it was Van Heerden's evidence that the office was 'fairly small', the whole room being 'probably less than 10 metres'.[62] According to Van Heerden the room housed seven desks which were not very big and were placed so that there was not very much space between each one.[63] Van Heerden said that she sat opposite Portelli separated by computer screens.[64]

[63] In respect of what occurred on the 21 March 2025, the Applicant said she walked into Portelli's office to hand in the attendance sheet that she had completed from the class that day.[65] The Applicant recalled that there was a woman in the office with blonde hair toward the back of the room and another colleague, Naomi Coslani (**Coslani**), was at her desk near the

hallway.[66] The Applicant said that she approached Portelli at her desk. The Applicant said that the room was large and others in the room were at a distance.[67]

[64] In respect of the woman in the office with the blonde hair, the Applicant said she believed the woman was Van Heerden.[68] According to the Applicant, Van Heerden sat five to ten metres away from Portelli's desk and the Applicant had her back to her.[69] The Applicant expressed that her conversation with Portelli was not loud enough for Van Heerden to hear or at least understand the context.[70]

[65] Leading up to her conversation with Portelli on 21 March 2025, the Applicant explained that on 20 March 2025, she had gone out to coffee with a group of mothers she had known for around nine years.[71] Those same mothers had children at the school that the Applicant's daughter had previously attended, and whilst the Applicant had moved her daughter to another school last year, the Applicant noted that she kept in touch with the mothers.[72]

[66] At the coffee catch-up, the group of mothers were discussing circumstances surrounding a teacher at the school where the Applicant's daughter previously attended. According to the Applicant, the mothers were discussing this same teacher to the extent that they referred to the following:

a) he was having marital problems;
b) he had a bad temper which was affecting students at the school;
c) the students had witnessed him and his wife bickering (the wife taught at the same school);
d) there was a proposal to move him to the school where the Applicant's child attends, to separate the teacher and his wife;
e) students had complained of him raising his voice in the playground towards his wife; and
f) children were saying that they believed the teacher hated women.[73]

[67] The Applicant said she was teaching human factors non-technical skills (the training course for pilots and cabin crew) on the day,[74] because she was on a restricted medical clearance after breaking her big toe in March 2025.[75]

[68] The Applicant recalled that the conversation between her and Portelli unfolded as follows:

Portelli:	when are you coming back to work?
Applicant:	I've got clearance from the doctor – so when the company and the union agrees, I'll go back to flying
Portelli:	I am working on May's roster now
Applicant:	how's the little one going at school?[76]

[69] The Applicant stated that Portelli showed her a photo of her son on his first day of school and that the Applicant showed Portelli a photo of her daughter on her first day of school.[77] The Applicant further stated that the two of them started talking about how difficult it is to manage and juggle workload commitments and family responsibilities.[78]

[70] The Applicant recalled that she said to Portelli words to the effect of:

> Look, I heard a bit of a rumour from the school mums yesterday, that Wayne from [my daughter's previous school] maybe [sic] heading your way. He's having issues with his wife. He's going through a messy divorce. I think this is their way of shifting him sideways to let things cool down and give them a bit of space. Some of the girls are complaining that he hates women.[79]

[71] The Applicant explained that she informed Portelli about the teacher because the day prior (20 March 2025) she heard that the teacher might be moving to Portelli's son's school and the teacher was obviously going through some challenges.[80]

[72] The Applicant reported that in response to that information Portelli just nodded and acknowledged the conversation.[81]

[73] The Applicant stated that when she read the allegation against her, it took her some time to recall the conversations that she had previously had with Portelli.[82]

[74] Portelli gave evidence that at approximately 3:00PM on 21 March 2025, she was at her workstation in the Resource Planning office when the Applicant entered the office to drop off paperwork following a 'HFNTS course' she had conducted.[83]

[75] Portelli stated that the conversation with the Applicant started because she engaged in conversation with the Applicant, congratulating her on being signed off as a 'HF Instructor'.[84] According to Portelli, the Applicant walked over to her desk and asked her if she was aware of what was happening with her current roster.[85] In cross examination Portelli explained further that whilst she could not be exact on the wording she recalled:

> …she was I think sick – had been put – her flying duties had been turned to sick leave, I believe, on the live roster which is dealt with by ops after we in resource planning publish it. And she wanted to know what was happening with the roster because the medical certificate that she had provided was, I guess – had said that she was medically still cleared to fly. And I said, "[I]t's out of my hands. It's sitting in the live roster and I don't have anything to do with that".[86]

[76] In her witness statement Portelli similarly explained that she advised the Applicant that the situation was out of her hands and being in a published roster, it would probably 'be Ops who would be making any changes'.[87]

[77] It was at this point that the Applicant is said to have started talking to Portelli about Ovens. Portelli reports that the Applicant stated 'he hates women, and is clearly having marital problems'. Portelli added that the Applicant informed her that she 'had spoken to her "DAME" who had provided the certificate and mentioned he was also not happy it wasn't being accepted by the company'.[88]

[78] Portelli stated that she changed the conversation to something that the two had spoken about in the past and something that they had in common, as she felt very uncomfortable about the Applicant's comments.[89] According to Portelli, that topic was how difficult school hours were for working parents, and Portelli believed that she said '[s]chool hours suck!'.[90]

[79] Portelli said that after a brief conversation about school hours, the Applicant offered to help her with drop off and pick up whenever she got stuck, and then the Applicant turned the conversation back to Ovens.[91] Portelli detailed that the Applicant told her that she had engaged the union in her current matter, and when speaking to the union representative, they had both agreed that Ovens was 'obviously fighting with his wife and having issues at home'.[92]

[80] In cross examination, Portelli, when asked whether the Applicant had referred to Ovens' surname, responded, 'I can't be sure if his surname was used, but as you said, it would probably be unusual to use his surname'.[93]

[81] It was Portelli's evidence that after the Applicant left the room, she stood up and asked her colleagues in the room if anyone had heard the conversation and 'why didn't anyone butt in and "save me"?'. Portelli said that Coslani asked what was said and she repeated the Applicant's comments that the Applicant had made about Ovens.

[82] As to the size of the Resource Planning office, Portelli gave evidence that six people worked within the room, and that opposite from her - across the other side of the partition - was Van Heerden.[94]

[83] Portelli was questioned in cross examination as to whether she was aware that she had a responsibility to report behaviour that might qualify as harassment, to which she responded she was.[95] She was further asked whether she reported the conduct, and she confirmed that she did not.[96] Portelli's evidence was such that it was Ovens who came to her the following week and said that 'HR has requested me [Portelli] to write a statement',[97] and that she was pretty sure that she sent the statement directly to Ovens.[98]

[84] Counsel for the Applicant drew to Portelli's attention that things were said in her witness statement that were not in the 'interview notes' of 14 April 2025 that were located in the Digital Hearing Book at page 131 (**Portelli interview notes**). The 'interview notes' disclosed, in part, the following:

> Victoria: I couldn't recall word for word, but it was along the lines of:
> "He is clearly having marital issues,"
> "Clearly fighting with his wife,"
> "Union reps believe he's having family issues,"
> An aviation doctor was in belief that,
> "Every female needs to watch their back from him."
>
> Anj: Then what happened?
> Victoria: I tried to change the topic. I picked up my phone and showed her a photo of my son in uniform. The conversation went that way, but then circled back to Wayne again, and she made more
> comments.
> Marital comments,
> Fighting with his wife—
> She was probably there for about 20 minutes.[99]

[85] Portelli agreed that was correct[100] and acknowledged that the statement '[h]e hates women' was not something that she had said in the interview of 14 April 2025.[101] Portelli stated, '[y]es, it seems I have left that out'[102] and again 'I may have left it out and I…'.[103]

Portelli was asked whether she was encouraged to put certain things in her statement (presumedly her witness statement, the content of which differed in the respect highlighted by Counsel for the Applicant).[104] Portelli responded, '[n]o. No one has given me any encouragement to add those words'.[105]

2.4 Investigation and disciplinary process

[86] The evidence suggests that the investigation process was triggered by the complaint of Ovens dated 21 March 2025.[106] In that complaint at part 2 of 'Schedule 1 – Complaint Lodgement Form', Ovens had identified that in respect of the outcome he sought:

> I would like a full review of Ms Cooke's HR record to establish their suitability to remain an employee of NJE [sic] This is not the first time that I have heard that Ms Cooke has made false accusations about myself and other NJE management, however this time there were several witnesses.[107]

[87] The Applicant said that she received a call from Joyce on 16 April 2025, in which Joyce informed her that an allegation had been made about her and that she would be immediately stood down subject to a formal investigation about a conversation said to have occurred in March 2025.

[88] On that same date, the Applicant was provided with a letter which confirmed that a formal complaint had been made against her by Ovens about the alleged comments the Applicant made to Portelli about Ovens.

[89] A meeting was scheduled for 17 April 2025 for the Applicant to respond to the allegations, but that meeting was rescheduled to 23 April 2025, to enable the Applicant time to obtain representation, understand the allegations, and recall any related conversations with Portelli.

[90] The Applicant attended a meeting with Joyce and Panchal on 23 April 2025. The Applicant was accompanied by Alan Bailey, a Transport Workers' Union (**TWU**) official, the Applicant's support person. The Applicant said that she explained to Joyce and Panchal that the conversation with Portelli during which the remarks were allegedly made was not about Ovens, but rather about the deputy principal of the school her daughter attended,[108] and that the alleged remark about a 'union member' was in relation to a separate conversation about her return to work from an injury, which the TWU was assisting her with.[109] The Applicant said that she informed Joyce and Panchal that she did not make any comments about Ovens.[110]

[91] The Applicant said that at the meeting on 23 April 2025, Joyce refused to agree to copy the union to emails in relation to the investigation and whilst he invited the Applicant to provide her own witnesses to the conversation, when the Applicant asked whether she could contact two persons from 'Rex', Joyce declined the request, purportedly because the two persons were not the Respondent's employees.[111]

[92] A meeting was held on 9 May 2025 between the Applicant, Joyce and Edward Nell, a TWU official. The Applicant stated that she was informed by Joyce that the investigation had concluded, the allegations had been substantiated, the Respondent would send a show cause

letter with a view to terminating her employment, and that the Respondent had also considered previous performance issues in deciding to terminate the Applicant's employment.[112]

[93] By 16 May 2025, the Respondent wrote to the Applicant informing her that it was satisfied that the allegations had been substantiated and that the preliminary view of the Respondent was that the Applicant's behaviour constituted serious misconduct.[113] Whilst the Applicant provided a further written response to the allegations in the letter of 16 May 2025, on 26 May 2025, she attended a meeting with Joyce, accompanied by Shane O'Brien, a TWU official, and was informed that she was being dismissed.[114]

[94] Furber gave evidence that as the Chief Operating Officer (interim)[115] and account manager of the Respondent, it was his 'responsibility to make the final determination of certain things, especially when it affects safety...'.[116] Furber noted that whilst it was his decision (in respect of the Applicant's dismissal), he could also receive feedback from the Management Committee.[117] Furber clarified that the Management Committee included the following personnel: the Executive Chairman, Chief Corporate Services Officer (who was appearing, at hearing, on behalf of the Respondent), Chief Corporate Officer, Ovens and the Chief Fly-in Offshore Officer.[118] Furber clarified, in short, that a response from the Management Committee (in respect of the Applicant) was limited due to the fact that the allegations against the Applicant centred on Ovens,[119] and therefore Ovens was not part of those discussions.[120]

[95] Furber initially gave evidence in cross examination that he did not know what Ovens wanted from the outcome,[121] but then acknowledged that he stood corrected,[122] and then clarified when the Applicant's Counsel broke down the questions, that he had not seen the complaint form as part of the investigation report he was given by HR.[123] Then at a later point in cross examination, Furber said he had read the complaint form from Ovens, confirming that he did look at it before the Applicant's employment was terminated.[124]

[96] Furber's evidence was that he received the investigation file on 30 April 2025.[125]

[97] On 28 May 2025, the Applicant received a letter from the Respondent stating that her employment had been terminated on the basis of 'serious misconduct'. However, the letter of 28 May 2025, clarified that '[i]n spite of this gross misconduct, you will be paid 5 weeks' notice in lieu…'.[126]

2.5 The Applicant's past interactions with Ovens

[98] The Applicant described having had, at times, a complicated working relationship with Ovens,[127] albeit the Applicant stated that her involvement with Ovens on a personal level had been limited.[128] In respect of interactions, the Applicant referred to engaging with Ovens in consultation meetings as part of her role as a member of the TWU Flight Safety Committee and the Pilot Consultative Committee.[129]

[99] Ovens had been the Applicant's superior since she started with the Respondent. On a number of occasions, they disagreed with one another, according to the Applicant. In this respect the Applicant referred to the following:

a) soon after commencing with the Respondent, Ovens took issue with the Applicant's height and therefore suitability for flying an aircraft, so she took the matter to the Australian Industrial Relations Commission and Deputy President O'Callaghan ordered her reinstatement;
b) the Applicant complained to management about Ovens in October 2023, regarding his alleged swearing and yelling in the simulator. The Applicant gave evidence that Ovens stated in respect of the simulator female computer voice, 'shut that fucking barking bitch up now' and that when she responded, 'that's really inappropriate' he replied 'what the fuck would you know' (**Applicant's complaint about Ovens**);[130] and
c) the Applicant and Ovens disagreed about whether 24 hours rest time was required before starting simulator duties.[131]

[100] Regarding, presumedly, the complaints outlined at (b) and (c) above, the Applicant stated that a meeting was held between herself, the TWU, and Chris Hines, the Chief Operating Officer at the time, and the matter was resolved.[132]

3 Further findings

[101] The merits of the Applicant's unfair dismissal application turn on contested points of fact. It is unremarkable that in cases relating to alleged misconduct, the Commission must make a finding on the evidence provided as to whether, on the balance of probabilities, the conduct occurred.[133] The notion that the standard of proof on the balance of probabilities requires the fact finder to reach a state of actual persuasion of the occurrence or existence of the fact in issue before it can be found is very well entrenched and unquestionably represents the current state of the law.[134] Part of this process of fact-finding, as will be expanded upon shortly, is recognising that the graver the consequences of a particular finding, the stronger the evidence needs to be in order to conclude that any fact is established on the balance of probabilities.[135]

[102] To explain further, in *Opal Packaging Australia Pty Ltd v Calovski*[136] the Full Bench, in its consideration of what is meant by the 'balance of probabilities', referred to the explanation provided by the Court in *Lehrmann v Network Ten Pty Ltd*[137] ('***Lehrmann***'). In *Lehrmann*, the phrase was considered in the context of s 140(1) of the *Evidence Act 1995* (Cth), Lee J explaining:

> The concept used in subsection (1), being the "balance of probabilities", is often misunderstood. It does not mean a simple estimate of probabilities; it requires a subjective belief in a state of facts on the part of the tribunal of fact. A party bearing the onus will not succeed unless the whole of the evidence establishes a "reasonable satisfaction" on the preponderance of probabilities such as to sustain the relevant issue: *Axon v Axon* (1937) 59 CLR 395 (at 403 per Dixon J). The "facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied": *Jones v Dunkel* (1959) 101 CLR 298 (at 305 per Dixon CJ). Put another way, as Sir Owen Dixon explained in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (at 361), when the law requires proof of any fact, the tribunal of fact must feel an actual persuasion of its occurrence or existence before it can be found.
>
> Justice Hodgson put it differently, but to the same effect, by observing that when deciding facts, a civil tribunal of fact is dealing with two questions: "not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate

> basis on which to reach a reasonable decision": see D H Hodgson, 'The Scales of Justice: Probability and Proof in Legal Fact-finding' (1995) 69 Australian Law Journal 731; Ho v Powell [2001] NSWCA 168; (2001) 51 NSWLR 572 (at 576 [14]–[16] per Hodgson JA, Beazley JA agreeing).
>
> Whatever way it is put, a "[m]ere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact": *NOM v DPP* [2012] VSCA 198; (2012) 38 VR 618 (at 655 [124] per Redlich and Harper JJA and Curtain AJA); *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431; (2012) 10 ASTLR 164 (at 176 [51] per Campbell JA, Bergin CJ in Eq and Sackville AJA agreeing).[138]

[103] In the case before me much has been made of the what the balance of probabilities means, particularly where serious allegations of misconduct are in issue. In *Parker v Garry Crick's (Nambour) Pty Ltd*, the Full Bench acknowledged that the strength of evidence necessary to establish a fact in issue will vary according to the nature of what is sought to be proved.[139] At paragraph [125], the Full Bench continued:

> …In *Neat Holdings Pty Ltd v Karajan Holdings* the High Court explained the approach as follows:
>
> > 'The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct'.

[104] It is well settled that *Briginshaw* has long established that where serious allegations involving, for example, criminal conduct are made, such reasonable satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences' or 'circumstances pointing with a wavering finger to an affirmative conclusion'.[140] In *Briginshaw*, Dixon J emphasised that a state of reasonable satisfaction is not attained independently of the seriousness of the allegation, the inherent unlikelihood of the alleged occurrence or the gravity of the consequences flowing from the finding in question.[141] The Full Bench of this Commission, in *Illawarra Coal Holdings Pty Ltd v Sleiman*, noted that each of those matters could properly bear upon whether a court or tribunal is reasonably satisfied or feels actual persuasion in relation to the facts in issue.[142]

[105] It has previously been said that it is trite that the tribunal of fact having seen and heard the witness, is to decide whether the evidence of the witness is worthy of acceptance and this may involve accepting or rejecting the whole of the evidence or accepting some of the evidence and rejecting the rest.[143] As will become apparent, I am of the view that the Applicant engaged in that not unusual approach of communicating falsehoods about some things whilst telling the truth about others in her evidence. The reason for making this credit finding in respect of the

Applicant, is because I found Van Heerden and Portelli to be candid and forthright with their evidence and prefer their accounts over that of the Applicant. This is notwithstanding that Portelli's evidence concerning the Applicant's remarks about Ovens, as reported in her witness statement, did not precisely mirror what Portelli had reported to Walia as scribed by Panchal in the Portelli interview notes, as can also be said for Van Heerden, and that neither Van Heerden nor Portelli, were able to confirm whether Ovens' surname was said by the Applicant in the context of the conversation on 21 March 2025.

[106] To further explain, it is first necessary to consider the evidence of Van Heerden. Van Heerden had been employed by the Respondent for less three weeks when the conversation was held between the Applicant and Portelli on 21 March 2025. There is therefore no reason to assume, nor evidence to suggest, that Van Heerden was motivated by some agenda or held a level of animus toward the Applicant, such that she would provide evidence unsupportive of the Applicant's account.

[107] Unlike the Applicant who gave evidence that the Resource Planning office was large and that the woman she believed to be Van Heerden sat five to ten metres from Portelli's desk, Van Heerden expressed that the office was 'fairly small', the whole room being 'probably less than 10 metres'.[144] Van Heerden said the office housed seven desks which were not very big and were placed so that there was not very much space between each one.[145] Van Heerden said she sat opposite Portelli separated by computer screens.[146] Similarly, Portelli gave evidence that opposite from her (in the Resource Planning office) - across the other side of the partition - was Van Heerden.[147] As Portelli and Van Heerden appeared to have worked out of the Resource Planning office at the relevant time and understood the seating arrangements, I consider them a more reliable source of truth as to the physical layout of the office on 21 March 2025, and I consider Van Heerden was positioned to hear the conversation between Portelli and Applicant – that is, to those parts to which she listened.

[108] As to Van Heerden's evidence, I accept, for the most part, her evidence as set out in the Van Heerden interview notes, that on 21 March, when conversing with Portelli, the Applicant was upset about something and that the Applicant had brought up with Portelli that she had a medical certificate clearing her fit to fly or 'something' but 'Wayne' was not letting her.[148] I further accept that Van Heerden paid attention to this part of the conversation between Portelli and the Applicant because it was 'something' she 'never heard before', namely that the Applicant 'wasn't able to go to the simulator but she was still able to fly'.[149]

[109] Van Heerden's evidence as set out in the Van Heerden interview notes, was that the Applicant was talking about how 'Wayne' was having issues with his wife and said something like, 'he's such a dick, that's why he is being rude to everyone.'[150] In her witness statement Van Heerden states that the incident where the Applicant had mentioned 'Wayne Ovens' started with the Applicant stating, 'he was in such poor form' and being 'rude to everyone is because of conflict going on at home between him and his wife'.[151] Whilst Van Heerden's witness statement does not refer to the Applicant stating 'he's such a dick', the Van Heerden interview notes record that the Applicant said *something like*, 'he's such a dick, that's why he is being rude to everyone' and in giving her evidence at hearing, Van Heerden again confirmed that she 'heard something about Wayne being such a dick, that's why he's rude to everyone'.[152] On balance I am not persuaded that the Applicant referred to Ovens as 'such a dick' in the

conversation with Portelli on 21 March 2025. Van Heerden refers to 'something like' in the interview notes and the phrase 'such a dick' is not referred to by Portelli.

[110] In cross examination, Van Heerden was asked whether there was mention of Wayne's surname and Van Heerden conceded, appropriately in my view, that she inferred that it was 'Wayne Ovens',[153] that she was not listening closely,[154] and that she could not rule out that the Applicant was talking about a different 'Wayne'.[155]

[111] As to what Portelli did at the end of the conversation with the Applicant, Van Heerden's evidence in cross examination was that Portelli 'stood up and mentioned that she was uncomfortable, and she doesn't know why someone didn't say something'. Van Heerden expressed that she thought Portelli said, '"[t]hat was like really weird", and then that was the end of it'.[156] Counsel for the Applicant drew Van Heerden's attention to the point that in her oral evidence, she had said that Portelli expressed that 'she felt that was uncomfortable and why didn't anyone intervene' but that was not what she told the Respondent when interviewed (*see* the Van Heerden interview notes where Van Heerden said Portelli 'stood up and said, "That was weird"').[157]

[112] Turning to Portelli's evidence, I accept that the relationship between Portelli and the Applicant was cordial, that they communicated about their children, and, in fact, on the day in question, namely 21 March 2025, reference had been made to the children. Further, I consider it uncontroversial that at the relevant time, Portelli was responsible for writing rosters for the E190 flight crew and the 146 flight crew[158] and that in respect of roster requests, the crew received the opportunity to put in roster bids every month.

[113] I further accept that Portelli started the conversation with the Applicant by congratulating her on being signed off as a 'HF Instructor',[159] and that the Applicant walked over to her desk and asked her if Portelli was aware of what was happening with her current roster,[160] and that Portelli informed the Applicant '[I]t's out of my hands. It's sitting in the live roster and I don't have anything to do with that'.[161]

[114] As was the case for Van Heerden, there is therefore no reason to assume, nor evidence to suggest, that Portelli was motivated by some agenda or held a level of animus toward the Applicant, such that she would provide evidence unsupportive of the Applicant's account.

[115] Portelli gave evidence that after she initially engaged the Applicant in conversation the Applicant came closer to her desk and asked what was happening with her roster.[162] Portelli said that she informed the Applicant that it 'was sitting with Wayne and flight ops'[163] and that after that, the Applicant went on to mention that she had spoken to the DAME who was not happy that the company had not accepted her medical certificate because the medical certificate did state that she was fit to fly but not fit to attend a simulator. According to Portelli, it was upon talking about the DAME and the medical certificate, that the comments about 'Wayne' were made.[164]

[116] I accept Portelli's account that the Applicant stated 'he hates women, and is clearly having marital problems', that the Applicant informed her that she 'had spoken to her 'DAME' who had provided the certificate and mentioned that he was also not happy it wasn't being accepted by the company',[165] and that the Applicant told her that she had engaged the union in

her current matter, and when speaking to the union representative, they had both agreed that Ovens was 'obviously fighting with his wife and having issues at home'.[166]

[117] The Portelli interview notes did not include reference to '[h]e hates women'. When proposed to Portelli that the statement '[h]e hates women' was not something that she had said in the interview of 14 April 2025,[167] Portelli stated, 'It seems that I didn't',[168] '[y]es, it seems I have left that out',[169] and again, 'I may have left it out and I…'.[170] Portelli was asked whether she was encouraged to put certain things in her statement (presumedly her witness statement, the content of which differed in the respect as highlighted by Counsel for the Applicant).[171] Portelli responded, '[n]o. No one has given me any encouragement to add those words'.[172]

[118] I accept that Portelli has given a truthful and accurate account and had not succumbed to suggestion. Regarding succumbing to suggestion, in giving her evidence, Portelli stated that she was 'asked, when going through my [her] statement, if there were any other situations that I [she] have [had] been made to feel uncomfortable in the past' (regarding the Applicant) by Joyce.[173] It appears that Joyce had asked Portelli to include other circumstances where her interaction with the Applicant had led to her feeling uncomfortable (*see* paragraphs 13 and 14 of Portelli's witness statement). However, the inclusion of those paragraphs in response to Joyce's enquiry and Portelli's candid response as to their presence in her witness statement, leads me to conclude that Portelli was being honest when giving her evidence.

[119] The Applicant's evidence is no stranger to the phrase, 'he hates women'. The Applicant, of course, conceded the utterance of these words but did so in the context of the deputy principal that may have been heading to the school of Portelli's child. Whilst on balance I find that the Applicant said this phrase, I do not believe the Applicant's account that it was said in reference to the deputy principal.

[120] It is perhaps relevant to note at this juncture that the Applicant's evidence as set out in her first witness statement concerning the conversation with Portelli was not challenged through the process of cross examination. It should be stated that I am not persuaded that the Respondent, who was self-represented, simply accepted the Applicant's evidence in this respect, but rather was not familiar with practice of placing a witness on notice of contradictory evidence to allow the witness to address the contradiction.

[121] I return to Portelli's evidence that after the Applicant left the room, she stood up and asked her colleagues in the room if anyone had heard the conversation and 'why didn't anyone butt in and "save me"?'. That Portelli stood up after the Applicant left the room, accords with the evidence of Van Heerden and whilst Van Heerden said that Portelli stated, '[t]hat was weird' and Portelli's recollection differed to the extent that she reports she said, essentially, 'why didn't anyone butt in and save me?', that the recollections differ slightly in this respect does not, in my view, detract from the truthfulness of their accounts as to what the Applicant said about Ovens.

[122] In cross examination Portelli, when asked whether the Applicant had referred to Ovens' surname, conceded, again appropriately in my view, 'I can't be sure if his surname was used, but as you said, it would probably be unusual to use his surname'.[174]

[123] Whilst neither Portelli nor Van Heerden heard Oven's surname mentioned, their recollections are consistent with respect to context – discussion about a medical certificate, discussion about the simulator, and discussion about the Applicant expressing views about a 'Wayne' that were, in my view disparaging and inappropriate, which I will reflect further on shortly. Turning then to the issue of the correct identity of 'Wayne', the Applicant's evidence draws into question whether the conversation between Portelli and the Applicant was about 'Wayne', a deputy principal of a primary school as purported by the Applicant (or a principal of a junior school as suggested by Counsel for the Applicant),[175] or about 'Wayne Ovens'.

[124] Portelli gave evidence that she had no idea who the principal of the junior school was notwithstanding that the Applicant had asserted that their conversation had touched on that deputy principal's alleged conduct.[176] Furthermore, Portelli's evidence was that she probably said the name 'Wayne' first and that following that the Applicant proceeded to talk about the DAME, the medical certificate and then the Applicant made comments about 'Wayne'.[177] Portelli stated that she had 'never spoken about Wayne somebody else whose name I can't remember, or any other faculty of the school in that manner, so…'.[178]

[125] In re-examination, Van Heerden was asked how she had arrived at the conclusion that the Applicant and Portelli were talking about Ovens.[179] Van Heerden responded:

> …Ms Cooke and Victoria were discussing the medical certificate and her return to work, or whatever was going on. I didn't hear or I didn't hear the conversation stay [sic] to anything else so when the conversation switched to Wayne, I didn't believe there could be anyone else they were talking about…[180]

[126] The evidence of the Applicant aligns somewhat with Portelli to the extent that there was discussion of 'clearance from the doctor'[181], reference to 'he hates women' by the Applicant, and discussion of their children and work commitments. The evidence of the Applicant then departs from that of Portelli and Van Heerden in respect to the conversation referring to Ovens. These differences between authentic aspects of the evidence given by Portelli and Van Heerden as detailed, and the account given by the Applicant, are sufficient for me to harbour significant doubts about the truthfulness of the Applicant's evidence to the extent that based on what I have detailed above, I do not believe the Applicant's account that she was referring to Wayne, a deputy principal, and not Ovens. That the Applicant and Portelli were at cross purposes in the conversation, that is, that there was a miscommunication regarding the identity of Ovens, is, in my view, implausible. Portelli and Van Heerden provided clear and cogent evidence.

[127] I find that the Applicant informed Portelli that in respect to Ovens – not 'Wayne' the deputy principal – that:

(a) 'he hates women';
(b) 'he is clearly having marital problems';
(c) 'he is obviously fighting with his wife'; and
(d) 'even the Union Member agreed with these statements'.

4 Consideration

[128] For a dismissal to be unfair, the Commission must be satisfied that the dismissal was harsh, unjust, or unreasonable (s 385(b) of the Act). The conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd; Frew 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.[182]

[129] Section 387 of the Act, which address the factors to be considered when determining whether a dismissal was harsh, unjust or unreasonable, contemplates that an overall assessment as to the nature of the dismissal will be undertaken and in so doing, the aforementioned factors must, where relevant, be weighed in totality.

4.1 Valid reason

[130] When considering whether a dismissal is unfair, the Commission must consider whether there was a valid reason for dismissal.

[131] The Commission does not stand in the shoes of the employer and determine what the Commission would have done if it had been in the employer's position.[183] The question the Commission must address is whether there was a valid reason for dismissal, in the sense there was a substantiated reason that was sound, defensible or well-founded.[184] In *Hill v Peabody Energy Australia PCI Pty Ltd,*[185] the Full Bench described the Commission's task under s 387(a) in the following terms:

> It is well established that in cases where an employee has been dismissed for a reason relating to conduct, the Commission must, in considering whether there is a valid reason for dismissal, be satisfied that the conduct occurred. This obligation, articulated by the Federal Court in *Edwards v Giudice*, flows from the plain wording of s.387(a), which requires the Commission to consider whether there is a *valid* reason for the dismissal. The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceeding before it, to the *Briginshaw* standard. The test is not simply whether the employer believed on reasonable grounds that the employee engaged in the conduct.[186] (references omitted)

[132] The authorities are said to be clear that s 387(a) of the Act requires consideration, in a case where misconduct is the reason for dismissal, first as to whether the relevant conduct occurred, and second, if the conduct did occur, whether it was of sufficient seriousness or gravity to constitute a valid reason for dismissal.[187]

[133] The Applicant first submitted that the conversation between the Applicant and Portelli did not constitute a breach of the HDB Policy. The Applicant pressed that the subject of the offending part of the conversation concerned a person named 'Wayne' and that there was no evidence of Wayne's surname; only that Portelli thought it to be Ovens. The Applicant further

submitted that the comments were not about Ovens but instead they were throwaway comments made in passing between two mums having a chat about their kids' school.

[134] Contrary to the Applicant's argument, I have found against her in this respect and note that her comments as detailed at paragraph [127] were said in respect of Ovens. The question then is whether those comments are such that her conduct fell foul of the obligations she had under the HDB Policy, assuming that the obligations or directions within that policy were lawful and reasonable.

[135] It is uncontroversial that a failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer.[188] In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a 'valid reason' for dismissal.[189]

[136] The HDB Policy sets out that 'NJE personnel must not engage in behaviour that constitutes HDB towards another member of staff in the course of their employment'.[190] The policy continues that NJE 'has zero tolerance of such behaviour and actions in the workplace'.[191]

[137] Clause 6.1 of the HDB Policy sets out what 'harassment' means for the purpose of the policy; it is noted that the 'H' in 'HDB' refers to 'harassment' as defined in the policy, as set out at paragraph [17] of this decision. The HDB Policy provides examples of behaviour that can constitute harassment, which includes destructively criticising or undermining staff publicly or privately.

[138] It was submitted on behalf of the Applicant that the Commission must assess conduct in its proper context. The Applicant referred to a passing comment in a sprawling conversation spanning work and non-work topics being qualitatively different from a deliberate comment designed to undermine a colleague, and that Respondent's characterisation (of the Applicant's conduct) ignores this crucial context.

[139] The conversation the Applicant held with Portelli referred to Ovens and constituted a policy breach. The conversation was held in the Resource Planning office where others could hear – Van Heerden did to the extent detailed. It concerned the Head of Flying Operations, and both the Applicant and the Portelli were his subordinates. The content was disparaging, drawing upon negative observations of Ovens within his work environment and casting an aspersion about his personal life. It was not simply indiscrete. It was destructively critical and undermining and, to that extent, constituted misconduct justifying termination of employment given it breached the HDB Policy.

4.2 Notification of the reason and an opportunity to respond

[140] At a general level, the case law makes it plain that when it comes to providing an opportunity to respond, the process does not require any degree of formality, and that the requirement is to be applied in a practical way in order to ensure that the employee is treated fairly.[192] It is accepted that where an 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 of the sub-section.[193]

[141] Turning to whether the Applicant was afforded an opportunity to respond to the allegation and to 'show cause' as to why she should not be dismissed, first, the Applicant was informed of the following allegation on 16 April 2025:

> 1. In conversation with Victoria Portelli (Resource Planner), it is alleged that you made the below remarks in relation to Wayne Ovens (Head of Flying Operations);[sic]
> "he hates women"
> "he is clearly having marital problems"
> "he is obviously fighting with his wife"
> "Even the Union Member agreed with these statements."

[142] Second, a meeting was to be held with the Applicant on 17 April 2025, however, the Applicant asked for that meeting to be postponed so she had time to obtain representation, understand the allegation and recall any related conversations with Portelli.[194] The Respondent acceded to the request and a meeting was held on 23 April 2025, to which the Applicant brought with her an official from the TWU as her support person. The Applicant explained her version of the conversation she had held with Portelli. The Applicant notes that she asked if she could contact two persons from Rex, in response to which Joyce directed that she was not to speak to them. It is unclear how those persons were relevant to the allegation.

[143] Third, a meeting was held with the Applicant on 9 May 2025, again the Applicant was supported by an official of the TWU. The Applicant stated she was informed that the investigation had concluded and that the allegation had been substantiated on the balance of probabilities. The Applicant reports that Joyce informed her that the allegation had been substantiated upon the four witness statements taken by the Respondent, and that the Respondent would be sending a show cause letter with a view to terminating her employment, and that previous performance issues had been considered in deciding to terminate the Applicant's employment.

[144] Fourth, on 16 May 2025, the Applicant received a letter stating that the Respondent was satisfied that the allegation had been substantiated and that its preliminary view was that the behaviour (Applicant's behaviour) constituted serious misconduct. The Applicant provided a written response to the 16 May letter on 21 May 2025.

[145] In all the circumstances, I have found that the Applicant was notified of the valid reason and provided with a meaningful opportunity to respond.

[146] The Applicant, however, has submitted that there was a fundamental denial of procedural fairness, and that she could not defend herself against allegations she did not understand and could not properly address. Furthermore, the Applicant argues that the manner and timing (presumedly of the disciplinary process) reveal her dismissal to be retaliatory.[195]

[147] These issues were raised by Counsel when addressing s 387(b) and (c) of the Act, which Counsel addressed together with 'procedural unfairness'. Whilst I will further address procedural issues at paragraphs [157] to [189], the Applicant's contention that the Respondent relied upon the historical conduct of the Applicant that is said to have spanned years and upon

commencement of the investigation was suddenly resurrected, warrants addressing. The Applicant's Counsel submitted that the Applicant was given no opportunity to respond to these historical allegations, either in the investigation or the show cause process, and she was given no particulars that would have enabled her to properly answer (or respond to) them. In respect to the Respondent's reliance on historical conduct, the Applicant observes what was set out in Furber's written evidence and canvassed in his cross examination at hearing.

[148] For his part, Furber was an unimpressive witness insofar as he appeared, in cross examination, conscious of inadvertently disclosing perhaps his own perceived apprehension about having knowledge of Ovens' complaint. This rendered his evidence unnecessarily prolix at times. Nevertheless, in his witness statement at paragraph [3], Furber stated that on or around 30 April 2025, he was briefed on an investigation into allegations of misconduct against the Applicant concerning an incident on 21 March 2025.[196] Furber said that he reviewed a file of documents which included the investigation report, witness accounts of the incident, and the Applicant's responses provided in meetings and in writing. Furber stated that he also reviewed the Applicant's complete employment and conduct history with the company.[197]

[149] In *Diaz v Anzpac Services (Australia) Pty Limited*[198] ('***Diaz***') the Full Bench set out the following:

> [13] As was made clear in Bista, assessing whether a particular instance of misconduct is of sufficient gravity to constitute a valid reason for dismissal is not the same thing as considering whether dismissal was a disproportionate penalty for the misconduct. The former is "concerned with whether the conduct in question, considered in isolation, was intrinsically capable of constituting a valid reason for dismissal".15 The latter involves taking into account a range of potential mitigating factors, which may include matters such as the employee's length of service and disciplinary record, and weighing them against the gravity of the misconduct in order to determine whether dismissal was too harsh a penalty.
>
> [14] In respect of the former task, it is not correct, as Mr Diaz submits, that the specific acts or omissions which constitute the relevant misconduct can be divorced from contextual matters relevant to the seriousness of that conduct. In Sayers v CUB Pty Ltd, the Full Bench made it clear that the "conventional position" in considering the valid reason issue is to take into account contextual matters bearing upon the degree of culpability on the part of the employee.16 The majority judgment in B, C and D v Australia Post17 might be read as standing for the proposition that contextual matters which operate to diminish the culpability of the employee should be taken into account under s.387(h) rather than s.387(a). However that does not assist Mr Diaz, because the majority also made it clear that the following matters, which concern the employee's misconduct assessed from the employer's perspective, arise for consideration in relation to the valid reason issue under s.387(a) (emphasis added):
>
> > "The acts or omissions that constitute the alleged misconduct on which the employer relied (together with the employee's disciplinary history and any warnings, if relied upon by the employer at the time of dismissal) but otherwise considered in isolation from the broader context in which those acts or omissions occurred."
>
> [15] It is clearly the case that the gravity of an employee's misconduct is increased in circumstances where the employee has previously engaged in conduct of the same or a similar conduct and has been warned not to repeat it. To put this another way, the employee's defiance of the earlier warning(s) is an intrinsic aspect of his or her misconduct, and necessarily forms part of the assessment of the gravity of the misconduct. We do not consider that it is in any way

> controversial for such circumstances to be taken into account in determining whether there is a valid reason for dismissal under s.387(a). We therefore do not consider that Mr Diaz has demonstrated any arguable case of error in respect of the approach taken by the Senior Deputy President under s.387(a). Nor do we consider that Mr Diaz has identified any question of general application or any disconformity in the authorities in this respect.

[150] The Full Bench considered that an employee's defiance of an earlier warning(s) formed an intrinsic aspect of her or his misconduct, which necessarily formed part of the assessment of the gravity of the misconduct, and that it was uncontroversial for such circumstances to be taken into account in determining whether there is a valid reason for dismissal under s 387(a) of the Act.

[151] It appeared significant to the Applicant that Furber had considered the Applicant's historical conduct in circumstances where she was denied an opportunity to respond to those historical allegations. Whilst Furber stated that he gave considerable weight to the Applicant's documented history of conduct issues in making the decision to terminate her employment,[199] it was not the case that the Applicant's conduct record was required to be re-litigated if procedural fairness was to be afforded to the Applicant, as seems to have been suggested by Counsel for the Applicant.

[152] By re-litigated, I simply mean that the allegations or particulars that gave rise to the first written warning in 2013, the final written warning in 2014 and the written warning in 2020, were not something that the Respondent was necessarily obliged to put to the Applicant to again respond. A disciplinary process had arguably been embarked upon by the Respondent on each occasion, when it broached the misconduct with the Applicant at the relevant time. To that point, whilst the Applicant provides further context in respect of each of those occasions of disciplinary outcome, she makes no suggestion that allegations were not provided to her or that she did not have the opportunity to address the allegations prior to the issuance of those historical warnings.

[153] As was the case in *Diaz*, it was open to Furber to assess the gravity of the Applicant's misconduct by reference to previous conduct of the same or similar type. This did not in turn mean that the Applicant had been denied procedural fairness to the extent of the consideration under s 387(b) of the Act. As to the Applicant's assertion that the timing of the decision to dismiss her and the dismissal itself were designed to 'get rid' of the Applicant, those points will be traversed shortly.

4.3 Support person

[154] It is evident from what has been traversed at paragraphs [92] and [93] that the Applicant was not denied the opportunity to have a support person present at the investigative and disciplinary meetings.

4.4 Warnings about unsatisfactory performance

[155] As will be evident from the background material, it was not the case that the Respondent sought to rely upon unsatisfactory performance to justify dismissing the Applicant.

4.5 Size of the Respondent's enterprise and dedicated human resource specialists

[156] The Respondent business is of a reasonable size, employing or engaging more than a couple of hundred workers. It appears to have its own internal human resources expertise. In all circumstances, I do not consider that the size of the Respondent business or its internal human resources capability impacted upon the process followed.

4.6 Any other matters considered relevant

[157] Several further issues require attention under s 387(h) of the Act. These include, amongst others, the Respondent's compliance with the Agreement; the differential application of the HDB Policy between Ovens and the Applicant; the Respondent's compliance with the HDB Policy; what to make of witnesses who were not called to give evidence; the relationship between the decision-maker, Furber, and the complainant Ovens; the weight to be attributed to warnings, and the personal impact the dismissal had upon the Applicant.

[158] As detailed, the Applicant attended a meeting with Joyce accompanied by her support person, an official from the TWU, on 9 May 2025. Joyce is said to have informed the Applicant that the investigation had been concluded and that the allegations were, on balance, substantiated on the basis of four witness statements taken by the Respondent.

[159] In a letter of 21 May 2025 from the TWU, on behalf of the Applicant, to Furber, the TWU highlighted that clause 14 of the Agreement sets out the requirements that the Respondent must comply with when conducting investigations. At paragraph 8 and 9 of the letter, the following is stated:

> On 9 May 2025, an Outcome Meeting was attended by Ms Cooke, Mr Joyce and I. During the meeting Mr Joyce stated that the investigation had been concluded and the allegations against the First Officer Cook had been substantiated. This was based on the further interviews during the investigation conducted by NJE and included reliance on four (4) witness statements.
>
> During the outcome meeting I asked Mr Joyce if he could confirm if any or all of the four (4) witness statements did the witness confirm that they heard Ms Cooke include "Ovens" in any of the alleged references contained in the allegation letter. Mr Joyce said he would not go into specifics but on the balance of probabilities NJE had substantiate the allegations. Mr Joyce refused the request to provide a copy of these statements to First Officer Cooke and/or the TWU.[200]

[160] I accept that the Respondent communicated to the Applicant that it had relied upon four witness statements to substantiate the allegation against the Applicant in respect of her conversation of Portelli. It is not apparent that the Respondent disputes that this was the case.

[161] Clause 14 of the Agreement sets out, amongst other matters, the following at clause 14.4:

> The Pilot shall be given access to all relevant materials relied upon in the investigation required to enable the pilot to provide a response to an allegation.

[162] The issue as to whether the four witness statements were required to enable the Applicant to respond to the allegation against her warrants the adoption of a conservative approach. I consider it safe to assume that those witness statements included the evidence garnered by the Respondent from Portelli and Van Heerden. Those records of interview were therefore, in my view, relevant materials relied upon in the investigation by the Respondent, that would likely have enabled the Applicant to respond to the allegation against her, and it follows, I am satisfied that this was a procedural flaw in the investigative process.

[163] However, I am similarly of the view that the allegation as set out in the Respondent's letter of 16 April 2025 provided sufficient particulars to enable the Applicant to meaningfully respond to it. Therefore, whilst finding that there was a procedural flaw in the investigative process, I do not consider that the flaw fundamentally prejudiced the Applicant's ability to respond to the allegation regarding her conversation with Portelli about Ovens.

[164] The Applicant further called into question whether the Respondent had been compliant with its HDB Policy. Clause 9 of the HDB Policy sets out the 'Complaint Handling Procedures' of the HDB Policy. The introductory passages of clause 9 state the following:

> NJE **endeavours** to deal with any breaches of this policy in a prompt, confidential and fair way and to ensure that all staff are provided with a safe environment from the moment the complaint is raised.
>
> NJE recognises the gravity of such matters and, in circumstances where NJE considers it necessary, complaints will be investigated and reported to the relevant Management Committee or to the Group Chairman if a member of the Management Committee is implicated. All complaints should only be discussed with those who are involved in the resolution of the matter, irrespective of what process is followed to resolve the matter.
>
> All staff could avail themselves of external channels of complaints such as the Australian Human Rights Commission or the relevant discrimination authority in each State. However, it is a requirement for all staff to first lodge a complaint with the Company prior to seeking external intervention.[201]

[165] In cross examination, Furber's attention was drawn to the time between Ovens making the complaint about the Applicant on 1 April 2025 and the commencement of the investigation, which appears to have commenced on 14 April 2025.[202] The Applicant submitted that the Respondent waited almost two weeks after Ovens' complaint to conduct the interviews, which was in breach of its own policy to act promptly. The suggestion that the Respondent breached the HDB Policy is at best a long bow to draw. Whilst reference is made in clause 9 of the HDB Policy to the word 'prompt', it is prefaced by the word 'endeavours'. The paragraph is aspirational. It does not impose upon the Respondent an obligatory timeframe in which to commence an investigation.

[166] A two-week period between the receipt of Ovens' complaint and the commencement of the investigation, is not, in these circumstances, unreasonable. I am unable to conclude the Respondent breached its own policy in this regard and further note that I decline, as proposed by the Applicant, to draw an inference that the Respondent made a calculated decision to conduct interviews prior to Joyce's commencement.[203] The Applicant's reliance on evidence that the Respondent asked Van Heerden leading questions in her interview, does not support an inference of a calculated decision (presumedly forming part of the Respondent's targeting of

the Applicant by starting interviews before Joyce commenced) but is, instead, evidence that Walia likely requires improvement in her investigative technique. As to Joyce's absence from the hearing, this was first raised at the commencement of the hearing and further explained, to some extent, late in the day.[204] Although the explanation was provided late and by way of submission on one occasion and in evidence on another[205], I accept that the Respondent was self-represented and observe that those who undertook the advocacy on the day were not well versed in evidential rules. I am therefore not persuaded that any inference should be drawn from Joyce's absence, as suggested by the Applicant in this respect.

[167] That, however, was not the end of the Applicant's focus on the HDB Policy. The Applicant submitted that the Commission should note the starkly inconsistent treatment of complaint handling under the HDB Policy, noting amongst other things, that it was not followed in relation to the Applicant's complaint about Ovens (in 2023).[206]

[168] The Applicant submitted that when Furber gave his evidence, Furber spoke of a complaint that the Applicant had made against Ovens that was of the same nature, but which did not make it to the Management Committee in 2023. The Applicant further submitted that this was because, as her unchallenged evidence indicated, there was a meeting in which the Applicant was encouraged to resolve her complaint against Ovens.

[169] The Applicant's contention is that whilst the Applicant was encouraged to resolve her complaint against Ovens in a meeting, Furber did not encourage Ovens to do the same, as he was required to do under the HDB Policy. The submission continues that there was no evidence that HR tried to resolve the Ovens' complaint as they were required to do under the HDB Policy, because 'these men saw an opportunity to get rid of Ms Cooke'.[207]

[170] I have already observed that Furber presented at times as an unimpressive witness. His answers in cross examination were at times prolix and on at least one occasion, he appeared to vacillate as to whether he placed significant weight on the Applicant's previous employment history or not,[208] a point I will again address shortly (noting what I have already traversed at paragraphs [147]–[153] of this decision).

[171] However, on this occasion, in respect to the Applicant's complaint about Ovens, Furber's recollection was that he had not seen the Applicant's complaint about Ovens in the context of the Management Committee, which I believe.[209] Furber gave evidence that not all factors are discussed at the Management Committee and it depended on what agenda item was taken up in that Management Committee.[210] Furber speculated that the Applicant's complaint about Ovens 'could have been deemed as HR' and therefore should be dealt with by certain members of the Committee.[211] He clarified that he was not saying the Applicant's complaint about Ovens did not make its way up to the Management Committee; he simply clarified that he was not aware of it in the meetings of the Management Committee in which he sat.[212]

[172] To the extent that the Applicant is pressing that she was afforded differential treatment in comparison to Ovens in respect to the process followed by the Respondent under the HDB Policy,[213] a comparison of differential approaches to employees needs to be undertaken with a level of caution. In *Darvell v Australian Postal Corporation,*[214] ('***Darvell***') the Full Bench expressed in relation to differential treatment in the context of the termination of employment (references omitted):

> [21] The issue of differential treatment of employees in respect of termination of employment was considered by Vice President Lawler in *Sexton v Pacific National (ACT) Pty Ltd*. In *Sexton*'s case, his Honour said:
>
> > "[33] It is settled that the differential treatment of comparable cases can be a relevant matter under s.170CG(3)(e) to consider in determining whether a termination has been harsh, unjust or unreasonable …
> >
> > [36] In my opinion the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of s.170CE(1) or in determining whether there has been a 'fair go all round' within the meaning of s.170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing 'apples with apples'. There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made."
>
> [22] Subsection 170CG(3)(e) of the *Workplace Relations Act 1996* (Cth) was relevantly similar to ss.387(h) of the FW Act.
>
> [23] Similarly, in *Daly v Bendigo Health Care Group*, Senior Deputy President Kaufman said:
>
> > "[62] I am troubled by the apparent disparity in the treatment of Mrs Daly and the other nurses concerned. However, on balance I have concluded that this factor does not render the otherwise justified termination of her employment into one which is harsh, unjust or unreasonable. There was no evidence led as to why the other three nurses were treated differently to Mrs Daly. The fact that none of them was sacked does not of itself render the treatment of Mrs Daly unjust. Although differential treatment of employees can render a termination of employment, harsh, unjust or unreasonable, that is not necessarily the case. I agree with Lawler VP's observation in *Sexton* that *'there must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made.'* There is not, in this case, sufficient evidence to enable a proper comparison to be made. Having regard to Mrs Daly's years of experience, her direct involvement with the patient to a greater extent than that of the other nurses and her refusal to acknowledge that she had acted inappropriately, I am not prepared to find that because the employment of the other nurses involved was not terminated, Mrs Daly's termination of employment was harsh, unjust or unreasonable." [Footnotes omitted]
>
> [24] We respectfully concur with their Honours.

[173] As observed in *Darvell*, matters that may be taken into account when determining whether an applicant has been afforded differential treatment in respect of their dismissal include whether the cases are truly comparable and whether there is the absence of a proper basis for distinguishing between the employees concerned.

[174] The HDB Policy provides for 'Self Resolution' at clause 9.1. Clause 9.1 clarifies that this process can be utilised where appropriate, and where not appropriate, staff can proceed to make an informal or formal complaint.[215] An Informal Complaint Process is set out in clause 9.2 of the HDB Policy. It is not obligatory for a complainant or the Respondent to deal with a complaint via the 'informal' process.[216] Clause 9.3 of the HDB Policy provides that if the issue is serious or unable to be resolved by the relevant parties themselves or via the Informal

Complaint Process, the complainant may choose to lodge a formal, written complaint with HR, the Management Committee or the Group Chairman.[217] There was *no requirement* under the HDB Policy for the Respondent or Furber to encourage Ovens to resolve his complaint against the Applicant via the Informal Complaint Process.

[175] However, that the Respondent exercised discretion to adopt one approach for Ovens and another for the Applicant, warrants further examination. At paragraph [36(b)] of the Applicant's witness statement, the Applicant refers to her complaint about Ovens in October 2023 and identifies the following:

> I complained to management about Mr Ovens in October 2023. One complaint was that he was swearing and yelling one day when my colleagues and I were in the simulator. I reported him at the time for saying "shut that fucking barking bitch up now" about the simulator female computer voice that advises when the autothrottle is disconnected. I responded to him at the time "that's really inappropriate" and he replied, "what the fuck would you know?".

[176] In giving his evidence, Furber acknowledged that the use of the word 'bitch' was 'not to be accepted' in the Respondent's workplace.[218]

[177] For its part, the Respondent did not call Ovens to give evidence. The Applicant invited the Commission to draw an inference against the Respondent for its failure to call several witnesses (see paragraph [166] of this decision), one of which was Ovens. Essentially, the Applicant appeared to contend that the Commission must draw an adverse *Jones v Dunkel*[219] inference.

[178] The rule in *Jones v Dunkel* has been described as a 'rule of common sense and fairness in relation to the fact finding process'.[220] In *Hyde v Serco Australia Pty Ltd*,[221] the Full Bench observed that the rule in *Jones v Dunkel* had been considered extensively in *Tamayo v Alsco Linen Service Pty Ltd* (**'*Tamayo*'**)[222] and outlined the observations made in that case. Observing that the Commission was not bound by the rules of evidence, that it could inform itself in relation to a manner as it considers appropriate and that the Commission must perform its functions and exercise its powers in a manner that is 'fair and just', the Full Bench adopted the *Tamayo* observations. It continued that as the 'rule' in *Jones v Dunkel* is fundamentally concerned with issues of fairness, the Commission will give consideration to its application in an appropriate case. It is, of course, accepted that when exercising discretion concerning the rule in *Jones v Dunkel*, the discretion is to be exercised in accordance with the dictates of common sense and fairness.[223]

[179] A *Jones v Dunkel* inference can be drawn where there is a conflict in the evidence on particular issues and there is an unexplained failure to call someone to explain that conflict. In this case I consider that Ovens' evidence on this issue would not have assisted the Respondent. The evidence did not support a finding that Ovens' conduct, as alleged by the Applicant, did not occur. Preceding on the basis that Ovens engaged in the conduct as alleged by the Applicant, the resolution of his misconduct significantly differed to the process and outcome afforded to the Applicant, notwithstanding that the conduct complained of against Ovens was egregious and clearly in breach of the HDB Policy. On that point, the conduct of Ovens and the Applicant was not identical and the circumstances of each case are materially different. It is to be appreciated that Ovens held a higher level of responsibility within the organisation than that of the Applicant. Ovens spoke directly to the Applicant in a condescending and

disrespectful manner and made a comment, referencing the gendered simulator voice, that denigrated women. Whilst not minimising the conduct of the Applicant, Ovens' conduct was evidently reprehensible and does not strike me as conduct lending itself to resolution through an informal means. The difference in application of the complaints procedure under the HDB Policy to the Applicant when compared to Ovens some two years prior, demonstrates an inconsistency of approach. Ovens was offered an unjustified level of generosity by the Respondent when it adopted an 'informal' resolution approach when addressing the Applicant's complaint about him. Still, that is not to say that an 'informal' approach under the HDB Policy was warranted in the Applicant's circumstance simply because that approach had been afforded to Ovens. The inculcation of error in this respect was to be avoided and whilst appreciative of the unsavoury optics arising from the inconsistency, it was both open and entirely proper that the Applicant's misconduct was addressed via a 'formal' approach.

[180] The Applicant further framed her argument of inconsistency by highlighting the selective enforcement of the HDB Policy in respect of Portelli's conduct. After all, so the argument goes, Portelli had not, of her own volition, reported the conduct of the Applicant pursuant to the procedure in the HDB Policy. That Portelli did not report the conduct of the Applicant is conceded by Portelli.[224] However, Portellli's conduct in respect of not reporting the Applicant as described, is not a comparable case to that of the Applicant for the purpose of establishing unfairness due to inconsistent or differential treatment.

[181] One of the many focuses of the Applicant in pressing that her dismissal had been unfair was the timing of events. Counsel on behalf of the Applicant submitted that the Applicant had provided a medical certificate on 10 March 2025 and a subsequent one on 26 March 2025, in similar terms. Counsel remarked that this presumably, should have put the matter to bed (in respect of the Applicant's fitness to fly) but, Counsel continued, it was this very same day that Ovens said he was advised of the comments by the Applicant. The Applicant again submitted that the Commission should infer that Ovens' evidence would not have supported the Respondent's case.

[182] That the Applicant held a conversation with Portelli when she did and chose to disparage Ovens in that conversation, temporally relates to her provision of the medical certificate to the Respondent on 10 March 2025. The Applicant's conversation with Portelli touched on the Applicant's fitness, flying duties having been turned to sick leave, the provision of that medical certificate, and what was occurring with the roster. That Ovens made a complaint about the Applicant when he did, bears temporally with having heard about the conversation between the Applicant and Portelli, having asked Portelli to make a statement and then making a formal complaint about the Applicant (presumedly with Portelli's statement attached). In this respect only, I do not consider that there is a *significant evidentiary gap* arising from Ovens' absence from the hearing. To draw connection between Ovens' complaint and the provision of medical certificates, if such a connection is drawn, is at best unconvincing.

[183] Attention was drawn to the relationship that Ovens had with both Furber and Heal.[225] Turning to Furber's evidence regarding his relationship with Ovens, Furber gave oral evidence that he and Ovens spoke every day.[226] That two leaders within the Respondent business spoke every day, is, in my view, inconsequential given the positions that Furber and Ovens held. That the two spoke every day does not, in turn, mean that Furber was incapable of conducting an independent review of the Applicant's file or making an independent decision about the

disciplinary action, and Furber noted that Ovens was not involved in the decision to dismiss the Applicant. Whether Furber knew of the outcome that Ovens desired, that is a full review of the Applicant's HR record to establish her suitability to remain an employee of the Respondent, which I consider he was,[227] I am again unpersuaded that Furber was incapable of making an informed and unbiased decision. Whilst an unimpressive witness for the reasons already detailed, Furber presented as candid when disclosing the weight that he had attributed to certain matters on the Applicant's employee record (which did not assist the Respondent) and that Ovens was not involved in any disciplinary action taken in respect of the Applicant.

[184] Furber gave evidence that in making the decision to dismiss the Applicant, he took into account, that is, gave significant weight to, her prior warnings (although he vacillated somewhat on this point in cross examination). Those warnings included a first written warning on 28 October 2013 for inappropriate behaviour, a final written warning on 11 February 2014 for failing to be contactable whilst on reserve and provision of a dishonest and misleading reason, and a written warning on 24 April 2020 for a serious safety breach whilst performing her duties.[228] As noted, it is uncontroversial that an employer is entitled to rely on prior warnings to support its contention that there was a valid reason to dismiss an employee. An employee is also entitled to rely on warnings as a matter relevant to the overall exercise of weighing the matters in s 387 of the Act, which of course, the Commission is required to undertake.

[185] In my view the warnings that predate 2020 should be attributed far less weight than the warning of 2020. I have already observed that the Respondent's reliance on irrelevant conduct which included that the Applicant had not assumed accountability for the DAME's medical certificate, and for her cheating allegation against a colleague, was misplaced. The warnings form an important aspect of the factual matrix, and it was reasonable for Furber to have considered them; it was, however, unreasonable for the warnings predating 2020 to have been afforded significant weight. There is a point in time, not an arbitrary point, where an employee may have a level of confidence that they and their employer have moved well past a disciplinary signpost that almost caused the employment relationship to come to an immediate halt. To be judged by conduct that unfolded 15 years ago, or 12 years ago or for that matter 11 years ago, as is the case here, is unreasonable. However, in my view, the Respondent had a valid reason for dismissing the Applicant based on her conduct on 21 March 2025 irrespective of those past warnings or the conduct issues identified by Furber and by Heal. The decision to dismiss, was not made unreasonable or unfair because warnings predating 2020 were considered significant by Furber or because he took into consideration the irrelevant conduct of the cheating allegation or the Applicant's failure to take accountability in respect of her fitness to fly.

[186] It is timely at this juncture to remark briefly on Heal's evidence. I have placed limited weight on certain aspects of his evidence given his work relationship with Ovens extended to personal interactions through playing golf (albeit only once) and that it appeared that Ovens played some role in Heal assuming the position that he held in the business. Furthermore, it is apparent that Heal had limited knowledge about the Applicant's misconduct and the investigation into the same and had no input into the decision to take disciplinary action against the Applicant. This is notwithstanding that Heal was the Applicant's manager. However, paragraphs [4] and [7] of Heal's witness statement provide useful insight into the requirements of the Applicant's role, which, in my view, Heal was appropriately placed to talk about.

[187] Returning to the Commission's role regarding an unfair dismissal application, it is not to consider what it would have done had it been in the position of the employer, rather, it must consider whether the dismissal was harsh, unjust, or unreasonable, taking into account all of the circumstances. The decision to dismiss the Applicant was a significant sanction and as noted, I do not consider that it was unjust or unfair, but in my view, it was harsh.

[188] The formulation of 'harsh, unjust or unreasonable' calls for an assessment of the gravity of the conduct alleged as the valid reason and assessment of the proportionality of the sanction of dismissal against that conduct, having regard to the fairness of the process leading to dismissal and the consequences for the employee.

[189] Having heard from the witnesses, I simply find the Applicant's account of what was said in the conversation with Portelli to be implausible. In my view, the Applicant's misconduct warranted censure. Although there were several procedural deficits in the process engaged in by the Respondent as identified, and the Respondent had afforded differential treatment towards Ovens when the Applicant complained about his conduct, the Applicant's failure to comply with the HDB Policy, as identified, was a valid reason for her dismissal.

[190] However, the Applicant had been employed by the Respondent for some 27 years. She is approximately 54 years old and had spent most of her working life working for the Respondent. Based on the evidence provided, the impact of dismissal upon the Applicant had been significant. As the sole provider within her household, the Applicant referred to the profound emotional and financial impact upon her and her child. On balance and having regard to all the relevant factors referred in respect of s 387 of the Act, I have come to the conclusion that the termination of the Applicant's employment was harsh.

5. Remedy

[191] The Applicant stated that she sought reinstatement and an order to maintain the continuity of her service and restoration of lost pay.

5.1 Reinstatement

[192] Before dealing with the quantum of compensation, the Commission must be satisfied that reinstatement is inappropriate and that an order for payment of compensation is appropriate in all the circumstances.[229] It is uncontroversial that s 390 of the Act is the relevant provision for current purposes and that s 390(3) of the Act underscores the primacy of reinstatement as a remedy for unfair dismissal. The Full Bench in *Glamorgan Spring Bay Council v Mills*[230] recently endorsed what was stated at paragraph [10] of *Nguyen v Vietnamese Community in Australia*[231] ('***Nguyen***'), namely:

> [10] Subsection 390(3) underscores the primacy of reinstatement as a remedy for an unfair dismissal as the discretion to order a remedy of compensation may only be exercised if the Commission is satisfied that reinstatement is 'inappropriate'. Further, one of the objects of Part 3-2 of Chapter 3, in which the unfair dismissal provisions appear, is "to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement". We would observe that to describe reinstatement as the 'primary remedy', is to simply recognise that reinstatement is the first, perhaps even the foremost, remedy under the Act. The relevant question in determining

whether to grant the remedy of reinstatement of an employee in relation to a dismissal that is found to have been 'unfair' is whether reinstatement is appropriate in the particular case."

[193] As was identified in *Nguyen*, the most common argument advanced in support of the proposition that reinstatement is inappropriate is the suggestion, variously expressed, that there has been a loss of trust and confidence such that it would not be feasible to re-establish the employment relationship.[232] The Full Bench comprehensively explored the effect of a loss of trust and confidence on the question of the 'practicability' of a reinstatement remedy,[233] and clarified that 'trust and confidence' in this context was concerned with that which is essential to make the employment relationship workable.[234] At paragraph [27], the Full Bench outlined a set of propositions concerning the impact of a loss of trust and confidence on the question of whether reinstatement is appropriate, which are repeated here with footnotes omitted:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

[194] On the question of reinstatement, the Respondent submitted that the Applicant occupied the position of First Officer, a role integral to passenger operations, where the highest degree of professionalism, judgment and trust is non-negotiable. The Respondent pressed that the Applicant's history of misconduct, including dishonesty and a safety breach, compounded by the final incident, provided a clear and rational basis for the conclusion that the employment relationship was irreparably damaged.

[195] The Respondent clarified that it was not really questioning the Applicant's ability to fly the aircraft if she were on her own. But it drew attention to its operations involving a multi-crew, safety-critical environment and that in her role, the Applicant must respect the chain of command, take instructions from the Captain and any directions from the head of line operations, namely Ovens. The Respondent pressed that Ovens is the Head of Flying Operations, a CASA-approved role. It followed that he was in charge of all flight operations, pilots, cabin crew, rostering and operations control; all of these areas report to him. The Respondent stated that Ovens' authority had to be respected for the safety of work. It continued

that it could not have someone in the cockpit who it was not confident would respect and follow the hierarchy.

[196] According to the Respondent, the Applicant's disparaging comments about Ovens, combined with the strained relationship between the Applicant and Ovens rendered that relationship irrecoverable, and it had caused the Respondent to doubt whether the Applicant would follow instructions and whether it was realistic for them to work in the same team.

[197] It was proposed to the Applicant that Heal had given evidence that trust and accountability and crew resource management were critical to aviation safety. When asked if she agreed, the Applicant replied in the affirmative.[235]

[198] The Applicant pressed that she sought reinstatement primarily for three reasons. First, her case was an appropriate one for reinstatement because her conduct, even on the Respondent's case, did not reflect a fundamental incompatibility with continued employment. If the conversation occurred as alleged, it was a single incident that could have been addressed through counselling or a warning. Second, the evidence showed that her dismissal was orchestrated by a small number of individuals and that the Applicant had positive working relationships with both her colleagues and her clients. The Applicant submitted that she is known for her professionalism and her friendliness and has received compliments from clients about these qualities. Therefore, there was no evidence of any broader breakdown in the employment relationship. Third, at her age and in her circumstances, compensation was an inadequate remedy for the loss of her employment. The Applicant submitted that she wished to return to work and is capable of performing her role. The Applicant further asserted that the Respondent has actively precluded her from gaining other employment in the industry. The Applicant's view was that reinstatement was both appropriate and practical.

[199] I turn first to the Applicant's latter assertion that the Respondent had actively precluded her from gaining other employment in the industry. The Applicant gave evidence in her second witness statement that whilst she had found herself part-time work following the termination of her employment, she had been informed on 22 September 2025 by the Chief Executive Officer and director of the company for whom she was working, that they had received a call from the Respondent and, because she was subject to an allegation of serious misconduct, they could not continue to employ her. Consequently, the Applicant was now unemployed and earning no income.

[200] Whilst the Respondent did not appear to challenge the Applicant's evidence in this respect, the evidence was uncorroborated and the Applicant did not offer direct evidence to support her assertion that her employment with the new employer had been terminated, and she had not required the Chief Executive Officer of the relevant company to give evidence whether voluntarily or by applying for an order requiring his attendance at the hearing. I therefore have placed little to no weight on this assertion when considering whether reinstatement is not appropriate.

[201] As observed by the Applicant's Counsel, much had been said about a broader breakdown in the relationship (presumedly between Applicant and Respondent). The Applicant drew upon Furber's evidence, that the Respondent liked having the Applicant

around. This evidence, however, did little to assist the Applicant. The submission failed to acknowledge the nuance of Furber's response:

> Does the company like having her around?---We like all employees being around.
>
> Do you?---We have to have employees to operate.
>
> …
>
> I understand that, but Ms Cooke specifically, does the company like having her around?---There's no – I can't – basically, there's no comments to be made that we don't want Ms Cooke, except when we've got an investigation of this saying that she's been – serious misconduct…[236]

[202] Whilst the email correspondence between Portelli and the Applicant evinced positivity in the relationship, the evidence did not permit a broader extrapolation that the Respondent liked having the Applicant around. The question of whether there has been a loss of trust and confidence on the part of the employer such as to render reinstatement unviable does not simply involve an assessment of the subjective views of the employer's management personnel. Nevertheless, whilst not irrelevant, I am not tasked with simply determining whether the Applicant was liked or not, the question to be answered is whether there is a loss of trust and confidence that is *soundly* based.

[203] The Applicant further submitted that Heal had given evidence about how critical the Applicant's role as Human Factors instructor was to the safety infrastructure of the organisation, and that the Respondent recently trained the Applicant for a safety training role requiring precisely the qualities of judgment, professionalism and trustworthiness. The Applicant pointed out that when in the office on 21 March 2025, she had been congratulated for her having passed that exam and having been appointed to that position. Counsel submitted, on behalf of the Applicant, that one cannot credibly say someone lacks judgment while entrusting them to train others on safety and questioned why, if the Respondent genuinely held these concerns about the Applicant's character, she was in such a crucial safety role.

[204] There is an alternative view regarding the Applicant's training in human factors. That the Respondent facilitated the Applicant's training as a Human Factors instructor indicates that at the time when the decision was made to allow for such training and completion of the same, the Respondent did not hold the concerns it now expresses to the extent that training of the Applicant in this field would be precluded. The decision was taken, and the training completed, prior to 21 March 2025. It was therefore entirely reasonable for the Respondent to recalibrate its assessment of the Applicant's suitability for ongoing employment in the face of a valid reason for her dismissal. Clearly, the Applicant failed to demonstrate professionalism and judgment when she decided to engage in conduct that undermined Ovens in front of others.

[205] The context of the Applicant's employment is relevant. As Head of Flying Operations, it appeared uncontroversial that Ovens assumed full responsibility for flight operations, pilots, cabin crew, rostering and operational control. I accept the Respondent's submission that its operations involve a multi-crew, safety-critical environment and that, in the Applicant's role, the chain of command must be respected.

[206] Respect is not engendered between an employer and its employee, when an employee openly disparages the Head of Flying Operations with colleagues – undermining his position by calling into question his emotional stability and essentially characterising him as irascible.

[207] The working relationship between Ovens and the Applicant may appear fundamental to the ongoing viability of the working relationship between Applicant and Respondent. In fact, the Respondent draws upon the breakdown in the relationship between Ovens and the Applicant, submitting that Ovens had stated in his complaint that the Applicant's action undermined his authority and was not acceptable behaviour for an employee of the Respondent. However, for reasons which, as noted, were only explained, to the extent they were explained, late in the day at hearing, the Respondent chose not to call Ovens to give evidence. As was said in *Nguyen*, and as I have already repeated, an argument of lost trust and confidence must be soundly and rationally based, and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The *onus* of establishing a loss of trust and confidence rests on the party making the assertion and in this case, that *sits with the Respondent*.

[208] In *Nguyen*, the Full Bench referred to circumstances in which any ripple on the surface of the employment relationship will destroy its viability but noted that, in most cases, the employment relationship is capable of withstanding some friction and doubts.[237]

[209] Ultimately, the Respondent has pushed against reinstatement premised not only on the Applicant's conduct on 21 March 2025, but her conduct over an extended period. However, reliance on that conduct proves problematic for the Respondent for the reasons detailed in this decision at paragraphs [184] and [185]. With the exception of the warning provided to the Applicant in 2020, to which I have given weight, the remaining warnings relied upon carry little weight because of the time that has lapsed since they were provided. Whilst an indubitable fact that the Applicant has not been promoted to First Officer during the course of her lengthy employment, the evidence presented shows no detail of performance improvement plans nor sustained failures to meet key performance metrics.

[210] Heal gave evidence that the Applicant had demonstrated a lack of accountability premised on her unsubstantiated claim that her colleague cheated in an exam and her failure to self-assess that she was unfit to fly if unfit to undertake simulator training. As observed, Heal, whilst the line manager for the Applicant, had little to no involvement in the investigation into her misconduct or the disciplinary process. Further, he had, essentially, been placed into the position he held by Ovens, and in my view, lacked the requisite independence to be forming views as to the whether trust and confidence was irreparably eroded. His examples of the Applicant's conduct which were said to have demonstrated loss and confidence, and a lack of accountability, were fatally flawed and did little to persuade me that reinstatement was not appropriate.

[211] The Applicant's misconduct warranted censure but censure in the form of dismissal was harsh. The evidence before me was not sufficient to demonstrate clearly that there had been a complete breakdown in the relationship of trust and confidence. In this case, I am persuaded that the employment relationship is capable of withstanding the friction and doubts that have arisen. It had been five years since the Applicant's last warning, and whilst I am of the firm view that the Applicant had, through her actions on 21 March 2026, demonstrated a lack of

respect for Ovens and more broadly exercised poor judgment and a lack of professionalism, I am not persuaded that the Applicant's misconduct and her reinstatement pose an imminent safety risk to the Respondent's operations. However, the Order to be issued nonetheless sends a clear message to the Applicant as to the consequence that flows from her own conduct.

[212] It should not be read from this decision that an employee is prohibited from ever expressing dissatisfaction with their employer or a leader within that same business. However, there will likely be appropriate avenues for expressing such views, and those views should focus on offending behaviours that are premised upon objectivity, rather than targeting a colleague or leader on personal level.

DEPUTY PRESIDENT

Appearances:

E Sarlos of Counsel, for the Applicant
A Walia, of the Respondent

Hearing details:

2025.
Perth:
30 September – 1 October.

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[1] PR796642.

[2] Ibid.

[3] Digital Hearing Book Pt 2 (**DHB**), 15.

[4] Ibid 89.

[5] *National Jet Express Pty Ltd Pilot Enterprise Agreement 2022-2026* [2023] FWCA 3875, AE522364, 20 November 2023.

[6] DHB (n 3) 15.

[7] Transcript of Proceedings, *Cooke v National Jet Express Pty Ltd* (Fair Work Commission, U2025/10141, Beaumont DP, 30 September - 1 October 2025) (**Transcript**), [PN751].

[8] Witness Statement of Mark Heal dated 23 September 2025 (**Heal Statement**), [6].

[9] DHB (n 3) 80.

[10] Second Witness Statement of Cassandra Cooke dated 25 September 2025 (**Second Cooke Statement)**, [41].

[11] Ibid.

[12] Ibid.

[13] *Transport Workers' Union of Australia v Qantas Airways Ltd* [2021] FCA 873 (**'*Qantas Airways*'**), [16]-[17].

[14] Ibid [16].

[15] [2013] EWHC 3560 (Comm).

[16] DHB (n 3) 81.

[17] Ibid 48.

[18] Ibid 84.

[19] Transcript (n 7) [PN154].

[20] Ibid [PN155].

[21] Heal Statement (n 8) [5].

[22] Transcript (n 7) [PN503].

[23] Ibid.

[24] Ibid [PN503].

[25] Ibid [PN504].

[26] Ibid [PN656].

[27] DHB (n 3) 45.

[28] Transcript (n 7) [PN743].

[29] Ibid [PN744].

[30] Ibid.

[31] Ibid [PN745]-[PN746].

[32] Ibid [PN1684].

[33] Ibid.

[34] Ibid [PN1687].

[35] Ibid [PN1688].

[36] Ibid [PN656].

[37] Ibid [PN178].

[38] Ibid [PN179].

[39] Ibid [PN193].

[40] Ibid [PN249].

[41] Ibid [PN251]–[PN252].

[42] Ibid [PN1781].

[43] Witness Statement of Shannyn Andrea Van Heerden dated 23 September 2025 (**Van Heerden Statement**), [4].

[44] Ibid.

[45] Ibid [5]–[8].

[46] DHB (n 3) 127–8.

[47]Transcript (n 7) [PN1810].

[48] Ibid [PN1817].

[49] Ibid [PN1819].

[50] Ibid [PN1825]–[PN1827].

[51] Ibid [PN1841].

[52] Ibid [PN1849].

[53] Ibid [PN1858].
[54] Ibid [PN1867].
[55] Ibid [PN1868].
[56] Ibid [PN1873].
[57] Ibid [PN1883].
[58] Ibid [PN1889].
[59] Ibid [PN1890].
[60] Ibid [PN1896].
[61] Ibid.
[62] Ibid [PN1789].
[63] Ibid [PN1792]–[PN1793].
[64] Ibid [PN1800], [PN1807].
[65] Witness Statement of Cassandra Cooke dated 5 September 2025 (**Cooke Statement**), [26].
[66] Ibid [27].
[67] Ibid.
[68] Second Cooke Statement (n 10) [33].
[69] Ibid.
[70] Ibid.
[71] Cooke Statement (n 65) [24].
[72] Ibid [21], [23].
[73] Ibid [24].
[74] Ibid [26].
[75] Ibid.
[76] Ibid [28].
[77] Ibid [29].
[78] Ibid.
[79] Ibid [30].
[80] Ibid [31].
[81] Ibid [32].
[82] Ibid [25].
[83] Witness Statement of Victoria Portelli dated 23 September 2025 (**Portelli Statement**), [3].
[84] Transcript (n 7) [PN277].
[85] Portelli Statement (n 83) [4]; Transcript (n 7) [PN277].
[86] Transcript (n 7) [PN277].
[87] Portelli Statement (n 83) [4].
[88] Ibid [5].
[89] Ibid [6].
[90] Ibid [6].
[91] Ibid [7].
[92] Ibid [8].
[93] Transcript (n 7) [PN288].
[94] Ibid [PN421], [PN430].
[95] Ibid [PN290].
[96] Ibid [PN294].

[97] Ibid [PN314].

[98] Ibid [PN319].

[99] DHB (n 3) 132.

[100] Transcript (n 7) [PN348].

[101] Ibid [PN349].

[102] Ibid [PN351].

[103] Ibid [PN355].

[104] Ibid [PN356].

[105] Ibid.

[106] DHB (n 3) 123–4.

[107] Ibid 123.

[108] Cooke Statement (n 65) [41(a)].

[109] Ibid [41(b)].

[110] Ibid [41(c)].

[111] Ibid [42].

[112] Ibid [43].

[113] Ibid [45].

[114] Ibid [47].

[115] Transcript (n 7) [PN965].

[116] Ibid [PN947].

[117] Ibid.

[118] Ibid [PN970].

[119] Ibid [PN973].

[120] Ibid [PN974].

[121] Ibid [PN975].

[122] Ibid [PN989].

[123] Ibid [PN996].

[124] Ibid [PN1034].

[125] Ibid [PN1003].

[126] DHB (n 3) 25.

[127] Cooke Statement (n 65) [36].

[128] Ibid [34].

[129] Ibid [35].

[130] Ibid [36(b)].

[131] Ibid [36(b)].

[132] Ibid [36(b)].

[133] *Edwards v Giudice* (1999) 94 FCR 561, 564; *King v Freshmore (Vic) Pty Ltd* (Australian Industrial Relations Commission, Ross VP, Williams SDP, and Commissioner Hingley, 17 March 2000), [24].

[134] *Qantas Airways* (n 13) [286].

[135] Ibid [48].

[136] [2025] FWCFB 16.

[137] [2024] FCA 369 (**'*Lehrmann*'**).

[138] Ibid [98]–[100].

[139] [2018] FWCFB 279, [125]; see also *Coogee Legion Ex-Service Club Ltd v Giblin* [2024] FWCFB 270.

[140] *Briginshaw* v *Briginshaw* (1938) 60 CLR 336, 362 (Dixon J), 350 (Rich J).

[141] Ibid 362 (Dixon J); see also *Lehrmann* (n 137) [98]–[104].

[142] [2024] FWCFB 364, [49].

[143] *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1, [118]–[123]; *Flint v Lowe* (1995) 22 MVR 1; *S v M* (1984) 36 SASR 316, 319–20.

[144] Transcript (n 7) [PN1789].

[145] Ibid [PN1792]–[PN1793].

[146] Ibid [PN1800], [PN1807].

[147] Ibid [PN430].

[148] DHB (n 3) 127.

[149] Transcript (n 7) [PN1826]–[PN1827].

[150] Ibid [PN1841].

[151] Van Heerden Statement (n 43) [6].

[152] Transcript (n 7) [PN1837].

[153] Ibid [PN1846].

[154] Ibid [PN1847].

[155] Ibid [PN1848].

[156] Ibid [PN1849].

[157] DHB (n 3) 128.

[158] Transcript (n 7) [PN178].

[159] Ibid [PN277].

[160] Portelli Statement (n 83) [4]; Transcript (n 7) [PN277].

[161] Transcript (n 7) [PN277].

[162] Ibid [PN455].

[163] Ibid.

[164] Ibid.

[165] Portelli Statement (n 83) [5].

[166] Ibid [8].

[167] Transcript (n 7) [PN349].

[168] Ibid.

[169] Ibid [PN351].

[170] Ibid [PN355].

[171] Ibid [PN356].

[172] Ibid.

[173] Ibid [PN229].

[174] Ibid [PN288].

[175] Ibid [PN263].

[176] Ibid.

[177] Ibid [PN455].

[178] Ibid.

[179] Ibid [PN1896].

[180] Ibid.

[181] Cooke Statement (n 65) [28(b)].

[182] (1995) 185 CLR 410, 465.

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

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

[185] [2017] FWCFB 4944.

[186] Ibid [15].

[187] *Diaz v Anzpac Services (Australia) Pty Limited* [2016] FWCFB 7204, [12].

[188] *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191; *Beijing Capital Airlines Co Limited T/A Beijing Capital Airlines v Shan* [2019] FWCFB 3867.

[189] *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191, 13 [36].

[190] DHB (n 3) 101.

[191] Ibid.

[192] *Royal Melbourne Institute of Technology v Asher* [2010] FWAFB 1200, 14 [26].

[193] Ibid; *Osman v Toyota Motor Corporation Australia Ltd* (Australian Industrial Relations Commission, Ross VP, Lacy SDP and Commissioner O'Connor, 17 October 2001); *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1; *Selvachandran* (n 184).

[194] Cooke Statement (n 65) [40].

[195] Transcript (n 7) [PN1973].

[196] Witness Statement of Robin Furber dated 23 September 2025 (**Furber Statement**), [3].

[197] Ibid.

[198] [2016] FWCFB 7204.

[199] Furber Statement (n 196) [5].

[200] DHB (n 3) 20.

[201] Ibid 108.

[202] Ibid 123–8; Transcript (n 7) [PN1989].

[203] Transcript (n 7) [PN1991].

[204] Ibid [PN4], [PN1446]–[PN1449].

[205] Ibid [PN1446].

[206] Ibid [PN1984].

[207] Ibid [PN1985].

[208] Ibid [PN1552]–[PN1568].

[209] Ibid [PN1335].

[210] Ibid [PN1338].

[211] Ibid.

[212] Ibid [PN1359].

[213] Ibid [PN1992].

[214] [2010] FWAFB 4082.

[215] DHB (n 3) 108.

[216] Ibid 109.

[217] Ibid.

[218] Transcript (n 7) [PN1304].

[219] (1959) 101 CLR 298.

[220] *Hyde v Serco Australia Pty Ltd* [2018] FWCFB 3989, [102] ('***Hyde***').

[221] Ibid.

[222] (Australian Industrial Relations Commission, Ross VP, Drake DP and Commissioner Cargill, 4 November 1997).

[223] *Hyde* (n 220) [105].

[224] Transcript (n 7) [PN308].

[225] Ibid [PN1936], [PN1982].

[226] Ibid [PN1457].

[227] Ibid [PN1049].

[228] Furber Statement (n 196) [5].

[229] *Fair Work Act 2009* (Cth) s 390(3)(a)–(b).

[230] [2025] FWCFB 69, [58].

[231] [2014] FWCFB 7198 (**'*Nguyen*'**).

[232] Ibid [20].

[233] Ibid [21]–[22].

[234] Ibid [23].

[235] Transcript (n 7) [PN130].

[236] Ibid [PN1673]–[PN1674], [PN1676].

[237] *Nguyen* (n 231) [27].