



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER MIRABELLA

C2023/3482

s.739 - Application to deal with a dispute

**Australian Workers' Union, The
and
Oceania Glass Pty Ltd
(C2023/3482)**

Oceania Glass Dandenong and AWU Enterprise Agreement 2020-2024

Melbourne

11.00 AM, MONDAY, 26 FEBRUARY 2024

Continued from 08/09/2023

PN1

THE COMMISSIONER: Thank you, parties. Please be seated. I will take appearances.

PN2

MR P REILLY: Yes. If it pleases the Commission. Patrick Reilly appearing on behalf of the applicant. With me is Benjamin Grabovich and (indistinct).

PN3

THE COMMISSIONER: Thank you, Mr Reilly. If you can just maybe move the microphone closer to you and maybe speak a bit louder.

PN4

Mr Crocker.

PN5

MR A CROCKER: May it please the Commission. I appear, or I seek leave rather, to appear for Oceania with my friend Elise Jasper.

PN6

THE COMMISSIONER: And, presumably, to assist the Commission.

PN7

MR CROCKER: Yes. Of course, Commissioner. I can address you on the grounds of 596 if that would assist.

PN8

THE COMMISSIONER: That's fine.

PN9

Mr Reilly, are there any objections?

PN10

MR REILLY: No, Commissioner, we don't have any objections, but it is for the respondent to persuade the Commission that permission should be granted.

PN11

THE COMMISSIONER: Okay. Mr Crocker, you can briefly address me.

PN12

MR CROCKER: Thank you, Commissioner. Oceania Glass seeks permission in accordance with section 596(1) of the Act to be represented in the hearing of this matter. Permission to be represented is sought in accordance with each of the grounds set out at 596(2), but primarily 596(2)(a). That section enables the Commission to grant permission where it would enable the matter to proceed more efficiently, taking into account the complexity of the matter.

PN13

There are aspects of each question that's been posed by the Commission that raise complexity in this matter. In relation to the first question, being whether or not

the decision of the panel was reasonable, there are legal questions as to the appropriate characterisation of that term and how it should be applied.

PN14

In relation to the second and third question, there are issues about the extent of the Commission's jurisdiction or power as to order relief in the event that a contravention were held to have occurred and what relief would be appropriate. In answering that question the Commission needs to consider the interplay between the terms of the Oceania Glass Dandenong and AWU Enterprise Agreement 2020-2024 and the underlying contract of employment between Oceania Glass and Mr Gardener.

PN15

In relation to grounds (b) and (c) respectively, 596(2)(b) goes to whether or not a person would be able to represent itself effectively. Here we have a national HR manager who, whilst familiar with the conciliation process, is unfamiliar with contested hearings before the Commission.

PN16

The third criteria under (c) is whether or not it would be fair to allow the person to be represented, taking into account the fairness between the person and others in the matter. Given the AWU is represented by an experienced advocate in its employ, we say this criteria weighs in favour of granting representation to the respondents. Those are the respondent's submissions, Commissioner.

PN17

THE COMMISSIONER: Thank you, Mr Crocker. As I am of the view that representation would be of assistance in navigating the issues in this matter, permission is granted. I have to say - and I will just correct you on one thing - the Commission has imposed these questions and the parties agreed.

PN18

MR CROCKER: Apologies. I appreciate they appear in the agreed statement of facts, Commissioner.

PN19

THE COMMISSIONER: Thank you. Please be seated. Are there any preliminary issues that we need to discuss?

PN20

MR REILLY: Just one, Commissioner.

PN21

THE COMMISSIONER: Yes.

PN22

MR REILLY: I assume you may have seen in the email that we sent earlier this morning Mr Wells is not present to give his evidence today. He is available tomorrow. So what we have agreed to with the respondent is that - assuming the Commission is open to this - is that if the matter does extend to tomorrow Mr Wells will be able to give his evidence then, even though it may be after the

respondent has led some of its evidence. So we would seek the Commission's permission to approach the matter in that way. If the matter is resolved today we don't propose, or concluded today, we don't propose to tender Mr Wells' statement.

PN23

THE COMMISSIONER: All right, and Mr Crocker, you're happy, if the matter does go into tomorrow, to have proceedings interrupted such that it would allow Mr Wells to be cross-examined and give his evidence?

PN24

MR CROCKER: Yes, Commissioner. Again, only if it naturally extends in tomorrow, given the obvious costs and so on that would be involved in delaying the matter for that purpose only.

PN25

THE COMMISSIONER: All right. We will proceed that way. Before I call on Mr Reilly, what I'm going to do is just tender the documents that we have got. I will mark them.

PN26

MR CROCKER: Yes, Commissioner, with the exception of Mr Wells.

PN27

THE COMMISSIONER: Well, witness statements will be done separately.

PN28

MR CROCKER: Thank you, Commissioner.

PN29

THE COMMISSIONER: I'm just dealing with the documents. So we have got the agreed statement of facts on page 18 of the court book and I presume everyone has got the court book with them. The agreed statement of facts will be marked as exhibit A1.

EXHIBIT #A1 AGREED STATEMENT OF FACTS

PN30

The applicant's outline of submissions on page 39 will be marked exhibit A2.

EXHIBIT #A2 APPLICANT'S OUTLINE OF SUBMISSIONS

PN31

The applicant's submission in reply will be marked exhibit A3 and the despatch records at tab 24, but on page 113, will be marked A4.

EXHIBIT #A3 APPLICANT'S SUBMISSIONS IN REPLY

EXHIBIT #A4 DESPATCH RECORDS

PN32

The behavioural interview guides from page 114 - no, I'm sorry, 115 onwards will be marked as A5.

EXHIBIT #A5 BEHAVIOURAL INTERVIEW GUIDES

PN33

The respondent's outline of submissions on page 97 will be marked R1.

EXHIBIT #R1 RESPONDENT'S OUTLINE OF SUBMISSIONS

PN34

Are there any other documents I have left out other than those attached to witness statements? No. Are you happy if all of the witnesses stay in the courtroom?

PN35

MR CROCKER: We have discussed that between ourselves, Commissioner, and our preference is for an order out of court for all witnesses.

PN36

THE COMMISSIONER: All right. We will have all of the witnesses out of the courtroom.

PN37

MR REILLY: Mr Marcus will be giving evidence for the applicant first so is it acceptable if he stays in the room for now?

PN38

THE COMMISSIONER: Do you intend on having an opening?

PN39

MR REILLY: Not unless you require it, Commissioner.

PN40

THE COMMISSIONER: No, I don't require it. You're free to do so, but if you don't wish to give one that's fine. Thank you, Mr Reilly.

PN41

MR REILLY: Yes. Thank you. If it pleases the Commission, we call Mark-Ashley Williams.

<MARK-ASHLEY WILLIAM MARCUS, AFFIRMED [11.08 AM]

EXAMINATION-IN-CHIEF BY MR REILLY [11.08 AM]

PN42

MR REILLY: Mr Marcus, for the record can you, please, state your full name and address?---Yes. So it's Mark-Ashley William Marcus and I'm at (address supplied).

*** MARK-ASHLEY WILLIAM MARCUS

XN MR REILLY

PN43

And have you prepared a statement for the purposes of these proceedings?---I have.

PN44

Is that statement true and correct to the best of your knowledge?---It is.

PN45

If it pleases the Commission, we will tender the statement of - - -

PN46

THE COMMISSIONER: That's the statement on page 89?

PN47

MR REILLY: Yes, Commissioner.

PN48

THE COMMISSIONER: It's signed 28 September 2023. The statement of Mr Marcus shall be marked exhibit R1.

PN49

MR REILLY: I'm sorry, marked as what, Commissioner?

PN50

THE COMMISSIONER: So at page 80.

PN51

MR REILLY: Yes.

PN52

THE COMMISSIONER: That's the page of the witness statement.

PN53

MR REILLY: Yes. I'm sorry. I thought I heard you say marked as R1?

PN54

THE COMMISSIONER: It was marked exhibit R1. Yes. I am having problems hearing.

PN55

MR REILLY: I will speak up.

PN56

THE COMMISSIONER: Thank you.

PN57

MR REILLY: I'm just used to being in the smaller courtrooms. So my understanding is the respondent's outline of submissions was marked R1.

PN58

THE COMMISSIONER: Pardon?

*** MARK-ASHLEY WILLIAM MARCUS

XN MR REILLY

PN59

MR REILLY: My understanding is that the respondent's outline of submissions has been marked R1.

PN60

THE COMMISSIONER: I'm sorry. I'm looking at an old sheet that I had marked up. My apologies. It is A7. I'm very sorry about that. A7.

PN61

MR REILLY: Thank you, Commissioner.

**EXHIBIT #A7 WITNESS STATEMENT OF MARK-ASHLEY
WILLIAM MARCUS DATED 28/09/2023**

PN62

THE COMMISSIONER: I will just get rid of my old sheet. I have got new ones.

PN63

MR REILLY: Mr Marcus, just one question. So paragraph 4 of your statement you say that in or around 2018 a mass meeting of glassworkers elected Warren Geyer and yourself as the ongoing glassworker representatives on selection panels. Could you just tell the Commission why you two were elected in that role?---Okay. So that came about. There had been some bias started to creep into the interview process with our own people in regards to how they might interpret or see people as opposed to relying on the questions to judge them so myself and Warren were elected to that role across the site as the glassworker representatives to try and remove that bias from the interview process.

PN64

Thank you, Mr Marcus. Nothing further, Commissioner.

PN65

THE COMMISSIONER: Thank you.

PN66

Mr Crocker, and Mr Marcus, there is a court book there. So you may be taken to certain paragraphs in the cross-examination and re-examination. So it's fair, we're all working from the same numbering system?---No worries. Thank you.

PN67

Mr Crocker.

CROSS-EXAMINATION BY MR CROCKER

[11.12 AM]

PN68

MR CROCKER: Mr Marcus, you have read the witness statement of Justin McKenzie dated 12 October 2023?---Not all of it. No.

*** MARK-ASHLEY WILLIAM MARCUS

XXN MR CROCKER

PN69

Perhaps if the witness takes a moment to familiarise himself with that statement. It's not very long.

PN70

THE COMMISSIONER: Do you want to direct him to the relevant page?

PN71

MR CROCKER: Yes. I have McKenzie and it commences at page 105?---Okay.

PN72

Thank you, Mr Marcus. Are you aware that Rob Paterson has also prepared a witness statement in this matter?---Yes.

PN73

And have you seen that witness statement?---I have seen his. Yes.

PN74

And that Mr Singh has also prepared a witness statement in this matter?---Yes.

PN75

And you have read that witness statement?---Yes.

PN76

You're familiar with the Oceania Glass Dandenong and AWU Enterprise Agreement 2020-2024?---Yes.

PN77

And you're familiar with the team selection process set out at clause 10.1.5 of that enterprise agreement?---Probably not all of the exact details within it, but yes.

PN78

You would agree that there are several criteria that are to be considered at clause 10.1.5?---Yes.

PN79

Apologies. Does the witness have a copy of the enterprise agreement?---Thank you.

PN80

If I could direct you, Mr Marcus, to page 124 of that agreement?---Okay. Yes.

PN81

You will see at the top of the page, Mr Marcus, there's a subsection (c) commencing with the words:

PN82

A selection panel consisting of 2 management representatives.

PN83

?---Yes.

*** MARK-ASHLEY WILLIAM MARCUS

XXN MR CROCKER

PN84

Do you see that?---Yes.

PN85

And you see that there are eight dot points underneath that paragraph?---Yes.

PN86

And each of those criteria are open to be considered in determining whether or not a person is appropriate for selection, aren't they?---Yes.

PN87

If an applicant scores very poorly they might not be offered a job even if there's a job available. That's true, isn't it?---Yes.

PN88

If they score less than 50 per cent they might not get the job?---Yes.

PN89

There's no rule in the enterprise agreement that an applicant must be given a job if they score more than 50 per cent is there?---No.

PN90

You would accept that Mr Gardener scored a total of 144 in his most recent application for the float despatch position?---I'm not sure off the top of my head what the number was.

PN91

If I could direct you, Mr Marcus, to court book page 20 at paragraph 17?---Okay. Yes.

PN92

You see there, at paragraph 17(d), Mr Gardner's score?---Yes.

PN93

And the score is 144?---Okay.

PN94

The next lowest candidate scored 167?---Yes. I'm sorry. Yes.

PN95

So you would accept that Mr Gardner scored quite a bit lower than the next applicant, wouldn't you?---It appears to be. Yes, about 20.

PN96

It's reasonable not to select a person who only scores about 54 per cent, isn't it?---No.

PN97

In your view, Mr Gardner had the qualifications and experience to perform about 90 per cent of the work required?---Yes.

*** MARK-ASHLEY WILLIAM MARCUS

XXN MR CROCKER

PN98

And your evidence is that Mr Gardner outperformed the other applicants in the required qualifications and experience?---Yes.

PN99

Can you recall what you scored Mr Gardner?---No, not off the top of my head.

PN100

Would you accept that it was 35 out of 66?---I don't know. I can't say without seeing it.

PN101

Does that sound about right?---No, again, without seeing it, I would hate to say yes or no to that.

PN102

Would you accept that you didn't give Mr Gardner a good score?---Yes.

PN103

It's not unreasonable not to select someone who only just scrapes over at 50 per cent score, isn't it?---No.

PN104

No further questions.

PN105

THE COMMISSIONER: Thank you.

PN106

Mr Reilly.

RE-EXAMINATION BY MR REILLY

[11.20 AM]

PN107

MR REILLY: Mr Marcus, you indicated in cross-examination that you didn't think it's reasonable not to select someone who scores about 54.5 per cent. Can you tell the Commissioner why you think that?---If the interview process was one, I guess was one job with a number of multiple applicants, then I would say that that was probably a correct thing, but in this instance there was multiple jobs. There was more jobs than applicants. During the interview process Mr Gardner answered the questions well enough to get a score that was just over 50 per cent, but then, on the basis of his skills that he has around mobile plant, I felt that he was a suitable applicant for that role and that position.

PN108

Thank you. Nothing further.

PN109

THE COMMISSIONER: Thank you. You're excused, Mr Marcus, and you can sit in the courtroom if you like?---Okay. Thank you.

*** MARK-ASHLEY WILLIAM MARCUS

RXN MR REILLY

<THE WITNESS WITHDREW

[11.21 AM]

PN110

THE COMMISSIONER: Mr Reilly.

PN111

MR REILLY: Yes. If pleases the Commission, we call Gavin John Gardner.

PN112

THE ASSOCIATE: Please state your full name and address.

PN113

MR GARDNER: Gavin John Gardner, (address supplied).

<GAVIN JOHN GARDNER, SWORN

[11.23 AM]

EXAMINATION-IN-CHIEF BY MR REILLY

[11.24 AM]

PN114

MR REILLY: For the record, can you please state your full name and address?---Gavin John Gardner, (address supplied).

PN115

Have you prepared a statement for the purposes of these proceedings?---Yes, I have.

PN116

Have you recently read that statement?---Yes.

PN117

Is that statement true and correct to the best of your knowledge?---Yes.

PN118

If it pleases the Commission, we tender the statement of Gavin John Gardner.

PN119

THE COMMISSIONER: Statement of Mr Gardner on page 59 of the court book to page 79 inclusive, of 73 paragraphs signed on 28 September 2023 with nine annexures shall be marked exhibit A8.

PN120

MR REILLY: Thank you.

**EXHIBIT #A8 STATEMENT OF GAVIN JOHN GARDNER DATED
28/09/2023 WITH NINE ANNEXURES**

PN121

Just a couple of questions, Mr Gardner. Have you read the statement of Justin McKenzie?---Yes, I have.

*** GAVIN JOHN GARDNER

XN MR REILLY

PN122

And in Mr McKenzie's statement he refers to, in discussions involving him and yourself and the site delegate, Harry Lumanovski, in relation to an application you made for a vacant float despatch position in late 2021 - - -

PN123

THE COMMISSIONER: Excuse me, Mr Reilly. It might assist me if you indicated perhaps which paragraphs.

PN124

MR REILLY: Of course. So this is page 107 of the court book, paragraphs 26 to 27.

PN125

Are you there, Mr Gardner?---Yes. I'm sorry. Yes.

PN126

So do you recall those discussions?---With Mr Lumanovski?

PN127

Mr Lumanovski and Mr McKenzie?---Yes. Yes.

PN128

And what occurred in those discussions?---I applied for a position, a despatch position. I was, at that stage, I was the only applicant for the job. I did the interview.

PN129

No, just the discussions with Mr McKenzie and Mr Lumanovski, please, Mr Gardner?---In the discussion I was unsuccessful for the position. I, as part of the disputes procedure, had a meeting. Justin informed me that he felt that I hadn't shown that I had done a lot of training and also he had issues that he felt I was maybe not a cultural fit, I think was the word he used at the time.

PN130

And then what happened in those discussions?---We spoke about the training side of things, which between that, you know, I had done training and gave him some examples, and then the cultural fit, well, I didn't - that sort of caught me off guard because I didn't sort of realise where he was coming from there.

*** GAVIN JOHN GARDNER

XN MR REILLY

PN131

So, Mr Gardner, you say you provided some examples. Do you recall what they were?---Well, basically from the time I had been - well, previously, before I even went to work in laminating I was an assistant. I operated on the mirror process on all of the different stations. I was made an assistant team leader. I was a trainer/assessor. I knew just about every position on that process. Then when we relocated over, I was asked by the manager at the time, Rob Wells, to go and look after the mobile plant side of things in the laminating process. So I went over and done the training that was required at the time, which was learning how to drive MAFI trucks, (indistinct), which is a flatbed truck, operating autoclave

(indistinct), loading repacks, unloading repacks, putting glass into the warehouse and sourcing raw glass for the process. So I learnt quite a few skills at that stage.

PN132

So what happened next in those discussions?---Basically we spoke for probably, I guess it would have been about 15-odd minutes. It was obvious that Justin - it was obvious at the time Justin sort of was set in his ways of thinking around it. So after that I basically said, 'Well', you know what I mean, 'I will go now', because we just sort of going around in circles. So Harry said to me at the time:

PN133

You just go back to work and I will have a chat to Justin and we will catch up later on.

PN134

And did you catch up with Mr Lumanovski later on?---Yes. The next day Harry came and saw me. We had a talk about what happened. Harry, at the time, sort of indicated about like Justin's issues with the training. He didn't think I had done enough training in laminating, and then the cultural issue, which I sort of - I couldn't sort of get my head around, but he explained to me that, in his words, at the time it was basically the team leader and the assistant in that area had a temp that had been there for quite some time. For one reason or another they really wanted him in that position, to get that position, and that was why they were, basically I suppose, putting pressure on that they wanted the temporary person to get the job over myself.

PN135

Is there anything else that Mr Lumanovski discussed with you?---He asked me if I would - if I wanted to dispute - dispute it. He felt I had strong grounds and I basically said, 'Well, if that's what they really want.' You know what I mean, 'I'm not going to fight and argue over it.' Obviously if that's, 'If that's the way they're going I will let it ride', which I did. I didn't pursue it at that time.

PN136

Thank you, Mr Gardner?---No worries.

*** GAVIN JOHN GARDNER

XN MR REILLY

PN137

Can you tell the Commission what work and what training you have been doing since you made your statement?---Work I have been doing since I have made the statement? I have transferred. Well, I transferred into a new role, which I applied for, which is working on a repack area. It's basically learning quality control side of things, glass, detecting faults, trying to consolidate glass, unloading interlayer that comes in which is used in between the laminates. It comes from overseas so unloading containers of that and putting that into storage. Yes, that's pretty much what I have been doing up until now. Then probably about three weeks ago, the only other thing I can sort of say, I was approached by our manager, Ziya Mustafa, and he basically asked me - he was in a real sort of a bit of an awkward position because we have got a lot of absenteeism, people off with other issues, so he was really - he was in a tight spot because I was - well, I was currently working

day shift. He asked me if I could go back on to shiftwork to help him out because he was in a corner, and go back to doing mobile plant for an eight-week period supposedly. So I said to him I would help him out and I sort of - I have jumped off my day shift role and I'm currently working back on shiftwork, back on mobile plant, which is the job I was originally doing.

PN138

Thank you, Mr Gardner.

PN139

Nothing further, Commissioner.

PN140

THE COMMISSIONER: Thank you.

PN141

Mr Crocker.

PN142

MR CROCKER: Thank you, Commissioner.

CROSS-EXAMINATION BY MR CROCKER

[11.34 AM]

PN143

MR CROCKER: Mr Gardner, my friend took you to paragraph 26 of Mr McKenzie's statement and you answered some questions about a job that you had applied for. Is it correct that you were the only applicant for that job?---Yes. That's correct.

PN144

You're aware that Mr Paterson will give evidence in this matter?---Yes.

PN145

Are you aware that Rob Paterson has prepared a witness statement in this matter?---Yes.

PN146

And have you read that witness statement, Mr Gardner?---Yes. Yes.

PN147

And you're also aware that Sunny Singh will give evidence in this matter?---Yes. Yes.

PN148

And you have read Mr Singh's statement that commences at page 111 of the court book?---Yes. Yes.

PN149

You commenced employment with a company related to Oceania Glass in 1997?---Yes. That's correct.

*** GAVIN JOHN GARDNER

XXN MR CROCKER

PN150

And you have worked in various roles since that time?---Yes.

PN151

You have never worked in float despatch, have you?---Not in float despatch, no.

PN152

Prior to the new role that you have just addressed the Commission about you were most recently employed in the position of team member in the laminating department?---Yes.

PN153

Are you familiar with the Oceania Glass Dandenong and AWU Enterprise Agreement?---Yes.

PN154

You know that the enterprise agreement sets out terms that apply to your employment?---Yes.

PN155

And is there a copy of that enterprise agreement available in the witness box, Mr Gardner? I think it might be to the right-hand side of you?---Yes.

PN156

If I can direct you, Mr Gardner, to page 55 of that enterprise agreement?---Yes.

PN157

You will see that part is headed Part 5 – Processed Products?---Yes. I have got that.

PN158

And that's the part of the enterprise agreement that applied to your role as a team member in the laminating department, isn't it?---Yes. Well, that's what the agreement says. Yes.

PN159

And if I can take you to page 62, Mr Gardner. You will see clause 5.5 sets out wages and allowances, doesn't it?---Yes.

PN160

And you're employed, in that table, subject to the day team rate. It's the third row in the table?---Yes.

PN161

And you have one licence with three endorsements, don't you?---Yes. I would say that's right. Yes.

*** GAVIN JOHN GARDNER

XXN MR CROCKER

PN162

Would you accept that based on a 40-hour week your annual remuneration works out at about \$89,674?---I would have to take your - what you're saying as being right.

PN163

If I can direct you back to the table, Mr Gardner. You would accept that the day team rate that applies to you is on the far right-hand column of that table, three rows down, being \$1,715?---Yes. That's what it says. Yes.

PN164

That's a weekly rate, and that in addition to that, you are entitled to the WorkCover allowance that applies to a person with one licence and three endorsements?---Yes.

PN165

So you would accept that those two components comprise your weekly rate of pay?---Yes.

PN166

The job you applied for most recently was a member of the float despatch team, wasn't it?---Yes.

PN167

And the advertisement for that position appears at page 22 of the court book. Do you have that, Mr Gardner?---Yes. I have got it.

PN168

So the vacancy that was advertised was for float continuous shift roster?---Yes.

PN169

And the skills required to perform float despatch work are different to the skills required to perform glass laminating, aren't they?---Yes.

PN170

And, in fact, the float continuous work on the float despatch team falls under a different section of the enterprise agreement altogether, doesn't it?---Yes.

PN171

And that's, if I can direct you, Mr Gardner, to the enterprise agreement at page 34, and you can see there, can't you, Mr Gardner, that Part 4 applies to float operations?---You said page 34, didn't you?

PN172

Yes, 34 of the enterprise agreement. Yes. Apologies?---I'm sorry?

PN173

No, not at all?---Okay. All right.

*** GAVIN JOHN GARDNER

XXN MR CROCKER

PN174

So you can see that float despatch duties are covered by Part 4 of the enterprise agreement at page 34?---Yes. Hours of work, rostered hours, yes, et cetera. Yes.

PN175

And if I can take you, Mr Gardner, to page 43. You should see there a table setting out the annual income rate and allowances that apply for float despatch employees?---Yes.

PN176

Pursuant to that table a continuous shift employee in float despatch would be entitled to a salary of \$133,421.41, wouldn't they?---Yes.

PN177

You would accept that's more than \$40,000 per annum in addition to your current wage, Mr Gardner?---Yes, based on - I didn't gross up what were the other ones because it was a weekly rate so I will have to take what you are saying is correct.

PN178

I understand. You have applied for float discharge roles previously, haven't you, Mr Gardner?---Yes.

PN179

On 25 April 2022 you applied for that role?---Yes. That's correct.

PN180

And there was a panel put together that assessed your application for that role?---Yes.

PN181

And you were interviewed in relation to that role?---Yes.

PN182

And Rob Paterson was part of that panel, wasn't he?---Yes.

PN183

Mr Paterson told you that your application was unsuccessful?---Yes.

PN184

And he said that the other applicants had scored better than you at the interview?---Yes.

PN185

And that they had better skills for the role?---No.

PN186

If I could take you to court book page 63, and at paragraph 41, Mr Gardner. This is your statement. You will see that the second sentence at paragraph 41 says:

*** GAVIN JOHN GARDNER

XXN MR CROCKER

PN187

When he did he said that the successful applicant had scored better in his interview and the other applicants had more skills.

PN188

?---Which paragraph was it? Page 63?

PN189

Yes. It's paragraph 41 and it's the second sentence that commences with the words, 'When he did'?---Yes, I did say that.

PN190

I see. You accepted Mr Paterson's decision?---Well, at the time, yes.

PN191

And then you applied for the same position less than two months later?---Yes.

PN192

And you were interviewed by the panel for that role?---That - yes. Yes.

PN193

And the outcome of that process was that you were unsuccessful for the role?---Yes.

PN194

Mr Paterson told you that, didn't he?---Yes.

PN195

And you accepted that decision, didn't you?---Yes.

PN196

You then applied for a float despatch role for a third time on 12 March 2023?---Yes.

PN197

At that time you hadn't completed the SAP fault identification or fault diagnosis training, had you?---No.

PN198

And you had an interview on 27 March 2023?---Yes.

PN199

And you thought you went all right in the interview?---Yes.

PN200

Would you accept that you didn't perform very well in the interview?---No.

PN201

You understand that you received the lowest score of the four applicants in the interview?---Yes. Afterwards, yes.

*** GAVIN JOHN GARDNER

XXN MR CROCKER

PN202

Would you accept that at that time you required further training to do the job?---No.

PN203

If I can take you to page 66 of the court book and paragraph 65?---Yes. I have got that.

PN204

So you can see the second sentence there:

PN205

The skills I have are transferrable -

PN206

and in the third sentence:

PN207

I could walk in tomorrow and start doing 90 per cent of the job.

PN208

?---Yes.

PN209

So you would accept that some additional training was required in order for you to be able to do the job?---Yes. Of course. Yes.

PN210

And you understand that Mr McKenzie will give evidence that it wasn't 90 per cent of the job that you could perform, but in his view, it was 20 per cent?---That statement is sort of a bit out of context.

PN211

Well, you would accept that that's the evidence that he will give having read his witness statement?---Yes. That's fine. Yes.

PN212

Would you accept that when you're transferred from one position to another, or you're promoted, that the relevant manager must sign a form effecting the transfer?---I assume so. Yes.

PN213

No further questions.

PN214

THE COMMISSIONER: Thank you.

PN215

Mr Reilly, any re-examination?

*** GAVIN JOHN GARDNER

XXN MR CROCKER

PN216

MR REILLY: So, Mr Gardner, in cross-examination you indicated to my friend that you were the only applicant for the vacant position in float despatch that you applied for back around September 2021. Can you explain to the Commission what Mr Lumanovski would have meant when he said that there was someone else that the team leader and the assistant team leader wanted to get the job?---Well, I think at the time when we spoke Harry Lumanovski was - - -

PN217

THE COMMISSIONER: Yes.

PN218

MR CROCKER: Apologies. It calls for opinion. I appreciate that the rules of evidence don't apply, but this is really quite speculative.

PN219

THE COMMISSIONER: It does. I think that's - - -

PN220

MR REILLY: I understood. Let me reframe that.

PN221

Can you explain to the Commission how there could be someone that the team leader and the assistant team leader wanted to get the job, how that person could be in consideration for the job if you were the only applicant? How does that work?---Well, the process is that the jobs are advertised for permanent employees onsite. If there's no applicants for the job then it gets opened up to all of the temporaries onsite to apply for those positions. So, in my situation, I was the only permanent that applied for the role at the time and the indications that Harry gave to me was what I said to the previous statement. It was that the temporary that they had working in there at that time filling in had been there for quite a while, and for whatever reason, that they liked that person particularly and they wanted him, and that's why they didn't really want me to go across there. So that was the cultural fit that Justin was referring to when we had the meeting. That was my take on it.

PN222

Thank you. Mr Gardner, before you moved into your current role in quality control what were your shift arrangements at work when you were in the mobile plant operator role?---Well, I was, before I went to there, I was working on the rotating day afternoon shift. I had just been doing my training on running the repack which I had completed, and that basically concluded, I think it was around December, and when I came back after Christmas I started the new role in January doing the quality control and consolidating of glass.

PN223

On average how much overtime do you think you would work?

*** GAVIN JOHN GARDNER

RXN MR REILLY

PN224

MR CROCKER: Objection.

PN225

THE COMMISSIONER: Yes.

PN226

MR CROCKER: It doesn't arise out of cross-examination.

PN227

THE COMMISSIONER: I'm sorry?

PN228

MR CROCKER: It does not arise out of cross-examination.

PN229

MR REILLY: Commissioner, we would say it does. My friend took Mr Gardner to the relevant rates of pay under Part 4 and Part 5. Under Part 5 these rates of pay do not include overtime which is paid in addition, whereas the rates in part 4 are an all-inclusive rate.

PN230

THE COMMISSIONER: I will allow the question.

PN231

THE WITNESS: Well, there's regularly overtime so it's up to - it's up to the person. I would work probably anywhere forward of four hours average, I suppose, so eight hours a fortnight possibly. It just depends how I'm feeling and what's happening at the time.

PN232

THE COMMISSIONER: Can I just ask. It depends how you're feeling. So, for example, over the last month how much? Have you done any overtime?---Yes. I worked not this Saturday, but the previous Saturday, which was a 10-hour shift, and then, at the moment, we're doing - we're trying - we're doing an extra two hours. So, yes, for the last fortnight I would have done 12 hours.

PN233

MR REILLY: So eight hours a fortnight. Is that in your current role or in the mobile plant operator role you were doing before the quality control role?---No, that's - that's since I switched over on to the mobile role because we're just that short with people and behind in production.

PN234

I'm sorry, I don't quite understand your response. So your estimate of an average of eight hours a fortnight overtime, is that in your current quality control role or is that in the mobile plant operator role that you were performing before you moved to quality control?---Mainly that's been in the last three weeks.

*** GAVIN JOHN GARDNER

RXN MR REILLY

PN235

Yes. So what about when you were in the mobile plant operator role before you were accepted to the quality control role? How much overtime were you working there?---The quality control? The mobile plant role previously?

PN236

Yes?---Look, that was every second Saturday you would sort of work sort of thing because there would be one shift's turn this Saturday and the other shift the next time. So that was probably a six to eight-hour overtime, plus anything maybe in the week if there was a few hours staying back and that to do other work. So, yes, I suppose you would average it around that 10 hours, probably, average a fortnight when you were doing mobile.

PN237

THE COMMISSIONER: So you're saying prior to this role, this new role that you have had for three weeks?---Yes. Yes, I'm helping them out. Yes, I have switched back.

PN238

Over the last year, on average, how much overtime did you do?---Well, in that quality role that I have done there was never a lot of overtime in that role because it was - pretty much it was a permanent day shift role. So I hadn't been doing a lot of overtime in that role. It wouldn't have been a lot, no.

PN239

MR REILLY: So, I'm sorry, an average of about 10 hours a fortnight in your mobile plant operator role and less in your quality control role. Is that your evidence?---Yes, because the scope wasn't there for the overtime.

PN240

So you said before that the skills in float despatch are different to the skills in laminating. If the skills in float despatch are different to the skills in laminating why did you say to Mr Wells - and this is dealt with in your statement at paragraphs - - -

PN241

MR CROCKER: Leading.

PN242

THE COMMISSIONER: Yes. I think you need to be really careful with your wording. If I can be of assistance. Perhaps you could take the applicant to a paragraph in their statement and ask them to explain it.

PN243

MR REILLY: Understood. Understood.

PN244

So at paragraphs 63 and 65. This is page 66 of the court book. I think 65, in particular, you have said you could walk in tomorrow. Are you there, Mr Gardner?---Yes. Yes.

*** GAVIN JOHN GARDNER

RXN MR REILLY

PN245

So you said there:

PN246

I could walk in tomorrow and start doing 90 per cent of the job.

PN247

Why do you say or why did you say 'walk in tomorrow and start doing 90 per cent of the job'?---I think that was taken a bit out of context, but what I was meaning by it was that there was four applicants for the job, which I was one of, and I was referring to myself as in, compared to the other applicants, I could have walked into that area and been able to perform 90 per cent of the tasks that were required.

PN248

And why do you say you were able to perform 90 per cent of the tasks required?---Well, I had pretty much the skills with mobile plant. I had operated overhead cranes. I could use the WMS system and I know for a fact none of the other applicants could do those things or had those skills.

PN249

Nothing further. Thank you, Commissioner.

PN250

THE COMMISSIONER: Thank you. You're excused, Mr Gardner. You can stay in the courtroom if you wish?---Thank you.

<THE WITNESS WITHDREW

[12.00 PM]

PN251

THE COMMISSIONER: Mr Reilly.

PN252

MR REILLY: Yes. So I have no further evidence now, Commissioner.

PN253

THE COMMISSIONER: All right. I will call on Mr Crocker.

PN254

MR CROCKER: Thank you, Commissioner. The respondent calls Justin McKenzie.

<JUSTIN MCKENZIE, AFFIRMED

[12.02 PM]

EXAMINATION-IN-CHIEF BY MR CROCKER

[12.02 PM]

PN255

MR CROCKER: Mr McKenzie, could you, please, state your full name for the Commission?---Justin McKenzie.

*** JUSTIN MCKENZIE

XN MR CROCKER

PN256

And what's your business address?---95 Greens Road, Dandenong South.

PN257

And, Mr McKenzie, what do you do for work?---I'm the national logistics operations manager for Oceania Glass.

PN258

Have you prepared a witness statement in this matter?---I have.

PN259

Does that appear at page 105 of the court book?---It does.

PN260

Is it a witness statement of 39 paragraphs with no attachments?---Correct.

PN261

Is it dated 12 October 2023?---That's correct.

PN262

Have you read a copy of it before coming to the Commission today?---I have.

PN263

Are there any corrections that you wish to make to that witness statement?---There are not.

PN264

And the contents of that witness statement are true and correct?---They are.

PN265

I tender that, Commissioner.

PN266

THE COMMISSIONER: Thank you. The witness statement of Justin McKenzie, on pages 105 to 108 of the court book, dated 12 October 2023 with 39 paragraphs, will be marked exhibit R2.

**EXHIBIT #R2 WITNESS STATEMENT OF JUSTIN MCKENZIE
DATED 12/10/2023**

PN267

MR CROCKER: Commissioner, I seek leave to ask a couple of brief questions of Mr McKenzie.

PN268

THE COMMISSIONER: Agreed.

PN269

MR CROCKER: Thank you.

*** JUSTIN MCKENZIE

XN MR CROCKER

PN270

Mr McKenzie, you will see to your right there there's a copy of the enterprise agreement that applies for your workplace. If I can direct you, Mr McKenzie, to clause 10.1.5 which commences at page 123 of the enterprise agreement. Are you able to describe for me, very briefly, what that clause relates to?---It's the team selection process we use for internal recruitment.

PN271

And if a person is selected pursuant to that clause is there any other step that's required for them to take on the new position?---Yes. Once - once the panel have reached agreement and there's an applicant put forward, then there's a step where the hiring manager completes what we call a pro forma form, so a payroll form for a transfer between different departments and cost centres. So it has to be signed off and authorised.

PN272

Thank you, Mr McKenzie.

PN273

Nothing further, Commissioner.

PN274

THE COMMISSIONER: Mr Reilly.

CROSS-EXAMINATION BY MR REILLY

[12.05 PM]

PN275

MR REILLY: Mr McKenzie, you are aware that Mr Gardner has prepared a statement in relation to these proceedings?---I am.

PN276

Have you read it?---I have.

PN277

And you're aware that Mr Marcus has prepared a statement in relation to these proceedings?---I am.

PN278

And you have read it?---I have.

PN279

Mr McKenzie, what areas of the Dandenong site are you responsible for in your role?---All warehouses and in distribution.

PN280

And what are your duties in relation to those areas?---So I'm a member of our senior leadership team, so I have overall direct responsibility and accountability for the budget for the area. You know, setting strategies and setting direction. I'm also an escalation point for any disputes under the EBA, coaching and mentoring my staff, approving spending, approving certain decisions, and also a key part of any facilitation of change processes with the workforce and the AWU.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN281

So how many direct and indirect reports do you have in that role?---Approximately. Direct reports, approximately around 10.

PN282

And indirect reports?---The (indistinct). Rob Paterson, Peter Broughton and Chris Lowe.

PN283

And the indirect reports?---So indirect reports. So I have got the 57 glassworkers.

PN284

Fifty-seven glassworkers?---I'm sorry.

PN285

Fifty-seven glassworkers?---At Dandenong and then also - also the distribution centre employees as well and other, some other staff, supervisors and planners as such.

PN286

Mr Gardner isn't one of those, is he?---No, he is not.

PN287

Now, you outlined what duties and responsibilities you have. I imagine they keep you quite busy there?---Yes. They do. Yes.

PN288

You wouldn't have time to be across what other employees in other areas of the Dandenong site are up to, would you?---Yes. No, I do. We have regular senior leadership team meetings where we discuss, you know, strategy and also performance and other areas. Hot topics. Things that are going on at the time. I'm well aware of anything that's happening as far as labour shortages, skill concerns, quality, quality issues and things like that. So, no, I would like to say I'm quite abreast of what's going on, particularly at the Dandenong site.

PN289

With individual employees? Individual glassworkers?---Indirectly, just through - I mean I have been - I have been in the business for 30 years at Dandenong so I know the workforce very well. The workforce has not changed a lot so I do, I do know - I know a lot of the employees on the floor. Not as many of the new people coming through, but I also like to get out and about a bit and chat to people. I'm also - I also do attend what we have - we have a weekly management meeting which is with the operational managers where, you know, certain things are discussed, so yes. No, I would. I would not - I wouldn't say I'm, you know, 100 per cent across everything that's going on, but I would like to think I have a good feel. Yes.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN290

That's mostly indirect knowledge isn't it? It's things that other people have told you about the glassworkers?---Sometimes. Yes. I mean I have also - I have also,

you know, been in the operational role, so I have had a lot of experience with issues that have gone on and performance related issues. Disciplinary related issues. Also, reward and recognition issues. Not issues, but reward and recognition, and I have also, you know, I do talk a lot to the operational managers and team leaders. I talk a lot to team leaders, particularly my team leaders, but also other team leaders in other areas.

PN291

That's information that you have received from other people telling you then? It's not direct knowledge about - - -?---Correct.

PN292

- - - the glassworkers, is it?---Well, correct. Yes.

PN293

You don't have any real direct knowledge of how Mr Gardner has performed in his various roles since 1997, do you?---I would like to think I do, based on the fact that I have - I have been involved in interviews and previous disputes around Mr Gardner. So I have done personal reviews of training matrixes. I have had discussions with the training department and discussions with his manager, so I would like to think, in that respect, I do.

PN294

So do you have any direct knowledge about how Mr Gardner performed his role on the laminating line when he first started in 1997?---No, I do not. My first interaction would have been when he was in the mirror line which couldn't have been much longer after that, I don't think, but no. No, I do not.

PN295

Do you have any direct knowledge of how he performed in laminating despatch for six to 12 months after?---No, not directly. I don't - I don't recall him ever working directly in the despatch team other than covering - covering things. I know he did used to work in there on overtime.

PN296

You don't really have any direct knowledge about how Mr Gardner performed in his role in the mirror line, do you?---Like I said, I have - I do have, you know, a lot of information around his training history and that, you know, that did come to light back in about 2022 when - when he was unsuccessful for a role he applied for when he was the only applicant, but other than that, no. I mean I haven't - I have never managed Gavin or, you know, been directly responsible for any of his outputs or anything like that.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN297

You say in your statement that you had raised concerns around the team selection process with Harry Lumanovski on many occasions as there have been quite a lot of disputes raised around the outcome of vacancies and selected applicants. That's because it's understood and accepted by people onsite that glassworkers can dispute the outcomes of selection process, isn't it?---It's not the only reason. You

know, it was raised. I have been raising these concerns for probably five or six years, when we used to have – when (indistinct) and I were the direct operations managers we used to have weekly IR meetings with Harry Lumanovski as the float site delegate and (indistinct) Prince as the processing site delegate. We raised concerns there around - there was a few issues. One was around the timeliness that the process took because there were so many steps, and we also spent a period of around probably between 12 to 18 months with disputes in the laminating - the laminating business. Also, just generally, you know, we felt that the clause was outdated and that, you know, we wanted teams, team leaders and stuff to have more input so we raised general sort of discussions around the process. I would like to think - I would like to say that I think that was acknowledged by the union and that's what led to, you know, after all of the disputes, that's what led to the change where Mark Marcus, and at the time, Warren Geyer, were elected to cover all interview panels because the union acknowledged that having team members being on individual panels was what was contributing to the various disputes that were occurring.

PN298

The evidence of Mr Marcus is that there was bias coming into the selection process because of the involvement of individual team members. Do you agree with that?---I wasn't privy to those individual - are you talking about pre that change?

PN299

Pre that change?---Pre that change.

PN300

That was the reason for the change?---Look, I wasn't - I wasn't privy to all of the individual outcomes of those, those individual panels and stuff like that. I know in discussions that I held with Harry as the site delegate, you know, he definitely acknowledged that it was, you know, due to different things. I wouldn't - I couldn't say if it was biased or not.

PN301

You can't dispute Mr Marcus's evidence that the concern was bias of individual team members being involved?---No. I mean I can't dispute that, no, but I can't confirm that either.

PN302

So isn't there the same potential for bias to come in if you're involving team leaders?

PN303

THE COMMISSIONER: (Indistinct) (1) it's opinion. (2) what's referred to previously as evidence of bias was opinion in itself.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN304

MR REILLY: The statement refers to two periods of absence that Mr Gardner had for non-work related injuries sustained in 2019 and 2022. You know that Mr Gardner's income protection insurance claims were accepted? Yes?---Yes.

PN305

You don't have any reason to believe that there was anything improper about Mr Gardner's absences due to those injuries, do you?---I do not. No.

PN306

You don't have any reason to think that he was faking his injuries or his absences?---I do not.

PN307

And Mr Gardner has made a full recovery from those injuries, hasn't he?---From what I understand. Yes.

PN308

So those injuries wouldn't affect Mr Gardner's ability to perform the work required in the float despatch vacancy?---They would not.

PN309

So if there's nothing improper about Mr Gardner's absences and he has a full medical clearance they shouldn't have adversely affected his application for the vacancy, should they?---We do take into account, you know, absences from the workplace for whatever reasons. It is just a small part of the criteria. You know, it's individual members of the panel may weight that different ways, but you know, all in all we do - we do take that into account, but that could be for various, whatever various reasons absences occur for.

PN310

So accept that absences for legitimate reasons that don't affect an employee's capacity to perform the role they're applying for, they are taken into consideration you say?---I'm sorry, can you repeat that?

PN311

You say that absences that have been accepted for legitimate reasons and that don't affect an employee's capacity to perform the vacant role are taken into consideration?---No. What I'm saying is time in attendance is part of the criteria. Now, that could be various reasons for attendance. Sometimes it's taken into account. Other times it's just parked during - during the interview process, depending.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN312

The evidence of Mr Marcus is that it's only taken into consideration if an employee has a warning. You don't dispute that, do you?---A warning may or may not be taken into account. The EBA states that general, you know, a warning, you know, like generally an employee with a warning will not be shortlisted, however, that - sometimes that can be taken into account if it's - I know - I know that I have been on panels where somebody has had a formal counselling and they have still been given an interview.

PN313

Mr Marcus's evidence is that time in attendance isn't taken into account in the selection process if an employee hasn't received a warning in relation to timekeeping and attendance?---No, I would dispute that from panels that I have previously been on. Sometimes you can get time in attendance reports and as a panel you look at them, and everyone is equal so you just, you know, you just put them aside. Other times somebody may not have a warning, but they may have, you know, be regularly late. I would say that time in attendance is low on the weighting, the overall weighting.

PN314

There are no questions in your behavioural interview guide about time in attendance, are there?---Pardon? I'm sorry?

PN315

There are no questions - - -?---No.

PN316

- - - in the interview guide about time in attendance, are there?---No, not to my recollection.

PN317

THE COMMISSIONER: Yes.

PN318

MR CROCKER: Commissioner, a proposition was put by my friend in relation to Mr Marcus's evidence. I believe what was said was that Mr Marcus gave evidence that the panel did not consider time in attendance unless there was a warning that had been issued or some misconduct. I just ask that the witness be directed to the relevant part of Mr Marcus's evidence in the witness statement.

PN319

THE COMMISSIONER: You can ask the question again by direct reference to the paragraph in the witness statement. I did previously say, to assist the witnesses and to assist me to, please, where appropriate, direct witnesses to the relevant page and paragraph of the court book.

PN320

MR REILLY: So this is page 81 of the court book, down the bottom at paragraph 17. It is over to page 18 too?---Yes. So on reading that, you know, I would - I would agree that that's Mark Marcus's opinion.

PN321

You would agree with that?---No. I would say that that's his opinion.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN322

All right. So you disagree with it, do you?---I'm not saying I agree or disagree with it. I haven't been on a panel for quite some time. What I am saying is panels that I have previously been on it has been, you know, taken into account. In this instance, yes, I mean I couldn't - I couldn't disagree with it, but - - -

PN323

You can't disagree with it?---I'm not disagreeing with it. No. What I'm saying is time in attendance is just a very small weighting we put on part of a decision to employ somebody.

PN324

When was the last time you were on a selection panel?---I would have to guess there. I'm going to say probably at least four or five years ago.

PN325

Four or five years ago. So Mr Marcus's evidence on page 17 may not just be his opinion. It may be something that - - -

PN326

THE COMMISSIONER: You can't - - -

PN327

MR REILLY: Okay.

PN328

So in the statement you refer to concerns that team leaders and AWU delegates in float despatch raised with you about Mr Gardner.

PN329

THE COMMISSIONER: At which paragraph?

PN330

MR REILLY: This is page 106?---Yes.

PN331

It starts at paragraph 20?---Yes.

PN332

So you refer to being approached by a team leader and the AWU shop steward and asked to ensure that Mr Gardner didn't get a job on their team.

PN333

THE COMMISSIONER: My apologies for interrupting, Mr Reilly. Can you speak up or perhaps speak down.

PN334

MR REILLY: Speak down.

PN335

THE COMMISSIONER: No, not speak down to the bench so to speak. Speak up, because I'm having problems hearing.

PN336

MR REILLY: Okay.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN337

THE COMMISSIONER: If I'm having problems hearing maybe the transcribing service will have problems transcribing.

PN338

MR REILLY: Understood. So you refer to concerns raised by team leaders and AWU delegates about Mr Gardner's application. Do you know if any of those team leaders ever worked directly with Mr Gardner?---No, I do not.

PN339

You don't, so you don't know if their concerns were based on their own direct experience and observations about Mr Gardner, do you?---Not directly, however, a lot of our employees have been around for a long time and, you know, like with a workforce like that people, you know, people's performance in teams and people talk. They talk very closely to each other, and in this particular instance, these team leaders and AWU shop stewards were very vocal about the impact on the culture within the area if Mr Gardner was employed.

PN340

All right, but you don't know what their concerns were actually based on if they didn't work with him. You have said that didn't directly work with him?---So I can tell you some of the stuff they said to me. They were very concerned about his training history, about the fact that the feedback they got from people that worked with him was that he liked to sort of settle into certain roles and not - not, you know, rotate through different roles, and that his - his training had only just sort of kicked off when he felt that it suited him to get a position of higher salary. That was - that was pretty much the feedback they gave me.

PN341

Yes. So it's all based on stuff that other people told them?---Yes.

PN342

So at page 106 of the court book - and this is paragraph 23 of your statement - you stated that Mr Gardner had made no effort at all to get to know anyone in the area or tried to reach out to sell himself for the job. That's not a requirement or a specified consideration under the selection process in the enterprise agreement, is it?---It is not, however, I would say that that - that sort of action would foster a good culture of teamwork and involvement.

PN343

You say in your statement at paragraph 25 - and this is at page 106 of the court book - that Mr Gardner's training records were very poor. Now, Mr Gardner's evidence, at paragraph 4 of his statement, page 59 of the court book, is that he trained in and worked on all stations on the laminating line?---I'm sorry, what was the paragraph?

PN344

Paragraph 4?---Page 59?

*** JUSTIN MCKENZIE

XXN MR REILLY

PN345

Page 59, paragraph 4:

PN346

I started at the site. I started at the site as a team member in the laminating department. For about the first nine months I have worked on the laminating line, but I learned and then worked on all of the laminating line stations.

PN347

You don't dispute that, do you?---No, but I would - I would say that that's back in 1997 or when he started, and back then we didn't even have competency-based training, so there was no assessments or training records. So it was just buddy training way back then.

PN348

Yes, but you don't dispute that he did the training?---I wouldn't know.

PN349

No, so you don't dispute it?---No, I don't dispute it. No.

PN350

And at paragraph 6 of Mr Gardner's statement it says that he went across to the mirror department and he learnt and worked on all of the mirror line stations other than the silver room. You don't dispute that, do you?---I don't dispute it. I cannot confirm it, but I don't dispute it.

PN351

No. Mr Gardner's evidence, at paragraph 7 of his statement, is that he trained in the use of new robotics on the mirror line and trained other operators in that work. You don't dispute that, do you?---Once again, I do not dispute, nor can I confirm that.

PN352

And at paragraph 14 of his statement the evidence of Mr Gardner is that he agreed to take on additional duties in mirror cutting and vinyl as part of his assistant team leader role in 2007. You don't dispute that, do you?---The same answer.

PN353

Mr Gardner's evidence, at paragraph 15, is that in 2009 he completed training in a certificate IV in training and assessment. You don't dispute that, do you?---It's the same answer.

PN354

Mr Gardner's evidence at paragraph 17 is that he undertook company leadership training in 2009. You don't dispute that, do you?---Once again, the same answer.

PN355

You don't dispute Mr Gardner's evidence, at paragraph 18, that he completed a second certificate IV in training and assessment in 2013?---The same answer.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN356

The same answer, and you don't dispute - - -

PN357

THE COMMISSIONER: Mr Reilly, what are you trying to establish because the respondent hasn't provided any evidence to contradict or to question these matters? So what's it going to try and help me understand?

PN358

MR REILLY: Mr McKenzie's evidence is that Mr Gardner's training records were poor.

PN359

THE WITNESS: Excuse me. That was to what's relevant in my area. Everything you are - - -

PN360

MR REILLY: That's not what your statement says. It just says Mr Gardner's training records were very poor?---But it was in reference to our work area.

PN361

All right. So you're saying Mr Gardner's broader training records aren't poor?---I didn't review the rest of his training records.

PN362

You only reviewed his training records insofar as they related to float despatch?---Plus probably some other broad ones. So when - when - the thing you pointed to me in my statement refers to when we had the dispute back in 2021 when I had the discussions with Harry Lumanovski and did the review of the training department, and then it was found that Gavin was doing a lot of tasks that he was putting forward as selling points for the area and he wasn't competent on the matrix for that, and once again, I will just say that that is only a small portion of what we take into account when we select somebody for suitability in the area.

PN363

All right. So at paragraph 26 of your statement, at page 107 of the court book, you say you set up a meeting with Gavin to give him feedback, and before the meeting Harry asked you to focus on lack of training –

PN364

and told me that he would tell Gavin that glassworkers did not want him to be part of their team -

PN365

once you left the meeting. So you weren't there when Mr Lumanovski told Mr Gardner anything about it?---No, I was not. No.

PN366

So you don't know that Mr Lumanovski actually told Mr Gardner that?---I do not. No.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN367

Mr Gardner's evidence is that Mr Lumanovski didn't tell him that the glassworkers didn't want him. His evidence is that Mr Lumanovski told him that the glassworkers - - -

PN368

THE COMMISSIONER: I'm sorry, again.

PN369

MR REILLY: To speak up?

PN370

THE COMMISSIONER: To help me. Yes, speak up, and also perhaps if you can direct the - - -

PN371

MR REILLY: There's no paragraph to direct Mr McKenzie to because it was evidence given orally earlier today.

PN372

THE COMMISSIONER: Well, maybe just clearly so I can hear it.

PN373

MR REILLY: Understood.

PN374

So Mr Gardner's evidence is that Mr Lumanovski only told him that the relevant team leaders didn't want him on that shift because they wanted the temp on that shift to get the job. Obviously you can't dispute that; right?---No, I cannot.

PN375

You refer in your statement at paragraph - bear with me - at paragraph 30, the last sentence, so you asked Rob to speak to the team leaders -

PN376

so he could get a feel for the glassworkers' willingness to accept Gavin into their teams and I wasn't sure he tried to get to know people in the area or change his reputation.

PN377

?---Okay.

PN378

Mr Lumanovski didn't tell Mr Gardner that the team leaders didn't want him. He wouldn't know that he has a reputation to change, would he?

PN379

MR CROCKER: That calls for speculation.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN380

MR REILLY: I will withdraw it.

PN381

THE COMMISSIONER: Well, Mr Reilly, let's - - -

PN382

MR REILLY: Okay.

PN383

THE COMMISSIONER: You are a very competent and knowledgeable advocate. You know the rules.

PN384

MR REILLY: Understood.

PN385

THE COMMISSIONER: And although we are not strictly bound by the rules of evidence, in order for me to do all that I can to ensure a fair hearing to all I would ask you to keep those rules in mind when cross-examining witnesses. Thank you.

PN386

MR REILLY: I will direct you to the relevant paragraph. So paragraph 28 of your statement. You say that you informed Rob Paterson that Mr Gardner had previously been rejected for roles in the area. Did you tell Mr Paterson the reasons that the glassworkers gave you for not wanting Mr Gardner in their team?---I might have summarised some of them, but I didn't go into a lot of detail, but you know, a cultural fit is extremely important for me with our business area and that's why I made sure that I did have that discussion with Mr Paterson.

PN387

So when you say 'cultural fit' what exactly are you referring to?---Somebody that fits in as a team player, that can be multiskilled and is capable of crossing across different teams within the department.

PN388

But the evidence of Mr Gardner is that he had started making efforts to improve his training and multiskilling?---That's only one small portion of it.

PN389

So were you aware that Mr Gardner had taken steps to improve his training record and multiskilling?---I was. Yes.

PN390

And did you communicate that to Mr Paterson?---I did. I did.

PN391

You did. Okay?---If I can just comment there though. I am also aware of one other thing I did do is I asked all of the team leaders if he had gone and approached them about the role and he hadn't. All of the ones I spoke to said he hadn't so - - -

*** JUSTIN MCKENZIE

XXN MR REILLY

PN392

All right. You say in your statement at paragraphs 36 and 37 - and this is pages 107 and 108 of the court book - that it's up to Mr Gardner to apply to go to training and it's up to employees, including Mr Gardner, to arrange their training. What do you say is the process by which employees apply to go to training?---So we have a competency-based training system. We also have a process where team leader reviews are completed and annual training plans are set, and part of that process is the area manager will sit down with the team leader. The team leader will put forth what skills or what skill shortages he feels he has on his team. He will then push any training for individual team members that he feels that they're, you know, either in line for or they need or, you know, have been waiting for, and that is then, you know, managed up.

PN393

All right. So employees don't apply to go to training?---That it's not always directly managed. I'm sorry?

PN394

So employees don't apply to go to training. It's arranged by the team leader?---No, but through - through the team leader review process. You know, our expectation as a business is that team leaders have those discussions with their team members. So if a team member is not getting appropriate training or they feel that the company is not supporting that, then that is, you know, the application process, per se, that they would push through their team leader.

PN395

What do you say is the process by which employees arrange their own training?---Well, that's the process I'm eluding to, not actually arranging as in, you know, setting up the time, but also - also team members and team leaders. You know, our expectation as a business is, you know, we pay quite - quite a large allowance for team leaders and assistant team leaders under the EBA. Part of the criteria of a team leader and assistant team leader's responsibility under the EBA is training and everything for their team, coordinating that training, so you know, our view is that, or my view is that arrangement of training will be discussed between the team and the team leader and then they will, you know, work out how they structure a certain shift for a day. So that may be, you know, let's say for an example, if Gavin as going to learn a stacker, he would - you know, they would agree as a team that Gavin would work on that stacker for a week, then you know, swap over with somebody else. So that's some of the process for arranging that.

PN396

Mr Gardner can't arrange the swapping out of someone else so that he can learn the stacker, can he? He can't just tell another employee to operate his mobile plant?---Well, no, but through his - through his team leader discussions he could, and then if he was - then if he was - if he felt that that, you know, he wasn't getting traction or anything on that, he could then escalate that through his manager.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN397

And what would be the process by which training that has been interrupted or cancelled would be resumed or rescheduled?---The same process.

PN398

The same process?---The same process.

PN399

Team leader or - - -?---Yes. The same process. Yes. Unless, of course, it's training that involves a classroom or some other form of training. You know, the AWU have a - have a glassworker member who is specifically dedicated to training. We have a training coordinator that is captured in the EBA. They have a full position description in the EBA. So, you know, I would argue that the AWU have sufficient resources to support their employees as far as training goes.

PN400

So employees can't just, at least in relation to skills, resume their training without being asked, can they?---Yes, they can – they don't – they shouldn't have to wait for somebody to come and tap them on the shoulder. They can, you know, if they have missed a week because somebody is off on leave they could be saying, 'Well, he's back now', you know, 'So am I starting on Monday?'

PN401

But it's not their responsibility to do that. It's the responsibility of the team leaders to arrange the training?---Yes, however, I would say that a lot of employees do do that.

PN402

It's not their responsibility, is it?---(No audible reply)

PN403

THE COMMISSIONER: I'm sorry, I have lost my train of thought. It's not their responsibility to do what specifically? If you could just - - -

PN404

MR REILLY: To arrange and organise their own training.

PN405

THE COMMISSIONER: All right. Can you just ask the question sort of directly so I have got it for the record?

PN406

MR REILLY: Yes.

PN407

It's not the responsibility of the employees to arrange and organise their own training, is it?---It is not, however, they can influence it and they have many avenues to do so.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN408

In addition to team leaders there are other more senior employees in the company that have responsibility for planning and organising training, aren't there?---Yes.

PN409

Glassworker training coordinator?---Correct.

PN410

Shift coordinator?---No, there is no shift coordinator.

PN411

There's provision for a shift coordinator in the enterprise agreement?---Yes, but we do not have any. That's only because - that's only because it's been rolled over so many times.

PN412

Team leaders we have covered. Assistant team leaders are also responsible for organising training; right?---Correct. Yes.

PN413

And, of course, management is also responsible for organising training, aren't they?---Yes. They have a part to play. Yes.

PN414

So above Mr Gardner there are all layers of more senior employees and staff members with responsibility for planning and organising training?---Yes.

PN415

You say in your statement at paragraph 36, page 107, that Rob Wells told you that Mr Gardner did not want to do further training?---Correct.

PN416

Yes. Now, you don't actually know whether or not Mr Gardner wanted to do any further training, do you?---No, but I know Rob Wells told me that he - that he was resistant to some forms of further training.

PN417

But Mr Wells hasn't come here to give evidence, has he?---I'm sorry?

PN418

Rob Wells hasn't come here to give evidence, has he?---No.

PN419

Now, you say in your statement that nobody is stopping Mr Gardner from doing further training. I can take you to the various paragraphs if you like, but Mr Gardner's evidence is that on multiple occasions he has been stopped from doing further training. You don't actually know if anyone can stop Mr Gardner from training, do you?---No, I do not.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN420

You say at paragraph 37 of your statement that Mr Gardner does not make any effort to continue his training, but you don't actually know if he has not made any effort to continue his training, do you?---I'm sorry, repeat the paragraph.

PN421

You don't actually know whether or not Mr Gardner has made any effort to - - - ?---I'm sorry, repeat the paragraph.

PN422

Paragraph 37?---No. That's feedback from his management.

PN423

So you don't actually know?---No. I mean I can say that only from my perspective, from what I have seen, you know, with Gavin I guess stepping up in his training, is that it took many, many years of employment to do that and that now he is doing it, you know, as a means to get out of the current area.

PN424

Well, you don't actually know whether or not Mr Gardner has done it as a means to get out of his current area, do you?---No, but it's - - -

PN425

MR CROCKER: Objection.

PN426

THE COMMISSIONER: Yes. Do you have much longer to go with - - -

PN427

MR REILLY: No. No, Commissioner.

PN428

THE COMMISSIONER: And let's, again, try and contain our questions to those that do not include opinion.

PN429

MR REILLY: Well, no, Mr McKenzie has just stated that Mr Gardner has done some training to get out of his current area. I'm just confirming that Mr McKenzie doesn't actually know that. Mr McKenzie has expressed an opinion.

PN430

THE COMMISSIONER: Yes, and he should - - -

PN431

THE WITNESS: Excuse me.

PN432

THE COMMISSIONER: Just - - -

PN433

THE WITNESS: I'm sorry.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN434

THE COMMISSIONER: Just one minute. Both parties should know the evidence from both of you in this matter will be given appropriate weight and where the evidence is hearsay or opinion evidence or the like it will be given appropriate weight, so perhaps don't get too fixated on what's admissible and what's not admissible because that will all be weighed up, as happens in the usual course, in my consideration of relevant matters.

PN435

MR REILLY: Yes.

PN436

You have some very strong opinions about Mr Gardner, don't you?---I do not. No. No, I do not have strong opinions. I have - - -

PN437

Well, your opinions include that he is the only employee who doesn't identify his training needs or try to resume his training, don't you? That's in your statement?---Yes. I'm not saying that's the only - that he's the only employee.

PN438

Well, that's exactly what you have said, Mr McKenzie?---Can you point me to that paragraph, please?

PN439

I can. It's paragraph 36?---Okay. So, yes, I guess if you look at that, yes, every other employee, and it should be probably most employees take the initiative, or every other employee that was based, you know, in the - in the - that had applied for the role had taken the initiative. It's not supposed to mean the entire workforce.

PN440

At paragraph 37 you have also said:

PN441

Every other staff member takes the initiative to resume their training without being asked.

PN442

So, again, you're saying Mr Gardner and Mr Gardner alone does not take the initiative to resume training without being asked. You have some very strong opinions about Mr Gardner, don't you?---No, I do not. I don't have. I don't have any issues with Mr Gardner at all, to be honest, and like I said earlier, you know, the weighting on the selection process, training is only a very small part of it. What I do have a very strong opinion about is the culture of my area and ensuring that I set my area up for success moving forward.

*** JUSTIN MCKENZIE

XXN MR REILLY

PN443

So you say at paragraph 37 - I'm sorry, paragraph 39, that Mr Gardner has about 20 per cent of the skills relevant to the float despatch role?---Correct.

PN444

Mr Gardner is able to operate all of the line pieces of mobile plant used in the float despatch role; yes?---No, not all of it. I don't believe he can drive a pack truck, and mobile plant is only a very small portion of tasks in the area.

PN445

What proportion?---It depends on the day and how the teams have structured themselves around. I mean it's not - - -

PN446

Overall - - -?---It's not - it's not a scientific calculation that I came up with to come to the 20 per cent, it's a feel, but it's certainly not 90 per cent. You know, there's lots of tasks, like shoring up stillages. We have got A and B double loading we do now. There's a lot of tasks that Gavin has had no exposure to at all. The WMS system in the despatch area is totally different than anything in the laminating area. The laminating area's WMS process would only be about 5 per cent and that area, you know, that they, yes, use it for just very small tasks.

PN447

But Mr Gardner had the same, if not more, relevant skills than the other applicants?---Yes. I believe that's relevant because, like I said, it's only a very small part of the selection process.

PN448

But it is correct, isn't it?---I can't say. I haven't - I did - yes, he probably would have been close for some of them.

PN449

I'm sorry?---I said I can't recall the exact, you know, skills that each - each member had that was applying for that position, that they were all close or whatever, but like I said, it's only a small part of the criteria.

PN450

Nothing further, Commissioner.

PN451

THE COMMISSIONER: Thank you, Mr Reilly.

PN452

Mr Crocker.

PN453

MR CROCKER: No re-examination, Commissioner.

PN454

THE COMMISSIONER: Okay. In light of the time being almost 5 to 1.00, I think we will adjourn for the luncheon break and resume at 1.45.

<THE WITNESS WITHDREW

[12.54 PM]

*** JUSTIN MCKENZIE

XXN MR REILLY

LUNCHEON ADJOURNMENT

[12.54 PM]

RESUMED

[1.54 PM]

PN455

THE COMMISSIONER: We had finished with McKenzie. You're ready for your next witness?

PN456

MR CROCKER: Yes, Commissioner. The respondent calls Rob Paterson.

<ROBERT PATERSON, AFFIRMED

[1.55 PM]

EXAMINATION-IN-CHIEF BY MR CROCKER

[1.55 PM]

PN457

MR CROCKER: Mr Paterson, would you be able to repeat your full name for the Commission?---It's Robert Paterson.

PN458

And what's your business address, Mr Paterson?---It's 95 Greens Road, Dandenong South.

PN459

And what do you do for work?---I'm a warehouse and despatch manager.

PN460

Have you prepared a witness statement in this matter?---Yes, I have.

PN461

Does that witness statement appear at page 109 of the court book in front of you?---I'll have to assume it is, yes.

PN462

If you can locate it, please?---109, did you say?

PN463

Yes?---Yes.

PN464

Is that a witness statement of 21 paragraphs, with no attachments?---Correct.

PN465

Is it dated 12 October 2022?---Yes.

PN466

Is that date correct?---Yes.

ROBERT PATERSON

XN MR CROCKER

PN467

THE COMMISSIONER: Perhaps I can be of assistance. We've got an issue that the events happened in 2023, and the witness statement of Mr Justin McKenzie is

dated 12 October 2023. So what's the date supposed to be on yours?---I'm not sure what you're trying to ask me.

PN468

MR CROCKER: Mr Paterson, the date on your witness statement, it predates the matter that's in dispute. It appears to be a typographical error in relation to the year. The other witness statements in this matter are dated 2023?---All right.

PN469

Did you prepare this witness statement last year or the year before that?---I think it was – it was last year.

PN470

Have you a read a copy of the witness statement prior to coming to the Commission?---My witness statement? Yes, I have.

PN471

Yes. Save for the date, are there any other corrections you wish to make to the witness statement?---No.

PN472

And is the content of that witness statement true and correct?---True, correct.

PN473

I tender that, Commissioner.

**EXHIBIT #R3 WITNESS STATEMENT OF ROBERT PATERSON,
DATED 12/10/2023, OF 21 PARAGRAPHS, AT PAGES 109 AND 110
OF THE COURT BOOK**

PN474

No further questions.

PN475

THE COMMISSIONER: Thank you. Mr Reilly.

CROSS-EXAMINATION BY MR REILLY

[1.59 PM]

PN476

MR REILLY: Mr Paterson, at paragraph 18 of your statement, you say:

PN477

As per the interview with Gavin, it was like all the other interviews. Interviewed okay, answering all the questions, telling us what we wanted to hear.

PN478

So by that you mean he answered questions correctly?---Correct.

*** ROBERT PATERSON

XXN MR REILLY

PN479

So then, he interviewed well enough that he wouldn't have been unsuccessful for the vacant position based on this interview scores?---Correct.

PN480

So then, obviously, the decision wasn't based on his interview scores?---Not necessarily, no.

PN481

You say Mr Gardner had some of the required skills, at paragraph 20. He didn't have any less of the required skills than any of the other applicants, did he?---Sorry, can you repeat the question?

PN482

Mr Gardner didn't have any less of the required skills than any of the other applicants?---Not that I can remember, no.

PN483

Sorry?---Not that I can remember.

PN484

No. So his skills weren't the reason for the decision to not select him, were they?---No.

PN485

So your decision wasn't based on his interview score, or his skills and experience. It was really based on the opinions of people that you spoke to about Mr Gardner, wasn't it?---Yes.

PN486

Do you know if any of those people ever worked directly with Mr Gardner?---I'm not aware, no.

PN487

So you don't know if their opinions are based on their direct experience with Mr Gardner, do you?---No.

PN488

In your statement, paragraphs 15 and 16, you say you spoke to the continuous shift team leaders, and team leaders on day arvo shift. They said, 'I don't want him in my team, as he would not be a good fit, and he would find a way to go on income protection, as this was a common thing with him. And he's had a lot of time off'. Was that the extent of your conversations about Mr Gardner with those team leaders?---Yes.

PN489

You didn't have any follow-up questions for them?---No, not that I can recall.

PN490

You didn't ask the team leaders that you spoke to about any of the other applicants, did you?---No.

*** ROBERT PATERSON

XXN MR REILLY

PN491

Did Mr McKenzie suggest that you do?---Ask about the other - - -

PN492

Ask the team leaders about the other applicants?---No.

PN493

No further questions.

PN494

THE COMMISSIONER: Thank you. Mr Crocker.

RE-EXAMINATION BY MR CROCKER

[2.03 PM]

PN495

MR CROCKER: Thank you, Commissioner. Mr Paterson, you were asked by my friend whether or not, in your view, Mr Gardner had the required skills for the float despatch position. Can I direct you to paragraph of your witness statement, which appears at page 110 of the court book. Are you able to explain for me what you meant by the words 'whilst he does have some of the required skills'?---So he has – some of the skills are with the machinery that's required in that area. So he does have those skills.

PN496

And are there other skills that are required to perform the float despatch role?---There's quite a number of skills, but I can't recall exactly what skills he has at the moment.

PN497

My friend asked you about the interview scores that were given for Mr Gardner. Are those scores considered in the context of whether or not a person is selected pursuant to the team process set out in the enterprise agreement?---It's part of the criteria, yes.

PN498

No further questions, Commissioner.

PN499

THE COMMISSIONER: Thank you. Mr Paterson, you're excused. You may stay with us or you may go.

<THE WITNESS WITHDREW

[2.05 PM]

PN500

THE COMMISSIONER: And our last witness.

PN501

MR CROCKER: The respondent calls Sunny Singh.

<SUNNY SINGH, SWORN

[2.07 PM]

*** ROBERT PATERSON

RXN MR CROCKER

PN502

MR CROCKER: Mr Singh, could you please restate your full name for the Commission?---My full name is Sunny Singh.

PN503

And what's your business address, Mr Singh?---95 Greens Road, Dandenong South.

PN504

What do you do for a job?---I'm a warehouse distribution supervisor.

PN505

Could I suggest perhaps that the microphone (indistinct) that might assist. Have you prepared a witness statement in this matter, Mr Singh?---Yes.

PN506

And is that a witness statement that appears at page 111 of the court book? Sorry, if you can answer, for the transcript?---Yes.

PN507

Is it 19 paragraphs long, with no attachments?---Nineteen paragraphs - - -

PN508

Nineteen paragraphs?---Yes.

PN509

And no attachments?---Yes.

PN510

Is it dated 12 October 2023?---Correct.

PN511

Have you read a copy before coming to the Commission today?---Yes.

PN512

Are there any corrections you wish to make to that statement?---No.

PN513

Is the content of that witness statement true and correct in every particular?---Yes, it's true and correct.

PN514

I tender that, Commissioner.

*** ROBERT PATERSON

RXN MR CROCKER

*** SUNNY SINGH

XN MR CROCKER

**EXHIBIT #R4 STATEMENT OF SUNNY SINGH, OF 19
PARAGRAPHS, AT PAGES 111 AND 112 OF THE COURT BOOK,
DATED 12/10/2023**

PN515

No further questions, Commissioner.

PN516

THE COMMISSIONER: Thank you. Mr Reilly.

CROSS-EXAMINATION BY MR REILLY

[2.09 PM]

PN517

MR REILLY: Mr Singh, you interviewed Mr Gardner for a vacant float despatch position, using the questions in the interview guide, right?---Yes, continuous shift and float despatch.

PN518

Everyone just started with the guide, didn't they?---Pardon?

PN519

Everyone just asked the questions in the guide. Those were the only questions asked of Mr Gardner?---Yes.

PN520

And you say that Mr Gardner scored lower in his selection panel interview than the other candidates, right?---That's right.

PN521

You say there were various times throughout the interview that you required clarification on questions, to clearly identify the required skills and experience, right?---That's right.

PN522

But having received that clarification, the required skills and experience were identified in Mr Gardner's interview, weren't they?---Yes.

PN523

So Mr Gardner didn't interview poorly, did he?---Like, because his score were the lowest, compared to the other candidates.

PN524

Yes, but the score that he got wouldn't disqualify him, wouldn't rule him out of getting a job, would it?---It's dependent on – because for people in the interview panel, and the different in mentality in every person, so what I scored, maybe someone has scored low or not, I'm not sure.

PN525

Well, Mr Gardner's interview score was 144 out of 264?---Correct.

*** SUNNY SINGH

XXN MR REILLY

PN526

That score is not so low that it means he wouldn't get a job, is it?---As a supervisor of the department, I want to make sure, if anyone is coming to the

actual position, he has to be qualified, and plus the other responsibility also, he performing other responsibility too.

PN527

You selected Resti Rivera for a vacant float despatch position in September 2023, and he scored lower in his interview than Mr Gardner?---I can't remember.

PN528

Can't remember. Well, that's the evidence of Mark Marcus. That's page 85 of the court book, paragraph 54?---Page - - -

PN529

Page 85?---Paragraph?

PN530

Fifty-four?---I can't remember.

PN531

So you don't dispute that evidence?---Pardon?

PN532

You don't dispute that evidence?---No.

PN533

The evidence of Mr Marcus, paragraph 23, that's on page 82 of the court book, is that in his time on the selection panel, in circumstances where there are not less vacancies than applicants, every single applicant for a vacancy who scores 50 per cent or more in their interview has been selected. Do you dispute that?---Yes, I read that, yes.

PN534

Do you accept that?---Fifty per cent, but it's dependent on which I mentioned to you previously also. Like, because I'm the supervisor of that department, I want to make sure the person is coming aboard is correct for the department.

PN535

Your decision wasn't really based on the interview score, was it?---Both ways. So the interview guide is just a scoring guide, but you have to check the other responsibility also, and that person can – able to do the job or not.

PN536

And really, it based on the other considerations, wasn't it, not the interview guide?---The interview guide is a scoring guide, which we make sure the person can give the answer regarding relevant jobs.

PN537

You say in your statement that:

*** SUNNY SINGH

XXN MR REILLY

PN538

Mr Gardner didn't have all the necessary skills to complete the role, as he is unable to load or unload containers, load glass into frames.

PN539

This is at paragraph (indistinct) of your statement, right?---Yes, I know about that.

PN540

None of the applicants, the other applicants, were able to do that task at the time, were they?---As compared to other candidates, they are skilled up on different machinery, which – Gavin Gardner, he built his skill recently.

PN541

But the other applicants weren't able to do that task at the time, were they?---Not (indistinct).

PN542

And in fact, Mr Gardner had as many, if not more of the necessary skills than all the other applicants, didn't he?---No.

PN543

So what skills is it you say the other applicants had that Mr Gardner didn't have?---They can drive the GTR, which is a specialised machine to moving the frames, and the forklift, big forklifts also, which is a 16 tonner. But Gavin Gardner, he's built up his skill recently to get this job.

PN544

You don't know that, do you?---Regarding - - -

PN545

You don't know that Mr Gardner built up his skills to get this job?---Not this particular job. Maybe something else also, but, yes, he recently built up his skill.

PN546

He recently built up his skill, but you don't really know why, do you?---No, I don't know.

PN547

No. So you say the other applicants could operate a big forklift, but Mr Gardner couldn't?---I don't know. But other applicants – because what we find, it got into the metrics, so he build up his skills recently.

PN548

So did the other applicants have skills that Mr Gardner didn't have that were relevant to the role, or not?---No. The other candidates, they have experience on the particular skills, which they build up their skill before, long time ago, as compared to Gavin Gardner.

PN549

But did they have skills that Mr Gardner did not have, or not?---Yes.

*** SUNNY SINGH

XXN MR REILLY

PN550

What skills?---They can drive the GTR, and some of the guys, they used to work on crane also.

PN551

Mr Gardner used to work on a crane, didn't he?---According to me, no. He didn't mention in the interview.

PN552

No? So Mr Marcus' evidence is that he did refer to crane operation. I'll take you to page 84?---Yes.

PN553

Paragraph 39. Mr Marcus' evidence is:

PN554

I also recall that Gavin talked about his experience using grabs, which are overhead crane attachments that we use to move glass when he was on the mirror line.

PN555

So are you sure that Mr Gardner - - -?---I can't remember.

PN556

You can't remember?---It was a long time ago, so I can't remember.

PN557

So you don't know? He might have?---I can't remember.

PN558

So other than overhead cranes, what other skills do you say the other applicants had that Mr Gardner did not have?---Because a long time, like – we did interviews in March, so I can't remember all the things.

PN559

So you say, other than overhead cranes, that you can recall, it's one thing, or - - -

PN560

THE COMMISSIONER: Excuse me, can someone tell me what a GTR is?

PN561

THE WITNESS: It's a specialised machine which we - - -

PN562

THE COMMISSIONER: What does GTR stand for?---I can't remember.

PN563

So what does the machine do, Mr Singh? The GTR, what does it do?---The GTR, the actual machines move frames from one area to another area, because we load 20 tonne glass onto the frames.

*** SUNNY SINGH

XXN MR REILLY

PN564

And they're different cranes, in that they're smaller?---Correct.

PN565

MR REILLY: Mr Singh, if I can ask you to turn to page 113 of the court book?---113?

PN566

THE COMMISSIONER: One one three.

PN567

THE WITNESS: Page – I have to - - -

PN568

MR REILLY: It's upside down?---It's so small (indistinct).

PN569

So can you identify where GTR operation is in the skills matrix?---There should be another matrix also.

PN570

Try turning the page?---The Hubtex transport. So we call Hubtex sort of, because there's a company called Hubtex.

PN571

Hubtex. All right. So if you look at that matrix, Mr Gardner actually has the Hubtex competency, doesn't he?---Yes.

PN572

Yes. And in fact, only one of the other applicants has that competency, don't they?---Yes.

PN573

Are there any other skills and competencies that you say other applicants had that Mr Gardner didn't have?---I can't remember.

PN574

I put it to you that Mr Gardner was as skilled, if not more so, than the other applicants?---According to me, what I've told you as a clarification for the answers, and plus the responsibility, I was not satisfied.

PN575

All right. So it's really about when he trained up, isn't it?---It's not about trained up, because, as a supervisor of the department, I'm responsible to look after everyone.

PN576

Your decision really wasn't based on Mr Gardner's skills, was it?---It was based on skill and score.

*** SUNNY SINGH

XXN MR REILLY

PN577

It was really based on the opinions of people that you spoke to about Mr Gardner, wasn't it?---No. It's about skill, plus the actual score.

PN578

But you can't identify any skills that the other applicants had that Mr Gardner didn't?---I can't remember.

PN579

No. Can't remember. So you say it was based on skill and score. Can I ask you to turn to - - -

PN580

THE COMMISSIONER: So is it skill and score, or skill and scope?---Skill and score.

PN581

MR REILLY: Can I take you to paragraph 19 of your statement?---Nineteen?

PN582

Yes. Page 112 of the court book?---Yes.

PN583

You've said there:

PN584

Using the interview guide results, alongside the feedback from team leaders, after clear consideration, Rob and I both agreed that he was not suitable for the position.

PN585

So it wasn't about skills, was it? You based it on the interview guide results?---It's about skill also.

PN586

It was also based on feedback from team leaders, wasn't it?---Correct, but it's about skill, more important to us. Because in (indistinct) he's suitable to work in different teams. So I want to make sure everyone is happy, and plus it's skill also.

PN587

So in relation to your discussions with team leaders, you say that the despatch team leaders told you that Mr Gardner had a poor reputation being a good team player, and they were concerned that he had been off for long periods of time on income protection. This is at paragraph 16 of your statement, page 112?---Yes, I know. That's correct.

PN588

So you approached the team leaders to ask them what they thought of Mr Gardner?---We didn't approach, but mostly, when the jobs gone to the floor, they always discuss about these things.

*** SUNNY SINGH

XXN MR REILLY

PN589

So you're saying they came to you, are you?---Some of the team leaders came to us.

PN590

Who's 'us'?---Me and Rob.

PN591

Mr Paterson's evidence is that he went and asked the team leaders, not that they came to him?---Because we are not in the same room, so sometimes he's on the floor, I'm on the floor, so it depends. I don't have any idea.

PN592

Right. You don't have any idea?---Maybe when they talked to them, but I don't have any idea.

PN593

So do you know if any of those team leaders ever worked directly with Mr Gardner?---I can't remember.

PN594

You say here they told you Gavin has a poor reputation?---Yes, correct.

PN595

So they're going by his reputation, or things that they've heard from other people - -?---I don't know, because I'm new in the business, so two and a half years, so I don't know they worked with him or not. I'm not sure about that stuff.

PN596

You don't know. You didn't ask, did you?---No, I didn't ask about this.

PN597

No. And you say they were also concerned that Mr Gardner had been off for long periods of time on income protection. Do you know anything about Mr Gardner's absences on income protection?---No, not really.

PN598

So you don't know if there are concerns about Mr Gardner's absences?---Yes, correct.

PN599

You say in your statement that the interview process – this is at paragraph, page 111, 'The interview process is the same for each candidate, to ensure everyone is given an equal opportunity', don't you?---That's correct.

PN600

That's because it's fair to apply the same process to everyone?---Correct.

PN601

And it would be unfair to apply a different process?---Could you repeat, please?

*** SUNNY SINGH

XXN MR REILLY

PN602

THE COMMISSIONER: Mr Reilly, this is not relevant, and it's not helpful, or at least not helpful.

PN603

MR REILLY: All right. Nothing further.

PN604

THE COMMISSIONER: Thank you, Mr Reilly. Mr Crocker.

PN605

MR CROCKER: Nothing arising in re-examination, Commissioner.

PN606

THE COMMISSIONER: Thank you. That brings us to the end of our witnesses. If closing statements don't take us into tomorrow, which – I'm going to take a big bet and say they're not, but please don't let my comments restrict your closing statements, if you have any. Firstly, are there any other documents that we've missed that need to be tendered? No?

PN607

MR REILLY: No.

PN608

THE COMMISSIONER: All right. So did you want to make a closing statement, Mr Reilly?

PN609

MR REILLY: Yes. Thank you, Commissioner.

PN610

THE COMMISSIONER: And then, Mr Crocker, you can respond, and Mr Reilly can have a reply.

PN611

MR REILLY: (Indistinct) Mr Singh, Commissioner?

PN612

THE COMMISSIONER: Yes. Mr Singh, you're very quiet there. We almost forgot about - - ?---(Indistinct).

PN613

You're free to stay in the room. Thank you.

<THE WITNESS WITHDREW

[2.29 PM]

*** SUNNY SINGH

XXN MR REILLY

PN614

MR REILLY: Commissioner, we propose to rely on the written outlines of submissions in reply that we've already filed in this matter, but we would like to make a few comments by way of closing. In this matter, Mr Gardner applied for a

vacant (indistinct) despatch position. And in relation to that position, clause 10.1.5 of the agreement applies. It sets out the relevant selection process. That process requires, in the first instance, an examination of the position and selection criteria; an understanding of the qualifications, attributes and experience required to best carry out the duties and responsibilities of the position. The advertisement for vacancy internally specified – sets out the relevant criteria.

PN615

The process then requires a selection panel comprised of two management representatives and two team representatives to shortlist the interview applicants based on the relevant attributes, and decide who to select. In our submission, those attributes and the other criteria set out in the selection process are the criteria by which applicants are to be assessed, and decisions have been made by the selection panel. The process is a detailed one. Parties who drafted the agreement set out and agreed to a suite of criteria they consider to be relevant to the selection process, and the process by which those criteria are to be assessed. If it were their intent for other matters to be taken into account in the selection process, they would have included them. They did not.

PN616

That process is the process the parties have agreed is to be observed in relation to vacancies. The Commission should not now read other criteria into the process that simply aren't there, or accept, as the respondent has submitted in its written submissions, the parties intended for any and every other possible consideration a panel member wants to base their decision on to enter into equation. To do so would be to defeat the entire purpose of 10.1.5, which is to set out the process to be followed. If it were open to a selection panel member to take anything they wanted into consideration in deciding whether to select an applicant for a vacancy, there'd be no point setting out any criteria.

PN617

An applicant to meet all the criteria, and the decision to be based on something completely different. It rendered the existence of any criteria and the selection process as a whole otiose. In our submission, the decision of Mr Paterson and Mr Singh was not based on those criteria, and as such, was not reasonable. The evidence of Mr Paterson is that his decision was not based on Mr Gardner's interview score. The evidence of Mr Paterson is also that his decision was not based on Mr Gardner's skills and experience. Mr Paterson has accepted that his decision was based solely on the opinions of the team leaders that were conveyed to him.

PN618

Mr Singh claims that his decision was based on Mr Gardner's skills and experience, but he hasn't been able to identify a single unit of competency that Mr Gardner didn't have that the other applicants had. In fact, he incorrectly claimed that the applicants had competency in Hubtex, and Mr Gardner didn't, when it was only Mr Gardner and one other applicant that had the competency in Hubtex. Mr Singh claimed that Mr Gardner didn't talk to his experience using overhead cranes and grabs in his interview, when the evidence of Mr Marcus is that he did. Mr Singh then says, 'I can't remember'.

PN619

Mr Singh's evidence about Mr Gardner's skills and qualifications should have little to no weight attached to it. He can't remember. He hasn't been able to demonstrate anything lacking in Mr Gardner's skills. In talking about Mr Gardner's skills, Mr Singh started talking about when Mr Gardner skilled up. That's really what he's talking about when he's talking about Mr Gardner's skills. In relation to Mr Gardner's interview score, the unchallenged evidence of Mr Marcus is that Mr Singh selected another employee for a vacant float despatch position who scored lower than Mr Gardner.

PN620

The unchallenged evidence of Mr Marcus is that, save for Mr Gardner – and Mr Marcus' five years sitting on selection panels as an ongoing selection panel member, save for Mr Gardner, no one who scored 50 per cent or more in their interview, when applying for a position where there were as many, if not more vacancies as applicants, has never been rejected on the basis of their interview score. We say it's evident that Mr Gardner's interview score was not the reasons he was not selected for the position. So what does that leave us with, in terms of the reasons for Mr Paterson's and Mr Singh's decisions?

PN621

Hearsay. Nothing but hearsay; what they were told by the float despatch team leaders they spoke to. They don't know if the opinions of those team leaders was based on direct experience or observations. None of those people actually worked directly with Mr Gardner. We say those opinions weren't based on direct knowledge or experience. So Mr Singh and Mr Paterson relied on hearsay to make their decision. In relation to those opinions, we have references to Mr Gardner's training, Mr Gardner absences on income protection, and Mr Gardner's cultural fit. In relation to Mr Gardner's injuries, absences on income protection, there's nothing before the Commission to suggest that those injuries and absences weren't genuine.

PN622

Mr McKenzie, Mr Paterson, and Mr Singh, they have no basis on which to assume they weren't genuine. Mr Gardner now has a full clearance. Not only is there no basis to believe Mr Gardner would, as it was put, try to find a way to go on income protection, to prejudice Mr Gardner's application for the vacancy on the basis that he injured himself – he exercised his lawful rights to make an income protection claim – it's outright discriminatory. In relation to Mr Gardner's training, the evidence is that, over his 27 years with the respondent, he's learnt all of the stations on the laminating line when he started there. He learnt to perform work in laminating despatch. He learnt all the – one station on the mirror line, he learnt robotics on the mirror line.

PN623

He undertook training in training and assessing twice. He undertook leadership training. He learnt to operate the mobile plant on the laminating line. He learnt a number of other skills along the way. Mr Gardner has trained and assessed other glass workers in many of those same areas. Mr Gardner has commenced training, and continues to train in fault identification, fault diagnosis, SAP software. Mr Gardner commenced and attempted to complete training in various skills on the

laminating line, but his training was repeatedly interrupted, cancelled, because he'd be required to go back onto mobile plant operations.

PN624

Mr McKenzie claims that it's up to Mr Gardner to apply for or organise and arrange for the resumption of his training. The agreement, at clauses 8.11, 10.1.1, 10.1.2, 10.1.10 makes clear the responsibility of planning and organising training. It lies with management, site training coordinator, team leaders, and assistant team leaders. Mr Gardner can't simply make another employee jump on the mobile plant, so he can finish his training. It's not within his authority. Mr McKenzie also doesn't have any direct knowledge or experience of Mr Gardner's preparedness to train. He never really worked with Mr Gardner closely. He relies on comments made by Mr Gardner's floor manager, Robert Wells.

PN625

The respondent hasn't called Mr Wells to give evidence. We say the Commission should draw an inference that Mr Wells' evidence would not have assisted. We say there's no solid evidence, no direct evidence of any failure to train on Mr Gardner's part. We have Mr Gardner's teamwork, again based on hearsay. In terms of evidence that's actually before the Commission that isn't hearsay, what we have is Mr Gardner having taken on several additional roles in his time with the respondent; assistant team leader, trainer/assessor, union delegate. We also have Mr Gardner's continued preparedness to stop his training and get back on the mobile plant, because that's what's required of him.

PN626

Even right now, Mr Gardner has agreed to step out of his quality control position and help out, by getting back on the mobile plant, because that's what he's required to do. That's not a sign of poor team playing, as the respondent would assert. Those are the actions of an actual team player, someone who's prepared to interrupt their training to do what's required of him in his role. So we submit that the decision is unreasonable, not only because it goes beyond the relevant criteria set out in 10.1.5, but also because there was no reasonable basis for the decisions that were made. It is all hearsay. Even if panel members were permitted to take those matters into account, and they did have some kind of legitimate foundation, the process by which the decisions were reached was fundamentally procedurally unfair, and as such, the decision was not reasonable for that reason also.

PN627

Mr Paterson and Mr Singh sought and obtained feedback from the team leaders before interviewing Mr Gardner. They didn't discuss the matters raised by team leaders with the other selection panel members, certainly not before making a decision. They didn't give the other selection panel members an opportunity to make their enquiries of the team leaders, or form their own views on Mr Gardner's reputation. Mr Singh says he raised it in the post-interview discussions. Nothing to that effect in Mr Paterson's evidence. There's nothing to that effect in Mr Marcus' evidence. We've only got one person saying it was raised, and we submit that no weight should be attached to that.

PN628

Likewise, Mr Paterson and Mr Singh did not tell Mr Gardner about the feedback they received from the team leaders. They didn't Mr Gardner an opportunity to speak to the team leaders about their concerns before making their decision. They didn't give Mr Gardner an opportunity to respond to those concerns at the interview. They didn't tell Mr Gardner that they'd based their decision on the opinions of the team leaders. For a decision maker to not tell a person who's affected by their decision the reasons for their decision, and to deny the affected person an opportunity to respond to those reasons before making a decision is about as basic a denial of procedural fairness as one can get.

PN629

So in our submission, the decision was not reasonable by any metric. It wasn't made in accordance with clause 10.1.5; based on hearsay on hearsay. And it was made without affording Mr Gardner procedural fairness. In our submission, the Commission does have jurisdiction to impose a different outcome in relation to the selection process. The Commission's jurisdiction to determine a dispute pursuant to an enterprise agreement dispute settlement procedure is determined by the scope of the dispute settlement procedure and the powers given to the Commission under that procedure. The agreements dispute settlement procedure is broad. It's expressed to apply to disputes arising between any person covered by the agreement, on any matter pertaining to the agreement, the NES, or the relationship between the company and the employees.

PN630

Further, clause 10.1.5 expressly permits a dispute to be raised about a selection panel's inability to reach a unanimous decision, and it also expressly permits an unsuccessful applicant to lodge an appeal. The dispute settlement procedure does not limit or prohibit the Commission's exercise of any power in relation to such a dispute. It confers broad powers on the Commission in determining a dispute. The Commission may give all such directions, orders, and/or recommendations, and do such things necessary or expedient for the speedy and just hearing and determination of the dispute. Imposition of a different outcome would not be inconsistent with the Act or with the agreement. In our submission, Mr Gardner satisfies all the requirements for vacant positions, and meets other selection criteria that weigh in favour of his selection for the vacant position. And as such, the appropriate outcome is for Mr Gardner to be selected for the vacant position. If it pleases the Commission.

PN631

THE COMMISSIONER: Thank you. Mr Reilly, just briefly, what do you say the purpose of 10.1.5 is?

PN632

MR REILLY: We say the purpose of 10.1.5 is to set out the process by which individuals are selected for vacant positions. It sets out the process by which they're selected, and it sets out the relevant criteria by which the decision to select them should be made.

PN633

THE COMMISSIONER: And do you say that – if I'm remembering correctly, on a previous occasion, someone was selected, even though they had less than a 50 per cent score?

PN634

MR REILLY: Yes. That's in the evidence of Mr Marcus.

PN635

THE COMMISSIONER: And is it your submission that that then means that if there is an internal application for an advertised position, as per 10.1.5, if someone scores less than 50 per cent, that should not preclude them from selection?

PN636

MR REILLY: We don't say that an employee who scores lower than 50 per cent can't be selected. But what we say is the standard that has been consistently applied on site for at least the last five years is that where there as many, if not more, vacancies than applicants, 50 per cent or more is a satisfactory score. It would not preclude them from being selected.

PN637

THE COMMISSIONER: Thank you. Mr Crocker.

PN638

MR CROCKER: Thank you, Commissioner. The AWU alleges, on behalf of Mr Gardner, that the respondent has acted unreasonably in not selecting Mr Gardner for the position of float despatch. It alleges that the respondent has contravened clause 10.1.5 by reason of that conduct. The respondent submits that it has not acted unreasonably in the requisite sense in rejecting that application. If the Commission finds that it has acted unreasonably, the respondent submits that the appropriate course is to remit the matter to the panel for re-determination. For reasons that I'll develop, it's not appropriate for the Commission to stand in the shoes of Oceania and determine that matter for itself.

PN639

I'll start by just briefly setting out some of the back for Oceania Glass and Mr Gardner's employment, and then I'll move to addressing the construction of clause 10.1.5, and by reference to that, each of the three questions that appear in the agreement statement of facts. Oceania Glass' operations can be broadly broken into two groups, the first being process products. It has its own section in the enterprise agreement, that we've been taken to. It has relevant terms applying to those employees at part 5. That's page 55 of the enterprise agreement. The terms include, amongst others, wages that engage with that part of the business, allowances, and other terms that are unique to process products employees.

PN640

The second group is float operations. It also has its own section in the enterprise agreement, commencing at part 4 of the enterprise agreement, page 37. And similarly, it has its own terms, setting out remuneration structures and other clauses that engage with that part of the business. Mr Gardner has worked for Oceania Glass or a related company since 1997, and he performs duties, at least until recently, as a glass worker. Since that time, he has performed duties that

broadly fall into the process product side of operations. Until his (indistinct) employment, he was employed as at team member in the laminating department. He was covered by part 5 of the enterprise agreement and had the day team rate, and had a WorkCover allowance, with one licence and three endorsements.

PN641

Mr Gardner accepted in cross-examination that meant he was remunerated at a rate of \$1,724.50 per week, including the WorkCover allowance. Mr Gardner is, as a matter of law, employed in his position subject to a contract of employment which has not been reduced to writing. As a foundational principle, we have the employment contract sitting alongside the enterprise agreement. They're separate to each other. Mr Gardner has applied for float operations roles on four occasions. In cross-examination, Mr Gardner conceded that his application in 2021 was in effect unopposed. He was the only applicant for the position. He was not successful in that endeavour. It's been put that Mr Singh had someone else in mind for that position. That proposition was not put to Mr Singh in cross-examination.

PN642

THE COMMISSIONER: (Indistinct) reply.

PN643

MR CROCKER: I withdraw that if I'm mistaken. In April 2022, he applied a second time, and was unsuccessful, as he was again in 2023.

PN644

Mr Gardner's most recent application for the float despatch role is the subject of the present application, and unlike his current position, it's covered by Part 4, an entirely different part of the enterprise agreement. The relevant advertisement states that the vacancy is for a float continuous shiftworker and the applicable salary is over \$133,000, being more than \$40,000 more than Mr Gardner's current remuneration.

PN645

The relevant process that Mr Gardner seeks to challenge is set out at clause 10.1.5 of the enterprise agreement, being the process to select team members where a vacancy exists. The parties have agreed, in relation to that process, that there was a selection panel assembled comprising of Mr Marcus, Mr Wells, Mr Paterson and Mr Singh.

PN646

Mr Gardner, among others were selected for interview. The panel interviewed the applicants using the Oceania Glass Behavioural Event Interview Guide. The applicant obtained the lowest score of the four applicants, being 144 or 54.5 per cent. The next lowest score belonged to Mr Morgan, being 23 points higher at 167. The other two applicants scored 173 and 176 respectively, and as a result of that interview the panel did not reach a unanimous decision to select Mr Gardner; Mr Paterson and Mr Singh each considering him not to be appropriate for the position.

PN647

In construing the operation of clause 10.1.5 the Commission is required to identify the objective meaning of the agreement by construing the words, having regard to their context, including their industrial purpose. The principles of construction are well settled, and I don't propose to take you, Commissioner, to WorkPac which I have no doubt you have been taken to many, many times before. The relevant principles appear at paragraph 197 of that decision.

PN648

In addition to those general principles - and I will, Commissioner, just take you to one decision - it's appropriate that the Commission have regard to the principle that not interfere with the right of an employer to manage its business unless the employer is seeking to do something that's unjust or unreasonable, and that principle, sometimes referred to as managerial prerogative was dealt with by Lawler VP, as he then was, in the decision of Construction, Forestry, Mining and Energy Union v HWE Mining Pty Ltd [2011] FWC 8288. There are a handful of paragraphs from that decision that are relevant, Commissioner. It will probably only take me a bit and it might be convenient if I just read them aloud. The Vice President says:

PN649

The law recognises –

PN650

and this is at paragraph 7 –

PN651

that there is an area of managerial prerogative in which the employer has the right to make decisions on how to manage their business.

PN652

He goes on at paragraph 8:

PN653

Subject to express terms, there is an implied term in the contract of employment that the employee will comply with the lawful and reasonable directions of the employer. This is one of the principal ways in which the employer's managerial prerogative arises from a legal perspective.

PN654

Then at paragraph 11:

PN655

If an employer's exercise of managerial prerogative is not prevented by statute, an award, a statutory agreement or the contract of employment, the basis for a tribunal such as Fair Work Australia, acting as an arbitrator of a dispute, interfering with what would otherwise be a lawful exercise of managerial prerogative –

PN656

and he goes on –

PN657

was laid down Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales.

PN658

better known as the XPT case, and to refer to a well-known passage from that decision, the Vice President floats:

PN659

It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all the facts and not to interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable.

PN660

I proceed on the basis that an exercise of managerial prerogative will not be unreasonable in this sense if a reasonable person in the position of the employer could have made the decision in question.

PN661

Turning to the construction of clause 10.1.5. It commences at page 123 of the enterprise agreement, and you will see, Commissioner, it sits in Part 10 of the enterprise agreement which deals with work organisation. That's the title at page 122. The clause immediately preceding 10.1.5 is titled Team Leader, Assistant Team Leader, Team Member Selection Process, and that clause sets out a number of gates through which vacancies are to move and prospective candidates identified for selection. So at clause 10.1.4a.i. it states that:

PN662

A job vacancy through increased demand or an Employee leaving the business.

PN663

At b.i. it states that if the vacancy is not filled by a shuffle, the next step is to advertise the job among permanent employees. The clause then goes on to set out the process if the vacancy is not filled by internal advertisement, all the way through to externally advertising the position in the event that the role is not filled.

PN664

Clause 10.1.5 engages with that clause in that it operates where there's a position that's required to be advertised. I'm not going to go through line by line of clause 10.1.5, but I will point to the following features. It requires a panel of four, comprised of two management and two trained team representatives. The panel is to interview the applicants against criteria, at paragraph c, which include, among others, motivation and ability to work in a team environment and time in attendance. The process requires that the selection panel must reach a unanimous decision in their selection of the successful applicant, and then there's a process to be followed in the event that a unanimous decision is not reached, including a right of appeal by the candidate.

PN665

Now, the things to note about this process, read in the context of the enterprise agreement as a whole are, first, the selection of applicants is made by way of a group decision requiring the agreement of each panel member. Second, the criteria against which panel members are to assess applicants are cast in very broad terms.

PN666

No particular weight is given in the enterprise agreement to any one of the eight criteria. The categories are general in nature. This gives each panel member a broad discretion as to whether or not they consider a given applicant to be appropriate. It calls for a global subjective assessment of each panel member, subject only to the requirement that the assessment be reasonable in the relevant sense.

PN667

Third, it doesn't, in our submission, preclude consideration of some other factors. If you turn to the clause, Commissioner, at page 124 of the enterprise agreement, true it is that it says that the selection panel will interview applicants against the criteria set out in subparagraph c, but it's expressed in restrictive terms. It's not a clause that's drafted with limitation.

PN668

Fourth, the purpose of the clause, read in context, is to give existing permanent Oceania staff an opportunity to apply for roles before other external modes of recruitment are considered. That's clear from reading clause 10.1.4 and 10.1.5 together. The process creates no obligation on the panel to select an internal applicant, just that the internal applicant be considered before going external.

PN669

Fifth, the clause does not obligate Oceania to employ a selected applicant in a new position. Now, it creates an obligation to follow a process, but the obligation goes no further than the selection by the panel.

PN670

Once the applicant has been selected the respondent then needs to transfer the applicant to a new position which involves - and I will come to this - the creation of a new employment contract or variation of fundamental terms to the existing employment contract. We have had unopposed evidence from Mr McKenzie that that process requires an additional sign-off by management, not contemplated within the enterprise agreement itself.

PN671

THE COMMISSIONER: But is the additional sign-off, presumably the applicant would say the additional sign-off is just the formal process by which the selection committee's decision is realised.

PN672

MR CROCKER: Yes. I'm sure that's what the applicant will put, Commissioner.

PN673

THE COMMISSIONER: So what does it mean? So what does it mean when it says:

PN674

The selection panel must reach a unanimous decision in their selection of the successful applicant.

PN675

So where there's a unanimous decision, the unanimous decision is in deciding on the successful applicant. So what is the applicant successful about?

PN676

MR CROCKER: The applicant has been successful in the panel, which has no status of its own, determining that that person is the preferred candidate for the job. It does not self-execute an employment contract between Oceania and the employee, and particularly not in circumstances such as this where the remuneration would increase by \$40,000 per year. The person would be in a completely different position.

PN677

As a matter of contract, it has to be for the employer to offer a position of employment. I appreciate that the enterprise agreement then engages and sets the floor for particular terms, including remuneration, but to take a very basic example, the contract of employment in a position is an offer by the employer to pay the employee in that role.

PN678

So that's step number 1 and that must exist for any employment relationship. An industrial instrument such as an enterprise agreement or an award may require the employer to pay the minimum to the person who is employed in that position, but it cannot be properly argued that the industrial instrument itself - - -

PN679

THE COMMISSIONER: So you're saying the selection panel merely makes a suggestion, and that 10.1.5 is just a process that allows existing employees to apply?

PN680

MR CROCKER: Yes.

PN681

THE COMMISSIONER: But having been successful through the panel process doesn't guarantee that they will be offered the job?

PN682

MR CROCKER: It doesn't guarantee that Oceania will engage in a contract of employment with them and give them that role, and Commissioner, if we look at the purpose of the clause, being to provide a filter through which existing permanent employees can move and are given an opportunity to take on a new role, that construction makes sense. The alternative construction being that it somehow self-executes that the employee is then substantively put in the role or

an obligation is created upon the employer to so employ them would mean that the operation of the agreement was such that the employer was bound to contract with one or more of its employees who, at the discretion of the panel, have been said to be an appropriate applicant.

PN683

It has real financial consequences for the business and it would be - putting to one side whether or not it's something that could be properly included in a mechanical sense in the enterprise agreement - at a minimum the expectation would be that it was clearly expressed because there's no machinery - - -

PN684

THE COMMISSIONER: No. I understand your argument. So what's the purpose then? So we have a situation where, in the event that there isn't a unanimous decision, and all of the steps go through to try and reach a unanimous decision, then an appropriate, the appropriate stage of the dispute resolution procedure is enacted and that brings it to the Commission.

PN685

MR CROCKER: Yes.

PN686

THE COMMISSIONER: So what purpose does that all serve if there's no - - -

PN687

MR CROCKER: Well, I don't want to be seen to evade the question, and I'm not, but just in terms of the structure, it's that - - -

PN688

THE COMMISSIONER: I'm sorry. I have interrupted your comment.

PN689

MR CROCKER: No. That's okay.

PN690

THE COMMISSIONER: That's fine. Just, yes, if you could answer my question at some stage.

PN691

MR CROCKER: Yes, and I think in short compass, it would be - we accept that decision-making in an employment context is not completely unfettered. It has to be reasonable by reference to that type of XPT standard. If there were general concerns, or if, for example, the Commission were to determine that a decision were unreasonable against that threshold - which I will develop a little - it may well be appropriate that the decision be remitted to the panel and the reasons, you know, given greater interrogation or development, but the purpose of the clause we say is plainly one that's designed to act as a filter, allow internal applicants to put their hat in the ring prior to the employer going external, but it rises no higher than that. So in those circumstances the remedy that might be achieved before coming to the Commission we say is necessarily limited.

PN692

Then in the first question, being whether or not a decision reached by the panel was reasonable, the way the question is expressed is:

PN693

In deciding whether Mr Gavin Gardner would fill a vacant float despatch position the selection panel did not reach a unanimous decision as required by clause 10.1.5. Was the decision reached by the selection panel reasonable?

PN694

Before answering that question it's necessary to construe what is meant by 'reasonable'. The panel's decision, in the respondent's submission, is broadly an exercise of managerial prerogative. That's the starting point for working out whether or not a decision reached by each of these decision-makers was a reasonable one. It's a decision that engages with Oceania's right to manage its business how it fills vacant positions with employees. It's a decision of that type of character.

PN695

So the Commission ought not interfere with that decision until it is unjust or unreasonable, and here the contention is that it is unreasonable, and in determining the answer to that, we say the essence is set out in Lawler VP's decision that I have already taken you to.

PN696

Now, Mr Marcus considered that Mr Gardner was an appropriate applicant so the question in this case is really limited to were the decision of Mr Singh and/or Mr Paterson unreasonable in the relevant sense?

PN697

Given the selection process requires a unanimous agreement, the decision won't be unreasonable unless the Commission determines that both Mr Singh and Mr Paterson reached the decision unreasonably; that is, provided one of two of them acted reasonably, the conclusion is that there would not have been unanimous agreement and Mr Gardner would not have been selected.

PN698

Now, both Mr Paterson and Mr Singh, who work in the despatch area, have given evidence of the reasons for their decision. Mr Singh - and this is in his witness statement at court book 112 - he states he scored Mr Gardner lower than the other candidates. So that's paragraph 14. He states the team leaders told him that Mr Gardner had a poor reputation as being a good team player, and a relevant criteria under the enterprise agreement is an ability to work in a team environment. That's at court book 112, paragraph 16.

PN699

I might pause there on that point and just address you, Commissioner, on the hearsay issue that's been raised by my learned friend. So it is a criteria under the enterprise agreement that ability to work in a team environment be given consideration. It might be, for some people, that's more or less important, and as I

have said, we don't say that the enterprise agreement prescribes a particular weight to be attributed.

PN700

Communications from team leaders with which Mr Gardner is going to work may well be on a hearsay basis, but it doesn't mean that just because something is hearsay it's unreasonable to make a decision on that basis. Indeed, courts make decisions based on hearsay in appropriate circumstances. It doesn't disqualify that information from being taken into account, and the evidence that's been given is that that was, you know, a criteria that's been considered.

PN701

Mr Singh did have concerns about time in attendance, which is, again, prescribed by the enterprise agreement. As to my learned friend's point that that consideration must be discriminatory - and I'm conscious not to go too far off track - but I would say by analogy to - and it's not in the materials, Commissioner - but the Full Court of the Federal Court's decision in *Anglo Coal* with which, Commissioner, you might be familiar. That decision involved the dismissal, in a general protections context I should say, of Mr Byrne, a mining employee, by his manager, Mr Powell.

PN702

Now, Mr Byrne had sought annual leave on particular days following a public holiday and Mr Powell said, 'No, you can't have it.' Mr Byrne then said to another employee, Mr Lorne:

PN703

I'm going to take the leave anyway. I don't care that I have been told that I can't. I'm going to get a sick certificate.

PN704

Byrne then gets the sick certificate to cover the relevant days. Powell finds out that this conversation has gone on and feels that he's been duped and he sacks him. Unremarkably, the CFMEU brings an application saying:

PN705

You have sacked Mr Byrne because he exercised his workplace right to sick leave, personal leave. That's why you sacked him.

PN706

and the employer says:

PN707

No. We sacked him because we thought that he was being dishonest with us –

PN708

and that was accepted. So there's a similar decision in the *Endeavour Coal* - and, again, I don't have the citation - where the reliability of a person was such that they kept taking a lot of sick leave. Again, it was in a mining context, and the employer dismissed the to be applicant on the basis that he was unreliable. The same sort of argument proceeded in that it was drawing this distinction between is

it because you're not there or is it because you're exercising a workplace right, and he, in a roundabout way - and apologies for deviating - we say that taking time in attendance into account isn't discriminatory. You know, on its face, if some other reason was taken into account that that might well be different.

PN709

So there was time in attendance. There were also concerns about integrating into the team's existing culture, and again, the fact that this might be based on other communications from managers is unremarkable.

PN710

These are experienced people who have been working in the business for a long time, who have concerns and who have views about who is appropriate in their department. It doesn't follow that, because those things have been taken into account, it's unintelligible or its unreasonable in the requisite sense. A reasonable person could, having regard to that information, come to a decision that a person is not a good fit in the organisation. These aren't uninvolved parties that's being discussed, but they're team leaders that Mr Gardner will be working with.

PN711

As to the cross-examination of Messrs Singh and Paterson and their inability to recollect particular skills that Mr Gardner had or did not have relative to other candidates, I'm conscious, again, this is a circumstance where the interview took place some 12 months ago. It's unsurprising that specific details about particular skills have not been recalled in those circumstances.

PN712

Apologies because I have broken it up a little bit. I have covered the evidence that Mr Singh gave. The evidence that Mr Paterson has given is that he was conscious to ensure that whoever was selected would be a good fit for the team, and that's at court book 110, paragraph 14. Again, he spoke to shift team leaders. He asked their opinion. They all said words to the effect, 'I don't want him on my team. He would not be a good fit.' That's at court book 10, paragraph 15, and he considered that Mr Paterson(sic) had some of the required skills, but he would not fit in and create a harmonious environment. That's court book 10, paragraph 20.

PN713

It was put by my learned friend that Mr Paterson gave evidence that the scores were not taken into account at all on that scoring guide. Mr Paterson clarified in cross-examination that the scores were a factor that was given consideration.

PN714

A final point just to round this out. Whilst different in the result, the level of detail given by Mr Paterson and Mr Singh is not materially different to the level of detail given by Mr Marcus as to why he was the preferred candidate. This sort of process doesn't invite a hugely detailed, vigorous analysis of particular data points upon which a decision is then made. It's a far more global assessment. So it's not to level any criticism towards Mr Marcus's evidence, but only to observe that there's a level of generality in relation to all of the witness's evidence in this material which, again, we will say is unsurprising.

PN715

Now, the question before the Commission is whether the decisions were reasonable, not whether the decisions were the best decisions or that some other decision might make a different decision or whether the Commission considers a different decision to be preferable.

PN716

In Oceania's submission, the decisions reached in this instance are reasonable in the relevant sense. They had regard to criteria set out in the enterprise agreement. Both the employees who have given evidence for the respondent work in float despatch and both are well-placed to determine what makes a candidate suitable for that department.

PN717

It's not disputed that Mr Gardner's performance, assessed by the panel as the whole, was the lowest of the applicants. He scored 144 out of 264 and was materially lower than the next closest applicant. The AWU's contention that a rating of more than 50 per cent should ensure success should be rejected. That's not contemplated by the enterprise agreement. It's not relevant to the task before the Commission. In any event, Mr Gardner's score barely exceeded it.

PN718

The Commission cannot be satisfied, having regard to the evidence, that there was no reasonable basis for Mr Paterson and Mr Singh to decide that Mr Gardner was not a suitable candidate for selection. What the Commission should find, in our submission, is that members of the panel held different views as to the suitability of Mr Gardner to perform the float despatch role. That difference of opinion reflects how the clause is intended to operate. That's why there are four panel members. That's why that filter isn't left to a single individual.

PN719

For these reasons the Commission should find that the answer to question 1 is that the decision reached by Mr Paterson and Mr Singh was reasonable. Turning to question 2:

PN720

If the answer to question 1 is no, does the Commission have jurisdiction to impose a different outcome for Mr Gardner's application for the vacant position?

PN721

As you will no doubt be aware, Commissioner, when exercising powers of private arbitration, the Commission must do so within the bounds of jurisdiction as established by the dispute resolution clause in the Act. The determination of the Commission's jurisdiction involves an exercise of the construction of the relevant dispute resolution clause in the agreement, and here, questionably, that clause is cast in broad terms. It touches on any person covered by the agreement on any matter pertaining to the agreement, the NES, or the relationship between the company and the employee.

PN722

This is a dispute, clearly enough, about clause 10.1.5 of the enterprise agreement, and given the breadth of the clause, it's a dispute that the Commission has jurisdiction to arbitrate. The nature of the relief that the Commission can grant is subject to the limitations in section 739(5) of the Act and the terms of the enterprise agreement itself.

PN723

So in relation to relief, the respondent submits that the order is open to the Commission, in the event that it finds the decision was unreasonable, are limited in the following ways. First, to be limited to the bounds of clause 10.1.5, and the high watermark of that clause, as I have already addressed, is that the selection panel may select a successful applicant. It provides for selection. It's not an appointment clause. It's not expressed to bind the respondent to the panel's decision.

PN724

In the circumstances, whilst the Commission has jurisdiction, the relief that it can order, at its highest, we say is to recommend a different outcome; that is, that the panel determine Mr Gardner to be a suitable applicant for the vacant position, and for the reasons that I will come to in relation to the third question, we say that whilst the Commission has that power, it would be inappropriate to exercise it.

PN725

The second and related limitation is that the Commission cannot order that Oceania employ Mr Gardner in a float despatch position. For reasons again that I have already covered, that would require Oceania to enter into a new or materially varied employment contract with Mr Gardner against its consent; that is, Oceania's consent. That order would run contrary, we say, of the doctrine of privity of contract and is beyond power. The Commission does not have the jurisdiction in this sense to fully determine legal rights.

PN726

Now, pausing on that point. The AWU raises three arguments in opposition to that submission, which appear at court book 93 between paragraphs 20 and 23 of their reply submissions. In summary, that opposition is that, first, Oceania is delegated the decision to employ a person to the panel, pursuant to clause 10.1.5 of the enterprise agreement. The second argument is that the terms of an enterprise agreement can compel an employer to offer employment to enter into a new or varied contract, and it cites casual conversion as an example, and the third argument is that, in the alternative, no employment contract is required in order for Mr Gardner to perform the new role.

PN727

Now, without repeating in detail, as to the first argument we submit that clause 10.1.5 does not include any term delegating authority to the panel to enter into contractual relations. The Commission should not be quick to imply such a term given the obvious and significant financial consequences for the respondent. For the reasons I have already set out, that argument should be rejected.

PN728

I also note that we have the uncontested evidence of Mr McKenzie that there is a further step after the process in the enterprise agreement that's been followed that's required in order to effect the employment.

PN729

Based on the second argument, the operation of casual conversion is quite different to a requirement that an employer be forced to enter into a new employment contract on materially different terms.

PN730

Casual conversion is now a part of the National Employment Standards set out at division 4A of Part 4-2 of the Act. All national and existing employees are entitled to be offered or to request conversion to permanent employment once certain eligibility of requirements have been met. It's clear that where a statute lays down requirements to be observed by parties to an employment contract the statute will be decisive in that regard.

PN731

That process, we say, is it's a recharacterisation of an existing employment relationship; that is, the conversion to permanent status, in circumstances where you have employees who have already been there for 12 months. They're already working regular hours for at least the previous six months, and it's also not unfettered. The request can be refused by an employer where there are reasonable business grounds, but in any event, it's a process that's granted in statute. We say it's not appropriate to the current question. It does not require an employer to offer an entirely new position or some other role, and again, it's not self-executing or unfettered.

PN732

The third argument put by the AWU, at case book 39, paragraph 23, is that Oceania would not be required to offer Mr Gardner new employment as he has been there for 26 years and he is classified as a team member and will continue to be classified as a team member.

PN733

We say that analysis should be rejected. The reason is that, as with all employees, Mr Gardner's employment is subject to a contract. Fundamental terms of that contract will include his position and the promise to pay him a wage for the work performed, and again, there's this important distinction that Oceania's obligation to pay Mr Gardner for work in that position is a matter of contract. The agreement between the parties is that he will work in the position in exchange for a wage, and separate to that contract is a floor or a minimum that is set by the enterprise agreement.

PN734

So we say that the appointment of Mr Gardner to float despatch, an entirely new role with new skills, with a substantially higher salary, covered by different terms under the enterprise agreement, would unquestionably involve a new or materially varied employment contract which requires agreement with Oceania. It's a different position. A different department. Own terms. It's not a tick and flick or

a transfer where there's no substantial amendment. Turning to question 3 - and I'm nearly finished, Commissioner - the question is:

PN735

If the answer to question 2 is yes, what is the appropriate outcome?

PN736

For the reasons that I have addressed, the extent of the relief that the Commission could order in this case we say is a recommendation or view that the panel should have reached a different outcome; that is, that Mr Gardner should have been selected.

PN737

Now, in our submission, while that course might be open, it would not be appropriate. The selection process agreed to by Oceania, as set out at clause 10.1.5 of the enterprise agreement, contemplates that the selection be by way of four panel members, two being management and two being team representatives, and the composition of that panel reflects the intention that persons with relevant experience be involved in the decision-making process.

PN738

If the Commission intervenes to make the decision it would be, we say, inconsistent with the purpose and intent of that clause when read in context. If the Commission were to determine that the decisions were not reasonable we say that the appropriate course would be to remit the decision to the panel for redetermination and direct that the process be followed in accordance with clause 10.1.5.

PN739

I accept that that result, Commissioner, has a degree of circularity about it, however, it's based on our interpretation of the clause and we say justified for the reasons that have been addressed.

PN740

So for the reasons that have been canvassed, we say that the Commission should find, first and foremost, that the respondent's decision not to select Mr Gardner for the float vacancy was reasonably reached in the requisite sense. Again, this is not a high bar. This is not something that requires a detailed examination of individual criteria that are carefully weighed. It's a more global assessment and it's been appropriately conducted in the circumstance.

PN741

If, however, the Commission considers that it was unreasonable, the decision ought be remitted to the panel for redetermination. Those are the respondent's submissions, Commissioner, unless you have any questions of me.

PN742

THE COMMISSIONER: No. I asked all of my questions. Thank you, Mr Crocker.

PN743

MR CROCKER: Thank you, Commissioner.

PN744

THE COMMISSIONER: Mr Reilly, would you like - - -

PN745

MR REILLY: Thank you, Commissioner. My friend referred to the decision of Lawler VP in the HWE decision, which in turn cites - I'm sorry, it's the XPT principle - as setting the relevant test for reasonableness, that being whether or not a reasonable person could have reached the decision in question.

PN746

Now, in our submission, that test was rejected by the Full Bench in the Mount Arthur case. In that case the Full Bench endorsed a different test, which is set out in our outline of submissions, to whether it's reasonable in all of the circumstances. There are considerations that might go into that. Departure from accepted standards and norms. In this case there has been a departure from accepted standards and norms.

PN747

THE COMMISSIONER: In what way? In what way do you say there's been a departure?

PN748

MR REILLY: Well, in applying a higher standard of interview score to Mr Gardner than has previously been applied to other employees. So the 50 per cent rule might not be a rule, but it is the common practice at least for the last five years. That's the unchallenged evidence of Mr Marcus. It might not be a rule, but that's the standard. A different standard has been applied to Mr Gardner. We say the application of a different standard, in departure from accepted norms and without discussion, without consultation in accordance with the consultation term of the agreement, is unreasonable in the requisite sense.

PN749

My friend also indicated that there's no weight attached to any one factor in the selection process at 10.1.5. In our submission, that's not correct. The weight to be attached is set out in the advertisement and forms part of clause 10.1.5.

PN750

THE COMMISSIONER: So if that's the case, what does it mean then in clause c, 10.1.5c, in the sentence preceding the dot points which says:

PN751

shortlist applicants based on the following criteria, consider as a whole.

PN752

What does that mean, 'as a whole' then? If I'm to accept your submission, how does that fit in with that?

PN753

MR REILLY: What we would say is that's in relation to the shortlisting process. So candidates may be shortlisted based on those criteria considered as a whole whereas - - -

PN754

THE COMMISSIONER: But then it says further down:

PN755

The selection panel will then interview the shortlisted applicants against the same criteria.

PN756

MR REILLY: Yes. The same criteria, those being the eight dot points, not the same criteria considered as a whole.

PN757

THE COMMISSIONER: Are you saying that the wording should say:

PN758

The selection panel will then interview the shortlisted applicants against the same criteria -

PN759

and it requires the words 'considered as a whole' again?

PN760

MR REILLY: Yes. That's our submission. The respondent has submitted that determining or ordering that the dispute be resolved by transferring Mr Gardner into the vacant position would involve the formation of a new employment contract or substantial variations of terms of Mr Gardner's own employment contract. We would say that that's incorrect. The basis of employment is set out at clause 3.1, specifically clause 3.1.1(b) Team Level. It's under the heading of Classification Structure. The team level rate applies to all employees:

PN761

In return there is an agreement on the Oceania Glass Competency Based System (core, support, operational skills and knowledge) that the Company and Employee can expect to achieve and draw upon. These skills and knowledge will be assessed consistent with Oceania Glass's Competency Based Training Policy and Procedures. No Employee will go back to their previous classification level once the team level has been attained.

PN762

There is only one classification, Commissioner. It's team member. Mr Gardner is currently employed as a team member. If he were engaged in float despatch he would still be employed as a team member.

PN763

Now, the respondent has referred to the difference in wage rates under the agreement between Mr Gardner's current role and float despatch role. All of those rates are based on the team member rate. There are different shift loadings

applied. There is a premium paid to float because it incorporates all overtime under the business needs allowance provisions.

PN764

The rates in process products may be lower, but that's also because employees can earn overtime on top of that. There is not the substantial increase weight once overtime is taken into account, and the difference in wages was not as significant at the time that Mr Gardner was not selected for the vacant position because he wasn't working day shift there. He was working day afternoon shift.

PN765

While there may be some separate parts of the agreement that apply to float and to processed products, the vast majority of the agreement applies to both of the sets, both conditions.

PN766

THE COMMISSIONER: And although there wasn't any detailed evidence on this, what do you say then is the approximate difference with what Mr Gardner's remuneration was at the time, the relevant time, and what the new position would be, or the position, the advertised position?

PN767

MR REILLY: We would have to get the calculator out to answer that question.

PN768

THE COMMISSIONER: All right. So we can agree it was more than what he was earning?

PN769

MR REILLY: We would have to get the calculator out and confirm what the value of the overtime work was.

PN770

THE COMMISSIONER: Please continue.

PN771

MR REILLY: It's not uncommon for employees to experience significant increases and reductions in wages based on changes to their hours of employment and we would submit that is responsible for, you know, a large part of the difference in wages. Mr Gardner is currently on day shift. The float despatch position is a continuous shift. So if we go to the float rates of pay, team rate day roster, \$102,631.19.

PN772

THE COMMISSIONER: So what page of the enterprise agreement?

PN773

MR REILLY: I'm sorry. That's page 43, Commissioner. I think my friend, you know, gave an estimate of about \$89,000 as Mr Gardner's annual remuneration under his day role. It's only 12 or 13 thousand dollars higher for the day rate under the float despatch and that's not including overtime. So merely

experiencing an increase in wages doesn't necessary apply the formation of a new contract. Is the respondent going to accept that, by moving an employee in float from continuous shift to day shift causing a reduction in wages of \$31,000 that requires the formation of a new contract or a substantial variation? I don't think so.

PN774

Now, in relation to some kind of requirement for additional sign-off by the hiring manager, what we would say is that is really something that would just give effect to the process set out at clause 10.1.5, but beyond that, that process isn't part of the agreement. It's not contemplated by the agreement.

PN775

To the extent that the respondent requires the hiring manager to sign off on it, that's the respondent's process. It's not the agreement process. There's nothing in evidence from the respondent's submissions to suggest that that's something that was known or acquiesced to by the AWU or the employees covered by the agreement. It's just something the respondents, you know, made up that it wants to do.

PN776

The respondent has submitted that the purpose of the selection panel is to recommend a successful applicant. It's not the recommendation panel. It's the selection panel. The purpose of the selection panel is to select a successful applicant. Merely being recommended and rejected isn't being successful. To construe it as merely being a recommendation panel is inconsistent with the plain meaning of the words used in clause 10.1.5. The respondent has submitted that
- - -

PN777

THE COMMISSIONER: I think what the respondent's argument is, it's the selection panel insofar as it selects candidates put forward to management to decide.

PN778

MR REILLY: Yes. Recommended is really what that is. It's merely recommending an applicant. It's not selecting an applicant.

PN779

THE COMMISSIONER: No. They have limited the word 'selection' to what the panel selects from the shortlist, but the actual decision is made by management.

PN780

MR REILLY: To construe - - -

PN781

THE COMMISSIONER: So that, yes, that's the different interpretation I suppose.

PN782

MR REILLY: To construe the clause that the respondent has urged the Commission to, it would require the Commission to read words into clause 10.1.5

that simply are not there. The respondent has submitted that the opinions of team leaders being hearsay doesn't preclude their consideration. It may be so that it's not merely hearsay. It is hearsay on top of hearsay. So it's things that people have told team leaders and team leaders have told management and we say no weight should be attached to those.

PN783

The respondent referred to a decision whereby an employee was found not to have been dismissed in contravention of general protections provisions because the decision was based on dishonesty, not discrimination. There's no suggestion that Mr Gardner acted dishonestly. The decision is not on all fours with the current case.

PN784

The respondent also referred to the existence of casual conversion rights in the National Employment Standards as supporting its argument that the Commission doesn't have jurisdiction to require the respondent to transfer Mr Gardner to the vacant position.

PN785

What we would just say about that is casual conversion terms existed in enterprise agreements and modern awards and pre-reform awards long before casual conversion was a term in the National Employment Standards. It was only introduced relatively recently so the existence of casual conversion in the National Employment Standards now supports the proposition that clause 10.1.5 can't require the respondent to change the basis of Mr Gardner's engagement. It doesn't withstand scrutiny. Nothing further, if the Commission pleases.

PN786

THE COMMISSIONER: Thank you. Thank you, Mr Reilly.

PN787

Thank you, gentleman. It will not surprise you that I will reserve my decision in this matter and provide a written decision in due course. So thank you very much for your contributions and that's a convenient time for us to adjourn.

ADJOURNED INDEFINITELY

[3.43 PM]

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