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Workplace Relations Gazette

1st edition

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- 2008 Winner Queensland Law Society Employer of Choice
- 2006 Winner BRW Client Choice Award for Best Law Firm in Australia (open to firms with revenue under $50M per year)
- 2005 Winner ALPMA/Locus Innovation Awards for innovative CN|Direct

Contents

From the CEO

Carter Newell is delighted to launch its latest publication – the Workplace Relations Gazette. Joining our extensive suite of publications compiled to assist our clients in their daily operations, this Gazette is designed to provide employers and insurers with a synopsis of practical and noteworthy cases with a focus on unfair dismissal, bullying, adverse action, legal representation, appeals and costs.

This Gazette contains recent decisions considered by the courts and highlights the importance of not only having in place appropriate policies and procedures but ensuring that they are put into practice. Regardless of the merits of a position taken by an employer, the failure to apply appropriate policies and procedures can be deleterious.

This inaugural edition focuses on decisions in the professional sphere of government, private and listed clients. The cases themselves are not necessarily developing new law or precedent, rather, they are a collective summary of what has been recently heard by the courts.

As a premier legal service provider we trust our inaugural Workplace Relations Gazette will be a useful guide for our readers.

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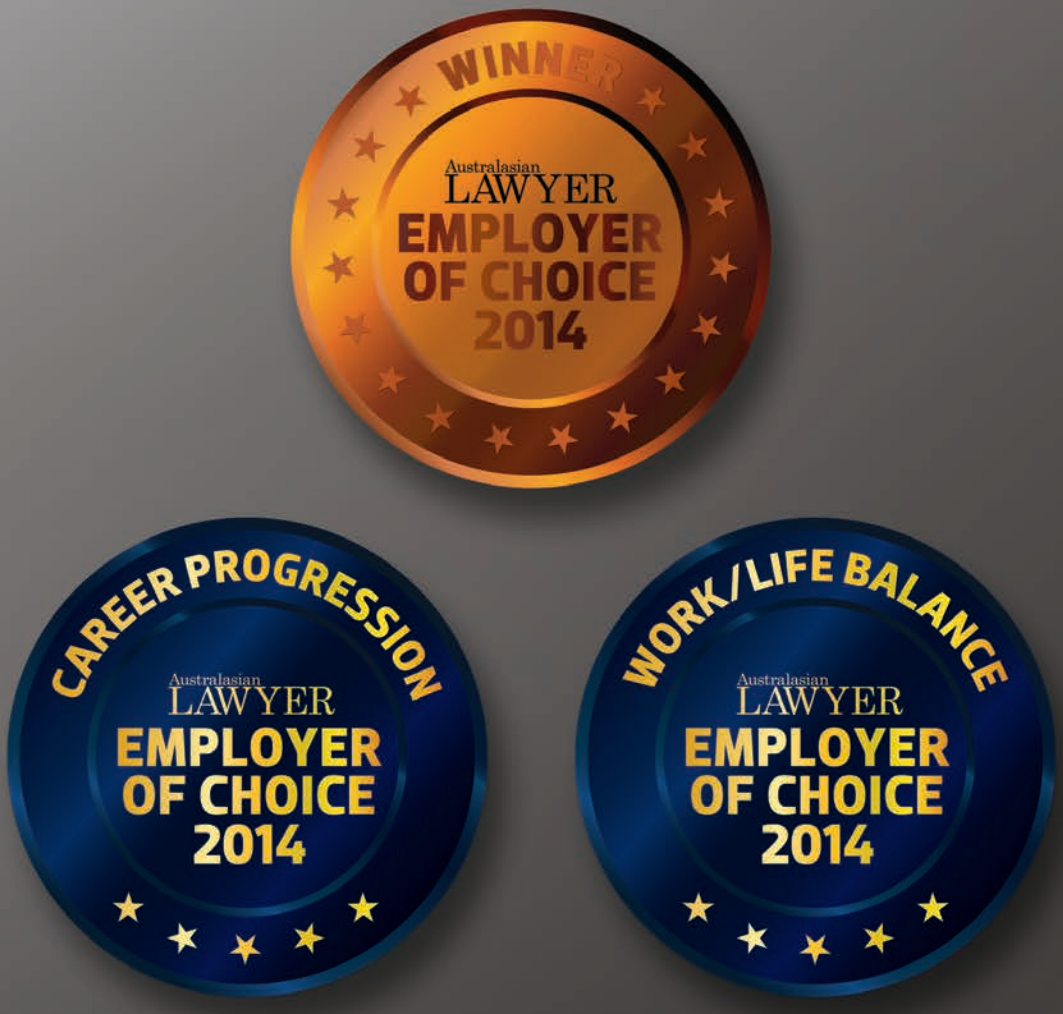

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Case Note

The Applicant v General Manager and Company C [2014] FWC 3940

Fair Work Commission not satisfied that one instance of unreasonable behavior satisfies the definition of bullying.

The facts

The applicant worked as a state training manager for a large listed company and was responsible for the company's training business in Victoria. The applicant reported to the General Manager for training, based in Queensland until 1 September 2013, after which she was required to report to the Victorian General Manager.

The applicant alleged that the Victorian General Manager had bullied her on a number of occasions between 30 October 2013 and 28 November 2013, including:

i. During a one-on-one meeting, by pointing his finger at the applicant while advising her that her behavior had to stop, and by using a forceful tone and aggressive body language in the meeting;

ii. Yelling at her '*you're wrong*' twice, then checking an email and conceding '*you're right*';

iii. Forcefully directing her to go home when she presented to work whilst certified unfit for work; and

iv. Refusing to allow her to have a support person present during her meetings with him.

The employer opposed the application for an anti-bullying order and argued that the applicant had resisted the changed reporting lines and was engaged in a bullying campaign against the Victorian General Manager.

Issues

1. Did the behavior of the Victorian General Manager amount to repeated unreasonable behavior?
2. Was the behavior of the Victorian General Manager reasonable management action carried out in a reasonable manner?

'It must be expected that managers will express upset and anger from time to time… As there was no finding of repeated unreasonable behaviour, the FWC found the conduct of the manager did not meet the definition of bullying.'

Decision

The Fair Work Commission (**FWC**) found that the Victorian General Manager had behaved in the meeting as alleged, however, on the applicant's own evidence, this behavior only lasted a matter of seconds. The FWC held that it must be expected that managers will express upset and anger from time to time. In the context of this case, it was reasonable management action for him to forcefully communicate to her that her behavior was unacceptable.

The FWC further found that the insistence by the Victorian General Manager that the applicant was wrong was not unreasonable in circumstances where only a few seconds later he conceded that the applicant was in fact correct.

In relation to the direction that the applicant leave the workplace whilst certified medically unfit, the FWC found that the while the manager may have been motivated by reasons other than just concern for the applicant's welfare, it was reasonable for him to do so given that she had not produced a medical clearance to return to work.

The FWC openly conceded that it was '*difficult to reach a conclusion in this matter*', but that *'on fine balance*' found that the only unreasonable behavior was the manager's refusal to allow the applicant to have a support person present during their meetings. As there was no finding of repeated unreasonable behavior, the FWC found the conduct of the manager did not meet the definition of bullying and the application for protection against bullying in the workplace was dismissed.

Case Note

Mr Tao Sun [2014] FWC 3839

Fair Work Commission held that determination of discretionary bonuses and allocation of work tasks are reasonable management action.

The facts

The applicant, Mr Sun, commenced work for his employer in April 2012. On 7 November 2013, he completed his 2013 performance appraisal with his direct manager, Mr Liu. The applicant received a rating of '*meets requirements'* for each objective in the performance appraisal.

Based on this performance feedback, the applicant formed certain expectations regarding the amount he could expect to receive by way of discretionary bonus. On 20 December 2013, the applicant received an email confirming the amount of his discretionary bonus, which was less than his expectations. The applicant then obtained unauthorised access to the electronic diary of his General Manager, Mr Achamedei. Mr Achamedei's diary contained a private email regarding a scheduled meeting between Mr Achamedei and Mr Liu in which Mr Achamedei suggested that he had concerns regarding the applicant's performance.

On 17 January 2014, the applicant complained that Mr Achamedei had bullied him. The employer investigated the complaint and found it to be unsubstantiated.

On 13 February 2014, Mr Achamedei gave the applicant a work task which he felt was not within his position description or capabilities. Mr Achamedei reassured the applicant that it was within his capabilities and that assistance would be made available if required.

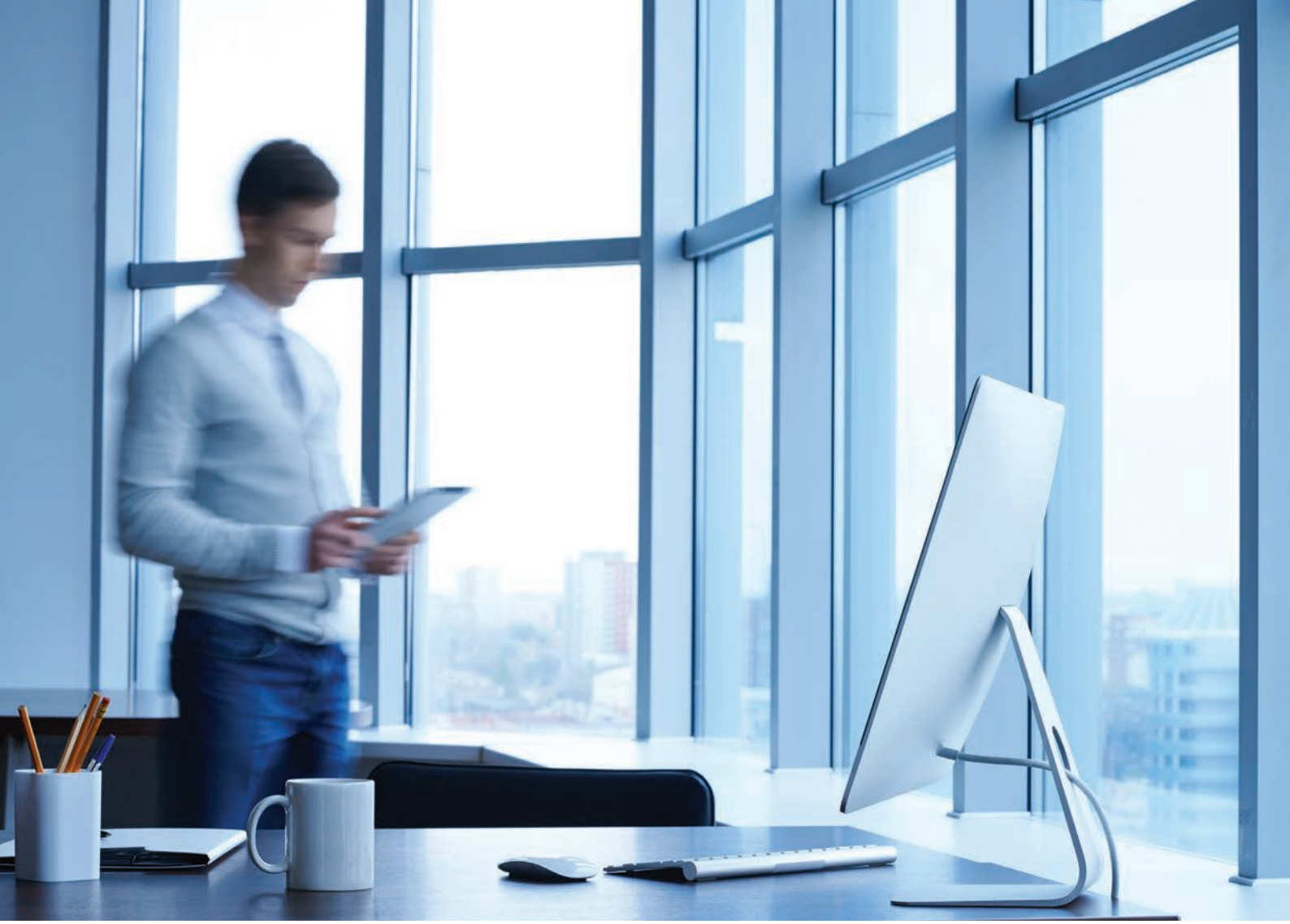
On 14 February 2014, Mr Sun made a further complaint to the employer alleging that Mr Achamedei had bullied him by allocating the work task to him. The employer investigated the complaint and dismissed it as being unsubstantiated.

Before the Fair Work Commission (**FWC**), the applicant alleged that the following behavior on the part of Mr Achamedei amounted to bullying behavior:

1. Retrospectively and unilaterally altering the applicant's performance appraisal to reduce his discretionary bonus; and
2. Allocating tasks to the applicant which did not fall within his position description and capabilities.

Issues

1. Did Mr Achamedei engage in the behavior as alleged?
2. If so, was the behavior reasonable management action carried out in a reasonable manner?



Decision

The FWC was not satisfied that there had been any change made to the applicant's performance appraisal as alleged or at all. Although the applicant may have held certain expectations regarding his discretionary bonus, the FWC held that bonus payments of this nature are purely discretionary and are a matter for the employer's judgment. As such, the FWC will be reluctant to consider a bonus payment in the context of an anti-bullying application unless it forms part of a broader pattern of behavior.

The FWC was satisfied that Mr Achamedei had allocated tasks to the applicant outside his position description, however, the FWC observed that it is unrealistic to expect position descriptions to capture each and every task an employee may be expected to perform. Further, the FWC considered it to be reasonable for employers to allocate further reasonable tasks even if they are not contemplated by the position description. Mr Achamedei's actions in allocating tasks to the applicant and offering assistance if required were considered to be reasonable management action conducted in a reasonable manner.

Whilst not determinative of the case, the FWC was critical of evidence the applicant sought to lead in support of his application, which had been obtained by unauthorised means. The applicant sought to rely upon a private email to which he had gained unauthorized access and sought to rely upon five audio recordings notwithstanding that the other parties to the recordings had specifically told the applicant that they did not consent to being recorded. The FWC cautioned that an employee who feels they are being bullied at work is not excused from observing '*all the policies and practices expected in the workplace and in the employment relationship*'.

Case Note

Ms SB [2014] FWC 2104

Fair Work Commission not satisfied that the making of a bullying complaint, and the investigation by the employer of such a complaint, amounts to unreasonable management action and bullying behaviour.

The facts

Ms SB was employed as a Team Leader and was responsible for supervising a number of employees.

In August 2013, a subordinate, Ms NP, made a bullying complaint against Ms SB. The employer investigated and found Ms NP's complaint to be unsubstantiated.

In early 2014, another subordinate also made a bullying complaint against Ms SB. The employer investigated and found Ms CC's complaint to be justified in part.

Ms SB filed an anti-bullying application against her employer, asserting that Ms CC had bullied her, and that her immediate manager and the HR staff had acted unreasonably towards her by failing to immediately dismiss Ms NP's and Ms CC's complaints against her as being vexatious.

Issues

1. Can the making of a bullying complaint in and of itself amount to bullying behavior?
2. Can the investigation of a potentially vexatious bullying complaint amount to unreasonable management action?

Decision

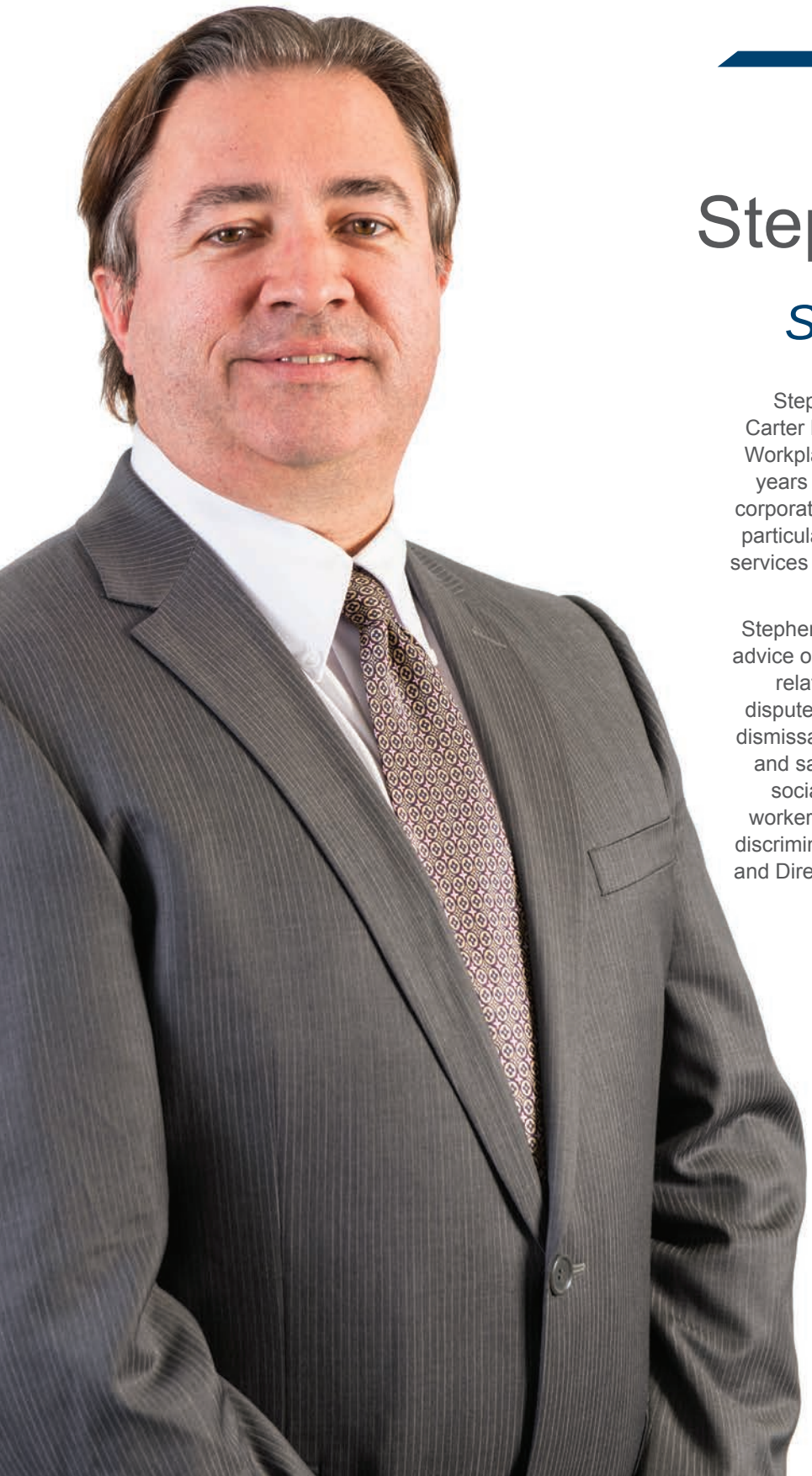
The Fair Work Commission (**FWC**) accepted that the making of false and malicious allegations could be unreasonable behavior which, if repeated, could satisfy the definition of bullying. However, the mere fact that a complaint is not found to be substantiated will not automatically mean that the complaint was vexatious or unreasonable.

Based on the particular facts of this case, the FWC held that the making of the bullying complaints was not unreasonable and did not amount to bullying.

The FWC further accepted that, whilst a person accused of bullying is entitled to support during the investigation process and following any finding that a complaint was unsubstantiated, it is entirely appropriate that employers investigate complaints of bullying.

If the investigation were to be conducted in a grossly unfair manner however, that may amount to unreasonable and bullying behavior.

The FWC held that in this particular case, the employer's actions did not amount to bullying and that investigation of the complaints was *'the only reasonable and prudent response'*.



Staff profile Workplace Relations

Stephen Hughes

Special Counsel

Stephen Hughes is a Special Counsel in Carter Newell's LDR team and leads the firm's Workplace Relations practice. He has over 20 years experience acting for a wide variety of corporations across Australia and internationally, particularly in aviation, construction and human services sectors, and is a regular speaker at local and international conferences.

Stephen provides high level policy and strategic advice on matters involving workplace / industrial relations (including redundancies, union disputes, enterprise bargaining, rights of entry, dismissals and general protections), work health and safety litigation, privacy, data protection, social media and freedom of information, workers' compensation litigation and appeals, discrimination, bullying and harassment litigation and Directors' & Officers' / Management Liability insurance claims.

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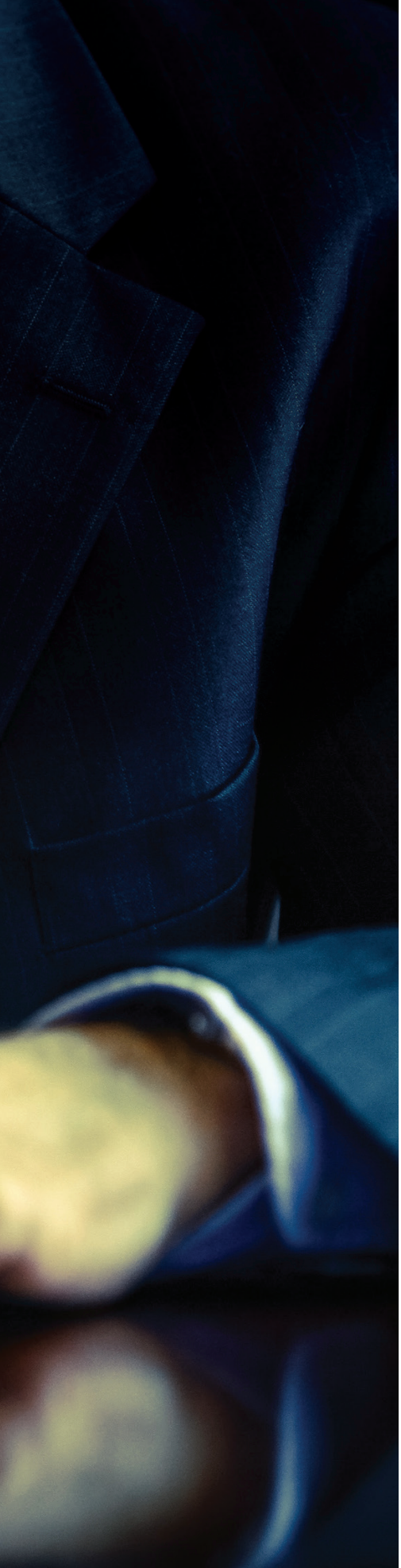
Case Note

Ghali and Chahwan v Sutherland Shire Montessori Society (Inc) T/A Sydney Montessori School [2015] FWCFB 345

The Fair Work Commission Full Bench ordered appellants to pay part of employer's costs as appellants could and should have appreciated that the appeal proceedings were instituted without reasonable cause and had no reasonable prospect of success.



The facts

Ms Ghali and Ms Chahwan were dismissed from employment and filed applications for unfair dismissal. Their applications were dismissed by the Fair Work Commission (**FWC**).

Both applicants appealed and relied upon a number of alleged factual errors, as well as raising a number of issues which were not put before the FWC at first instance.

At all relevant times the applicants were legally represented.

The applicants were denied permission to appeal on the grounds that the appeals were *'little more than an attempt to reargue the case which was put before the Commissioner in the hope of getting a different result'.*[1]

Issues

1. Were the appeal proceedings instituted without reasonable cause?
2. Is it appropriate that the applicants should pay the employer's costs of the appeal proceedings?

Decision

The Fair Work Commission Full Bench (**FWCFB**) acknowledged the general rule in proceedings before the FWC that parties should bear their own costs and it will only be in rare cases that a party will be ordered to pay costs.

In this case however, the FWCFB was satisfied that the appeal applications were instituted without reasonable cause in the sense that they did not raise any significant issues of fact or law and it should have been apparent, particularly in circumstances where the applicants were legally represented, that the appeals had little prospect of success.

The FWCFB expressed some doubt about the applicants' motivations in appealing, noting an ongoing separate dispute between the parties as to the management and future of the Sydney Montessori School.

Despite being relatively critical of the applicants' conduct in bringing the appeals, the Full Bench was not minded to order that the applicants pay the employer's full costs of the appeals, having regard to the general rule that parties should bear their own costs and the applicant's personal circumstances in having lost their employment and livelihood.

Each of the applicants were ordered to pay $2,500 towards the employer's costs.

[1] Per SDP Boulton, SDP Hamberger and Lewin C in *Ghali and Chahwan v Sutherland Shire Montessori Society (Inc) T/A Sydney Montessori School* [2014] FWCFB 5390 [39].

Case Note

Dahler v Australian Capital Territory (No 2) [2014] FCA 1154

The Federal Court of Australia held that an application for leave to appeal a number of interlocutory decisions was made without reasonable cause. They further held that the applicant's counsel's poor judgment caused the costs to be incurred, and counsel should therefore be ordered to pay the costs personally.

The facts

Mr Dahler made a general protections claim against his employer, the Australian Capital Territory (**ACT**). A number of interlocutory decisions were made in relation to the general protections claim, which Dahler sought to appeal. He was refused leave to appeal and the respondents sought an order that Dahler pay their costs of and incidental to the application for leave to appeal.

Dahler was at all relevant times represented by a barrister, Ms Judith Keys.

Issues

1. Was the application for leave to appeal instituted vexatiously or without reasonable cause?
2. If the poor judgment of a party's representative causes a party to institute proceedings vexatiously or without reasonable cause, should any costs order be visited upon the representative?

Decision

The Federal Court of Australia (**FCA**) observed that s 570(2)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**) empowers the Court to order a party to pay the other party's costs only if the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause.

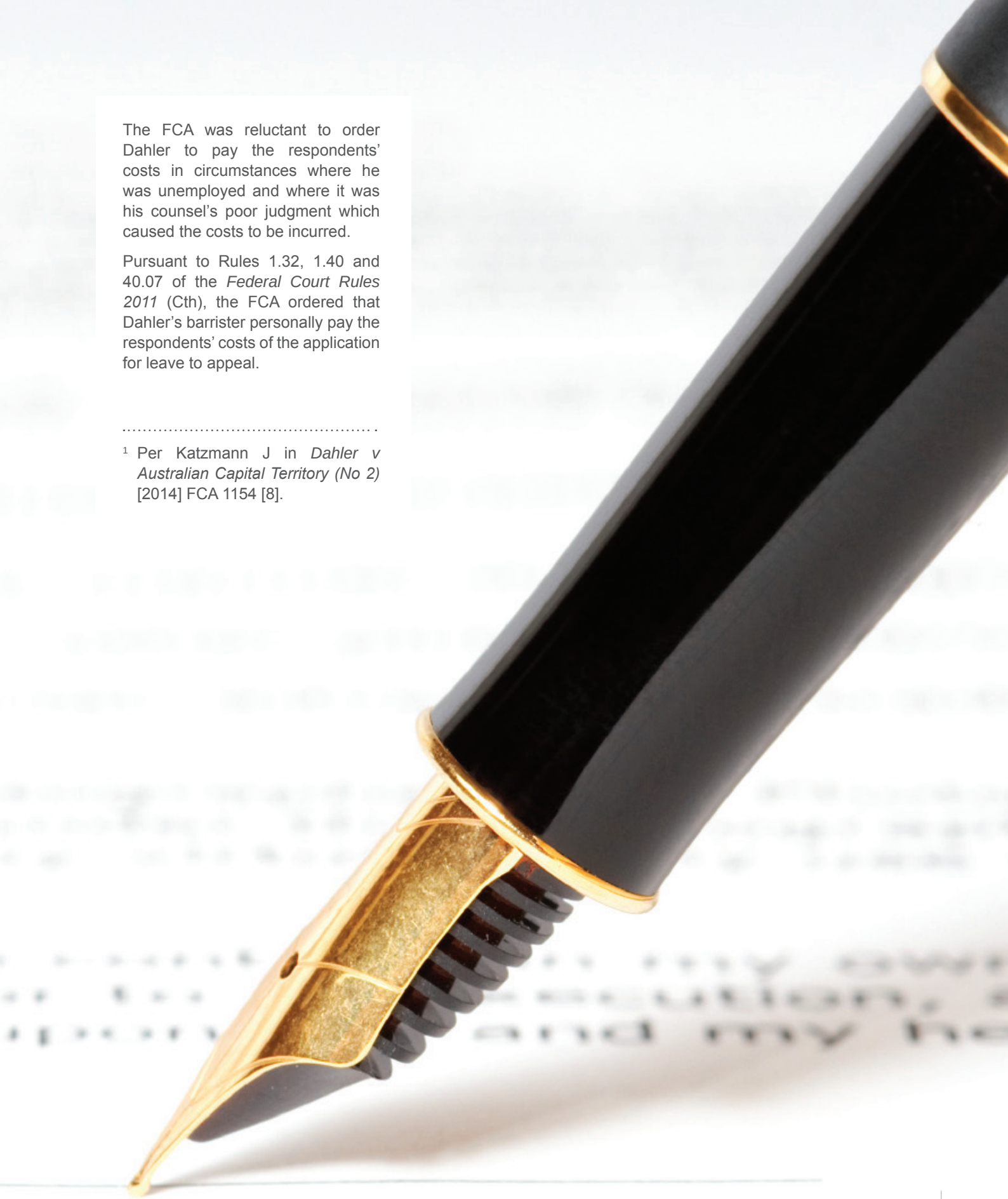
The court held that '*A proceeding will be vexatious if it could not possibly succeed; its purpose in that event is merely to harass or annoy. A proceeding is brought without reasonable cause if it was bound to fail'.*[1]

The court was of the view that the application filed by, and the submissions made by, Ms Keys on behalf of Dahler were not to the point, contained factual assertions unsupported by evidence and were not applications or submissions that any competent counsel would have made. Accordingly, the FCA was satisfied that the application for leave to appeal was bound to fail and was therefore instituted without reasonable cause.

The FCA was reluctant to order Dahler to pay the respondents' costs in circumstances where he was unemployed and where it was his counsel's poor judgment which caused the costs to be incurred.

Pursuant to Rules 1.32, 1.40 and 40.07 of the *Federal Court Rules 2011* (Cth), the FCA ordered that Dahler's barrister personally pay the respondents' costs of the application for leave to appeal.

[1] Per Katzmann J in *Dahler v Australian Capital Territory (No 2)* [2014] FCA 1154 [8].



Case Note

Shyamkumar Panchal v Torrens Transit Services Pty Ltd [2015] FWC 288

The Fair Work Commission declined the employer's application for a costs order as it was not satisfied that the applicant's conduct in refusing numerous settlement offers amounted to unreasonable conduct.

The facts

Mr Panchal was employed as a bus driver by Torrens Transit Services Pty Ltd (**Torrens**) for a period of approximately seven years. His employment was terminated following an investigation into an incident which resulted in the bus driven by Panchal colliding with a pedestrian.

Panchal filed an application for unfair dismissal remedy, arguing that his dismissal was unjust in circumstances where the pedestrian had run in front of the bus, and harsh in light of the disciplinary action taken by Torrens against other drivers involved in similar incidents.

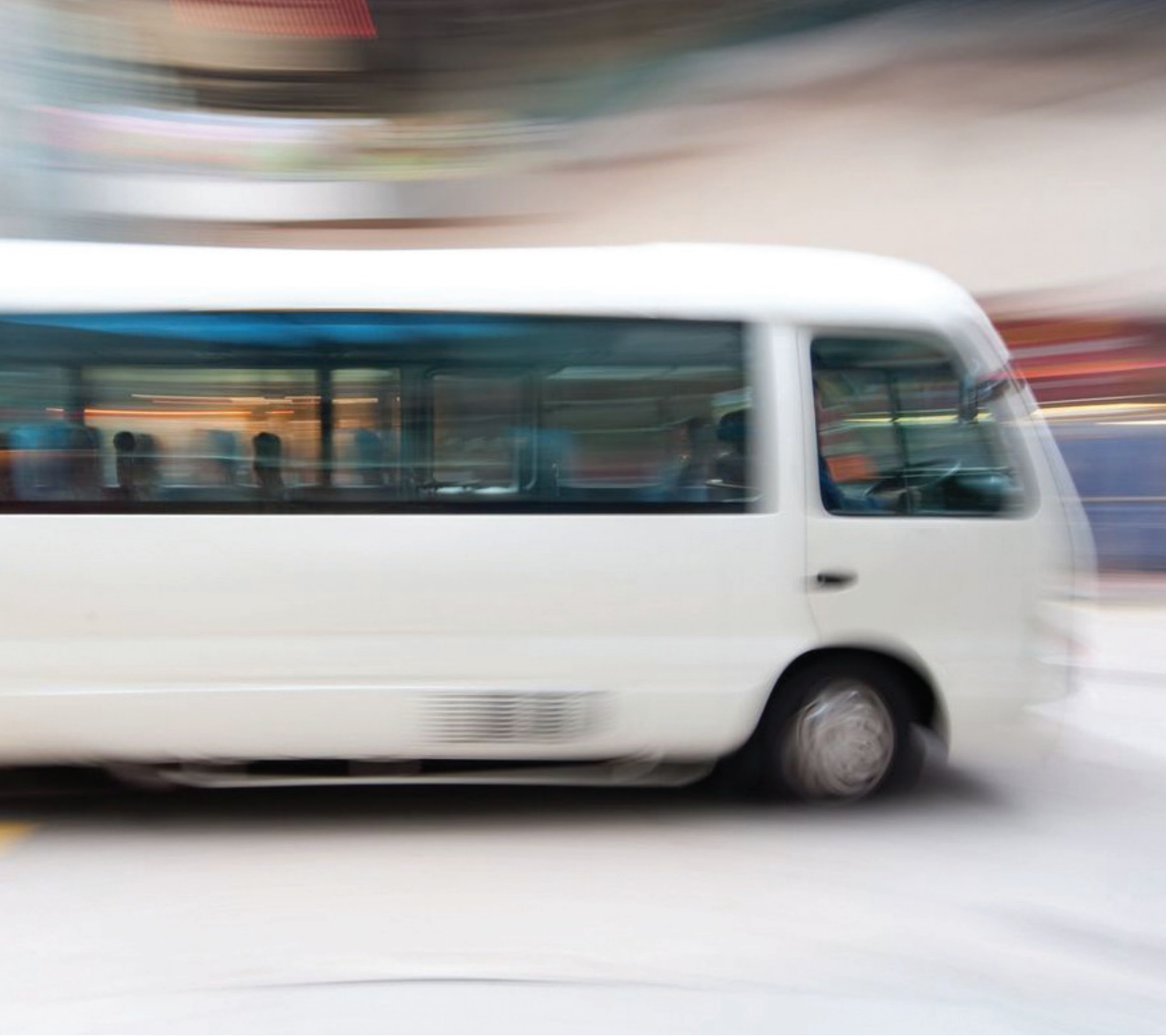
Torrens produced CCTV footage of the incident, which demonstrated that pedestrians were forced to cross in front of the bus as Panchal had stopped the bus in such a location as to block a pedestrian crossing. The CCTV footage demonstrated that numerous pedestrians were crossing in front of the bus, that the pedestrians were visible to Panchal, that the pedestrian hit by Panchal was walking rather than running, and that Panchal chose to move the bus forward in order to intimidate the pedestrians.

Notwithstanding that the CCTV evidence had been provided to Panchal and his legal representative, Panchal rejected all settlement offers made during the conciliation conference. Panchal also rejected two further settlement offers made prior to the hearing of the matter, one of which specifically foreshadowed that the offer may be relied upon in a future costs application.

The Fair Work Commission (**FWC**) dismissed Panchal's application for unfair dismissal remedy, and Torrens sought an order for costs on the grounds that Panchal's conduct in rejecting numerous settlement offers amounted to unreasonable conduct.

Issue

1. Was the conduct of Panchal in rejecting the settlement offers unreasonable?



Decision

The FWC was not satisfied that Panchal's actions were unreasonable in circumstances where he had information relative to the treatment of other Torrens' bus drivers involved in bus driving accidents, and he reasonably believed that he could challenge the termination decision on that basis.

The FWC further appeared uncomfortable with any finding that Panchal acted unreasonably in the absence of any evidence regarding the advice provided to him by his legal representative.

The application for costs was refused.

Case Note

Warrell v Walton [2013] FCA 291

Federal Court of Australia held that a failure by the Fair Work Commission to fully consider whether a party should be allowed representation in unfair dismissal proceedings resulted in a hearing which was not '*fair and just*'.

The facts

Mr Warrell was employed as a gardener by Bacto Laboratories Pty Ltd (**Bacto**) until his employment was terminated due to alleged misconduct. The misconduct was alleged to have occurred during two telephone conversations between Warrell and the Managing Director of Bacto, Mr Carter.

Warrell was brain damaged and suffered difficulties with reading and writing. He sought to challenge the dismissal but mistakenly lodged his unfair dismissal application with the Fair Work Ombudsman rather than the FWC. As a result, Warrell's unfair dismissal application was ultimately lodged with the FWC after the time prescribed for lodgment of unfair dismissal applications.

Warrell sought an extension of time to file his application, which was refused at first instance by the FWC. Warrell then sought permission to appeal the FWC's first instance decision. During the application for appeal, Warrell represented himself whilst Bacto was represented by a lawyer.

The Full Bench of the FWC refused Warrell permission to appeal.

Warrell then applied to the Federal Court of Australia (**FCA**) for an order setting aside the decision of the Fair Work Commission Full Bench (**FWCFB**) on the grounds that the hearing of the application for permission to appeal was not fair and just by reason of Bacto having been impliedly granted permission to be represented by a lawyer.

Issues

1. In what circumstances should a party be granted permission to be represented by a lawyer?
2. Did the granting of permission in this case result in the consequence that the hearing was not just and fair?

Decision

The decision of the FWCFB failed to disclose any consideration as to whether Bacto ought to have been granted permission to be represented by a lawyer.

Section 596(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) provides that permission for a person to be

represented by a lawyer may only be granted by the FWC if:

i. It would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or

ii. It would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

iii. It would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

The FCA observed that permission for representation must only be granted by the FWC if one or more of the above factors are present. Even then however, the right to representation is not automatic, as the FWC retains a discretion as to whether or not to allow legal representation.

In the circumstances of this case, the FCA observed that none of the factors outlined in s 596(2) of the FW Act appeared to be satisfied and, even if they had been satisfied, the FWC ought to have taken into consideration the fact that Warrell was functionally illiterate and brain damaged, and the consequent disadvantage he would face if Bacto were allowed legal representation. The end result was that Warrell did not receive a fair and just hearing.

The FCA warned that the grant of legal representation can '*fundamentally change the dynamics and manner in which a hearing is conducted*'. Accordingly, it should not be considered to be an automatic entitlement.

Case Note

Dennis McDeed v SA Water Corporation [2015] FWC 903

The Fair Work Commission refused permission for SA Water Corporation to be represented by a lawyer in unfair dismissal proceedings.

The facts

Mr McDeed was terminated from his employment with SA Water Corporation (**SAWC**) and filed an application for unfair dismissal remedy. The matter did not resolve at conciliation and was set down for hearing.

A solicitor acting for SAWC requested a grant of permission to appear at the hearing on the grounds that:

1. His representation would enable the matter to be dealt with more efficiently, noting the respondent's intention to call up to 20 witnesses;
2. His representation would ensure more effective use of the Fair Work Commission's (**FWC**) time by facilitating witness statements and ensuring that witnesses were only questioned on relevant matters and disputed facts;
3. SAWC did not employ any personnel with relevant FWC experience and held a reasonable concern about their ability to represent SAWC in the matter; and
4. It would be unfair not to allow SAWC to have legal representation in the event that Mr McDeed were to retain legal representation.

Mr McDeed opposed the request on the grounds that he could not afford legal representation for himself and he would be placed at disadvantage if SAWC were legally represented.

Issue

1. Noting that the FWC may grant permission for legal representation only if one or more of the criteria in section 596(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) met, were any of those criteria met?

Decision

The FWC considered the matter would ultimately turn on disputed facts and was therefore not satisfied that the matter was particularly complex.

While the FWC agreed that the number of witnesses

for the respondent ought to be minimised, the FWC was satisfied that SAWC could achieve this with the assistance of legal representation prior to the hearing of the matter. The FWC noted that a denial of permission for legal representation does not in any way restrict a party from accessing legal expertise in the lead-up to the hearing of a matter.

The FWC noted that SAWC is a large employer and was not satisfied that it would be unable to represent itself effectively.

Finally, in circumstances where the applicant did not seek to be legally represented, there would be no unfairness to SAWC if it were to be denied legal representation.

The FWC therefore held that the criteria in s 596(2) FW Act had not been met and denied the request for a grant of permission to appear.

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Television Education Network Pty Ltd

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Partner Tony Stumm conducting webinar on misleading or deceptive conduct in business acquisitions and will discuss what constitutes misleading or deceptive conduct in a sale of business transaction and practical precautions to limit liability for misleading or deceptive conduct.

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Case Note

New South Wales Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office [2014] FWCFB 1663

Fair Work Commission Full Bench holds that the power to grant representation does not extend to dictating the individual representative or qualifications thereof.

The facts

Mr McAuliffe filed an unfair dismissal claim against the Australian Taxation Office (**ATO**). At the hearing of the matter, McAuliffe was represented by a solicitor and the ATO sought permission to be represented by a barrister. The Fair Work Commission (**FWC**) denied permission for the ATO to be represented by a barrister but impliedly granted permission for it to be represented by a solicitor. In denying permission for counsel to appear, the FWC Commissioner expressed the view that it would be unfair for the ATO to be represented by counsel.

The New South Wales Bar Association sought permission to appeal. Whilst permission to appeal was refused on the basis that the parties to the unfair dismissal claim did not wish to disturb the FWC's primary findings on the question of unfair dismissal, the FWC Full Bench held that the decision regarding representation was attended by error.

Issues

1. In granting or refusing permission to be represented, does the FWC have power to distinguish between certain representatives, thereby effectively dictating who may represent a party?
2. Is the FWC bound to follow the Fair Hearings Practice Note in deciding issues regarding representation?

Decision

The Fair Work Commission Full Bench (**FWCFB**) held that the FWC at first instance fell into error by failing to determine the issue of representation by reference to the criteria set out in s 596 of the *Fair Work Act 2009* (Cth). The FWCFB further held that the powers conferred on the FWC by s 596 do not extend to a power to choose who the representative will be '*either by reference to the individual identity of the lawyer or by reference to whether the lawyer was a barrister or solicitor'.*[1]

The FWCFB rejected the ATO's argument that the FWC's failure to decide the issue of representation until the morning of the hearing was in breach of the FWC's Fair Hearings Practice Note and was an appealable error.

While the FWCFB conceded that the Fair Hearings Practice Note should generally be followed so as to allow the issue of representation to be determined in advance of the hearing, a failure to do so will not amount to an error unless the late determination of the issue results in a denial of procedural fairness or some other variety of serious prejudice to a party.

[1] Per Ross P, Hatcher VP and Cargill C in *New South Wales Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 [24].

Case Note

Shea v Energy Australia Services [2014] FCAFC 167

Court rejects the requirement of a 'genuine complaint' in protection of workplace right complaints.

The facts

Ms Shea, a former corporate director, brought an adverse action claim on the basis that her employer, Energy Australia, had dismissed her because she had exercised a '*workplace right*' to make a complaint. She alleged that she had been sexually harassed by the company's CFO at a corporate function in Hong Kong two years earlier in 2010, and in making further complaints in relation to the company's investigation of her allegations. She alleged she also made complaints against the Chief Executive Officer for the employer's '*culture*' of sexual harassment.

At first instance Shea's application was dismissed on findings that Shea's dismissal was a genuine redundancy due to the employer's restructuring and not the result of Shea's workplace complaints.

Further, it was found that a complaint must be a '*genuine complaint*' or one held in good faith, and that it had not been established that the CFO had engaged in sexual harassment and her complaints about the CEO were considered unreasonable and not made in good faith.

Shea was also ordered to pay part of Energy Australia's costs on an indemnity basis.

Shea appealed against both the substantive decision and the costs order.

Issue

1. The Full Court of the Federal Court (**FCAFC**) explored whether or not an adverse action complaint under the *Fair Work Act 2009* (Cth) (**FW Act**) was required to be a '*genuine complaint*'.

Decision

The FCAFC dismissed Shea's appeal, finding that no errors had been made in the decision at first instance, which had involved detailed and careful attention to the entirety of the evidence and carefully considered findings of fact based on the credibility of the '*main protagonists*' in the proceeding and the reasons for Shea's dismissal. On the evidence, the employer had discharged the reverse onus of proving the decision

to make Shea redundant was not the result of her exercising her workplace right to make a complaint.

The FCAFC did, however disagree with the first instance finding that an adverse action complaint was required to be a '*genuine complaint*'.

The FCAFC determined that considerable care should be taken before implying any restriction on an employee's ability to exercise their important statutory right to make a complaint. To suggest that it is necessary for such a complaint to be a '*genuine*' complaint (with criteria to determine that) may discourage people who may have mixed motives for making a complaint. The FCAFC observed that an employee should not require the knowledge of an experienced industrial lawyer or have to seek legal advice in order to determine whether they should make a complaint.

The FCAFC also found that when considering what constitutes a '*right*', care should be taken not to construe the term in a way that may have more far-reaching implications for the meaning of the term than is provided elsewhere in the FW Act.

Case Note

Scott Challinger v JBS Australia Pty Ltd [2014] FWC 4874

FWC gives leave to employer to re-open hearing to lead new evidence regarding the inappropriateness of reinstatement.

The facts

Mr Challinger had been employed as a slaughterman for JBS Australia (**JBS**) for a period of over ten years when he was dismissed for misconduct.

At the time of his dismissal, Challinger was a senior delegate for the Australian Meat Industry Employees Union. He had a lengthy history of abusive and offensive behavior and was subject to numerous previous warnings regarding his conduct.

He was dismissed following a discussion with two JBS managers, in which Challinger was instructed to wear an armguard. Challinger complied with the direction but indicated that he was *'sick of these f*****g rules swapping and changing, there are too many f*******s over in that office'*.

The Fair Work Commission (**FWC**) found that whilst such conduct would ordinarily be valid grounds for dismissal, in Challinger's position as a senior union delegate, it was reasonable for him to question the changed safety rules. Further, the evidence indicated that swearing was commonplace in the slaughterhouse. In all the circumstances, the FWC found that Challinger's dismissal was harsh.

During the hearing of the matter, Challinger made plain that his preferred remedy was reinstatement.

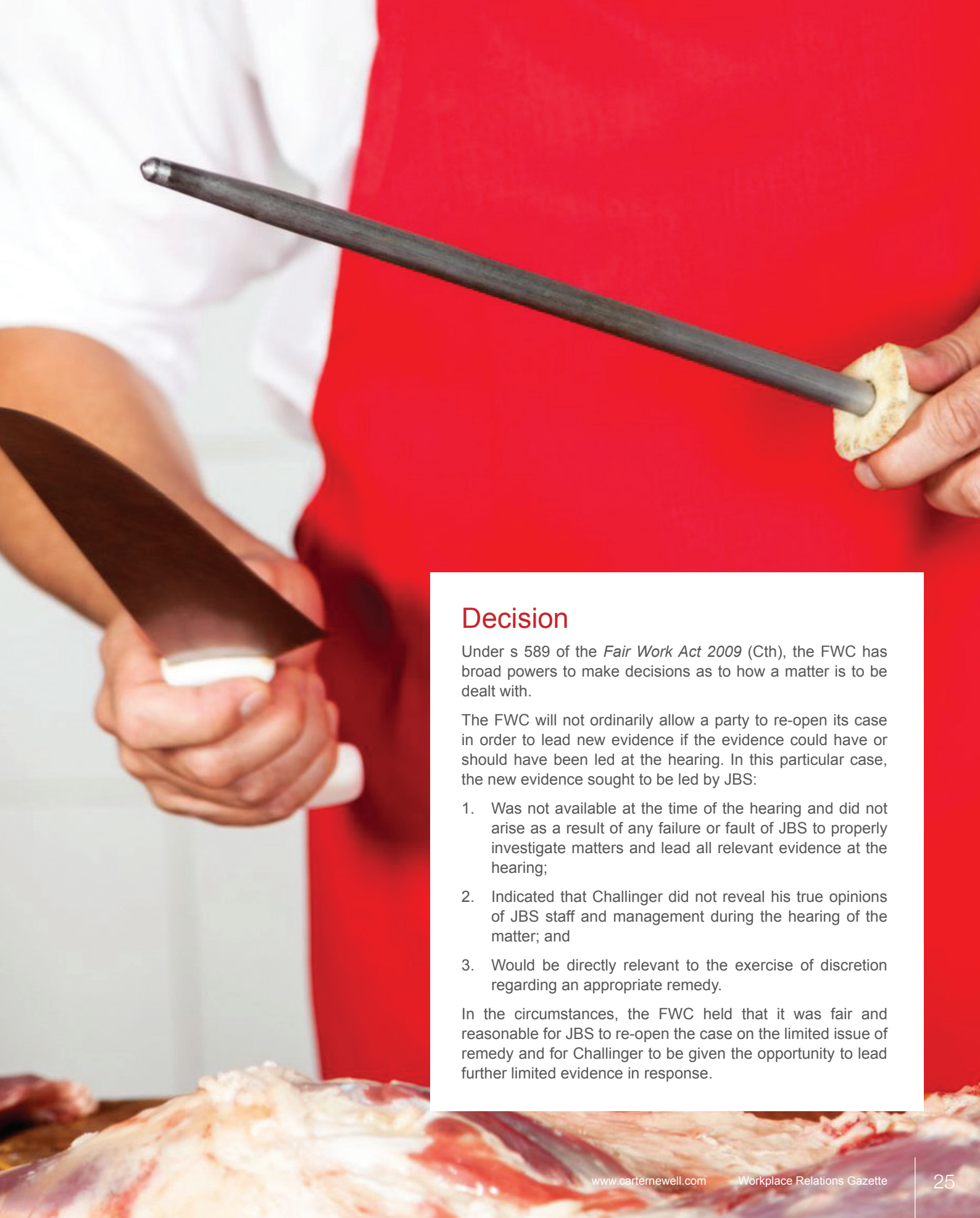
JBS opposed reinstatement but led limited evidence on the appropriateness of reinstatement as a remedy.

Following the hearing but before the FWC decision was handed down, Challinger reportedly made statements at a social function attended by several JBS employees which had the effect of destroying any relationship of trust and confidence between Challinger and JBS.

JBS sought leave to re-open its case in order to lead the new evidence regarding the appropriateness of reinstatement.

Issue

1. Can a party re-open a case before the FWC if new evidence comes to light?



Decision

Under s 589 of the *Fair Work Act 2009* (Cth), the FWC has broad powers to make decisions as to how a matter is to be dealt with.

The FWC will not ordinarily allow a party to re-open its case in order to lead new evidence if the evidence could have or should have been led at the hearing. In this particular case, the new evidence sought to be led by JBS:

1. Was not available at the time of the hearing and did not arise as a result of any failure or fault of JBS to properly investigate matters and lead all relevant evidence at the hearing;
2. Indicated that Challinger did not reveal his true opinions of JBS staff and management during the hearing of the matter; and
3. Would be directly relevant to the exercise of discretion regarding an appropriate remedy.

In the circumstances, the FWC held that it was fair and reasonable for JBS to re-open the case on the limited issue of remedy and for Challinger to be given the opportunity to lead further limited evidence in response.

Case Note

Marjan Lasovski v Pro Electrical Services Pty Ltd [2015] FWC 985

The Fair Work Commission held that a dismissal was harsh, unjust or unreasonable in circumstances where the employer failed to comply with redundancy consultation procedures.

The facts

Mr Lasovski had been employed as an electrician for Pro Electrical for a period of approximately 16 months when he was terminated on the grounds of redundancy.

Prior to making Lasovski's position redundant, Pro Electrical had failed to win two major contracts, necessitating a reduction in the size of its workforce.

Several other employees were made redundant at the same time as Lasovski, however Pro Electrical failed to consult with the employees as required pursuant to Pro Electrical's enterprise agreement.

Issue

1. Does a failure to follow consultation procedures render a termination harsh, unjust or unreasonable in circumstances where any such consultation would not have altered the outcome?

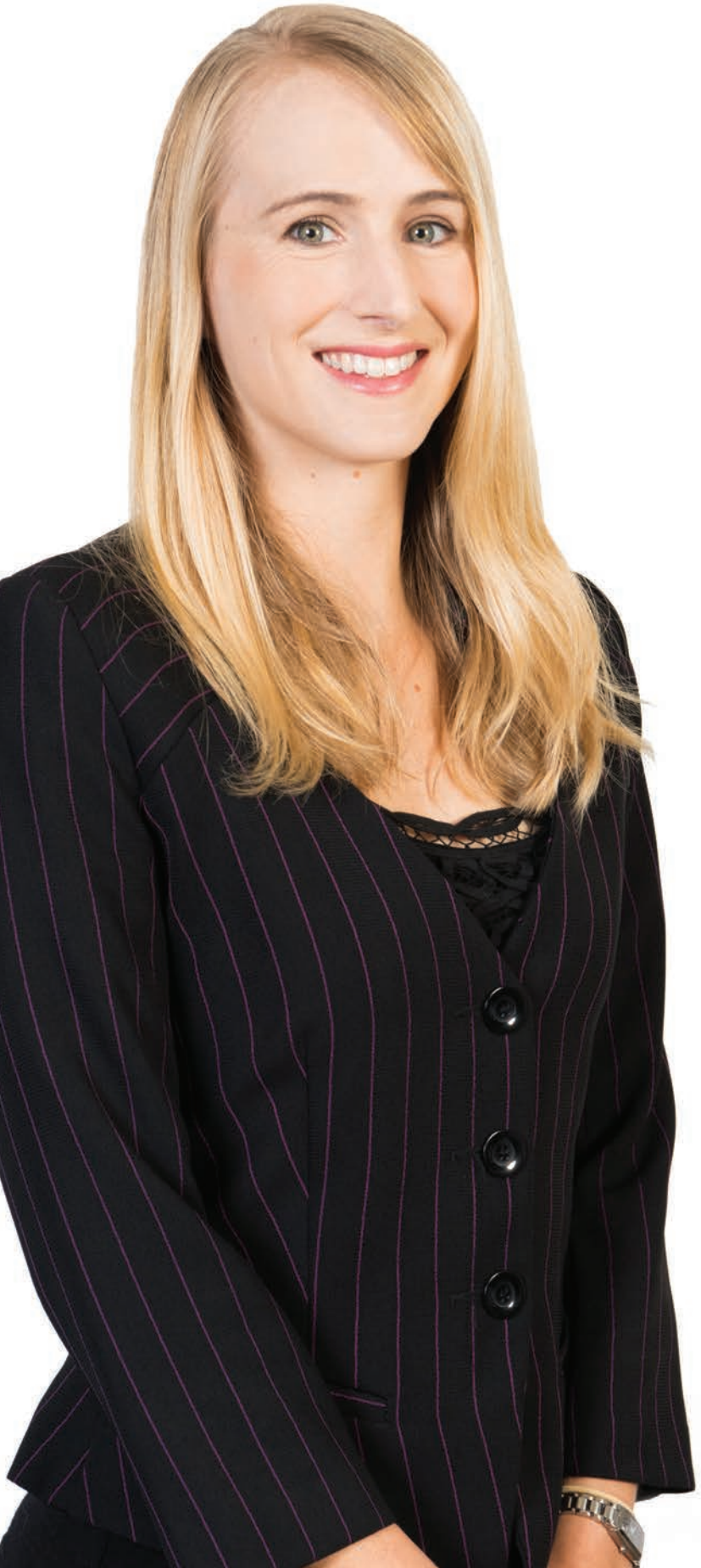
Decision

The Fair Work Commission (**FWC**) found that there were compelling operational reasons for Pro Electrical to reduce the size of its workforce and that there were no alternative positions to which Lasovski could have been redeployed.

The FWC was satisfied that, although Pro Electrical failed to comply with consultation procedures, such non-compliance was not conscious or deliberate.

Notwithstanding that any consultation would have ultimately resulted in Lasovski being made redundant in any event, the FWC held that the failure to consult meant that it was not a case of genuine redundancy within the meaning of the *Fair Work Act 2009* (Cth), and the dismissal was therefore harsh, unjust or unreasonable.

The FWC held that, if Pro Electrical had complied with its consultation obligations, Mr Lasovski would not have remained employed for any more than one further week. Pro Electrical was accordingly ordered to pay compensation of $1,000.



Staff profile Workplace Relations

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Lara is a Senior Associate in Carter Newell's Litigation & Dispute Resolution team focusing on workplace and industrial relations and workplace health and safety. She has seven years post admission experience advising in these areas across a wide range of industries and client types.

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Lara regularly advises clients on enterprise agreement negotiations, outsourcing arrangements, restructures and redundancies, post-employment restraints, protection of intellectual property and confidential information, managing underperforming employees, managing ill or injured employees, and compliance with work health and safety legislation.

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Case Note

Gina Resul v Fantastic Lights [2015] FWC 624

Applicant ordered to pay part of the employer's costs due to non-compliance with directions and failure to prosecute or discontinue her application.

The facts

The applicant filed an application for unfair dismissal remedy, claiming that she was terminated from her employment in circumstances that were harsh, unjust or unreasonable.

The application was defended on the basis that the applicant had in fact voluntarily resigned her employment.

The matter did not resolve at conciliation and the Fair Work Commission (**FWC**) subsequently made a number of directions regarding the filing of evidence and listing for hearing.

The applicant failed to comply with the directions and the employer applied for the matter to be dismissed on the basis of non-compliance with the FWC's directions.

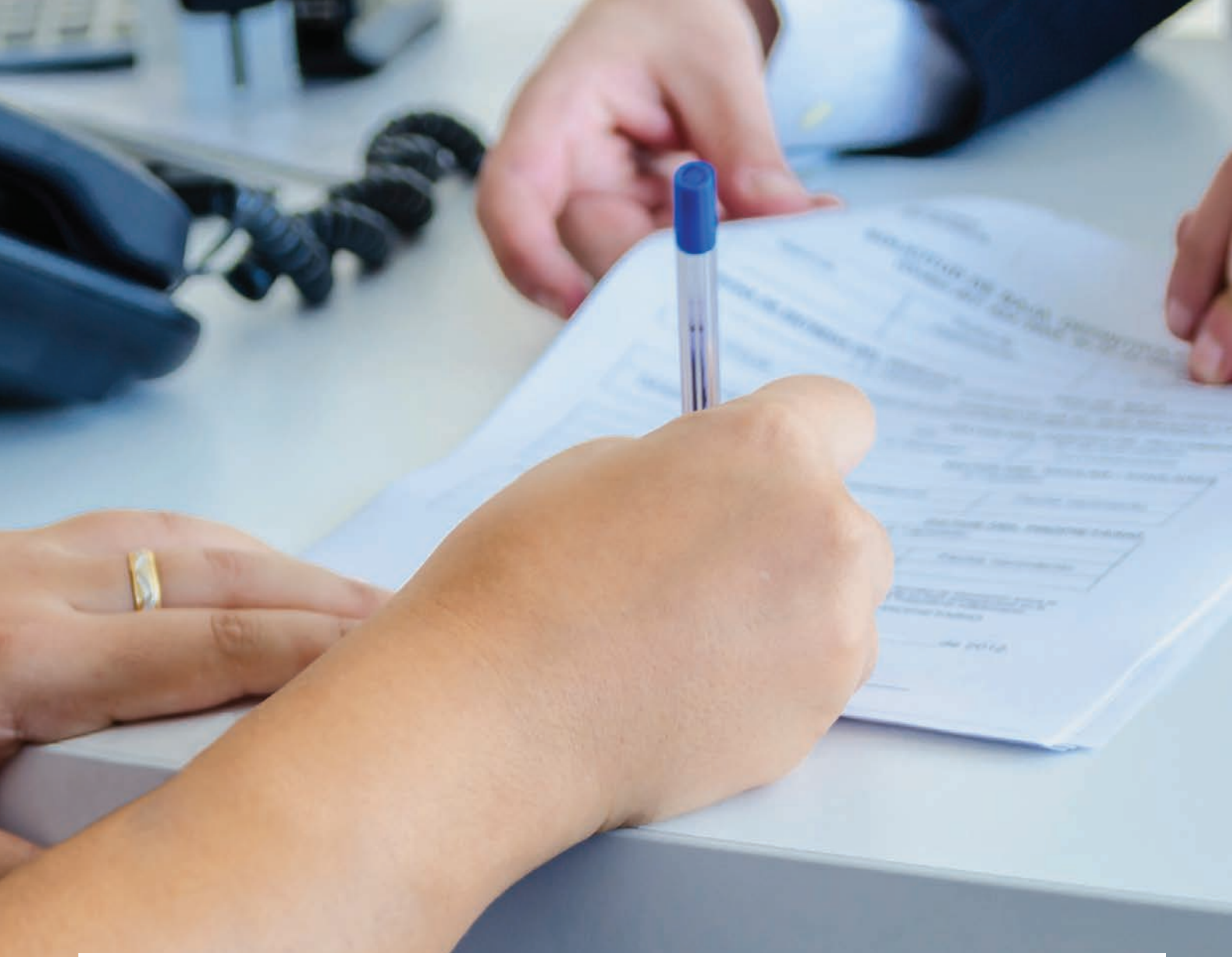
The FWC was not initially satisfied that the matter should be dismissed and instead allowed the applicant a further month to comply with the directions. The applicant however failed to file any evidence and failed to attend the hearing. As a result the application for unfair dismissal remedy was dismissed.

The employer then applied for an order that the applicant pay their costs on an indemnity basis because she had caused costs to be incurred by an unreasonable act or omission in connection with the conduct or continuation of the matter due to her failure to:

1. Prosecute her claim;
2. Accept a reasonable offer of settlement (with evidence of a '*without prejudice*' settlement offer made during negotiations); and
3. To discontinue the claim in circumstances where she should have been aware that she had no reasonable prospects of success.
4. In the alternative, the employer submitted that the application was made without reasonable cause.

Issues

1. Should the FWC exercise the discretion to award costs where a party has failed to prosecute or discontinue their claim?
2. Can a party rely upon without prejudice settlement negotiations as evidence of unreasonable conduct?



Decision

The FWC observed that, although not bound by the rules of evidence, there are sound policy reasons for not taking into account without prejudice settlement negotiations. The FWC held that if the employer wished to adduce evidence of settlement negotiations, an open offer to settle or a '*without prejudice save as to costs'* offer should have been made in writing. Accordingly, the employer was unable to rely upon the applicant's conduct during settlement negotiations as evidence of unreasonable conduct.

The FWC also found that there was insufficient evidence to conclude that the applicant's claim had been made vexatiously or without reasonable cause.

The FWC was however satisfied that the applicant should have been aware that her claim had no reasonable prospects of success once she was notified that the matter would proceed based on the evidence of the employer only, due to her failure to file any material in compliance with the FWC's directions.

Accordingly, the FWC ordered the applicant to pay the employer's costs from the date the applicant was on notice of the application for dismissal of her claim due to non-compliance with FWC directions.

The FWC was not forced to decide the issue of whether costs should be awarded on an indemnity basis because, upon reviewing the costs incurred by the employer, the FWC considered the costs claimed would not exceed the costs calculated on scale.

Case Note

Dennis Sipple v Coal & Allied Mining Services Pty Ltd T/A Mount Thorley Warkworth Operations [2015] FWC 1080

The Fair Work Commission dismissed the unfair dismissal application, finding that inability to perform the inherent requirements of the position was a valid reason for dismissal.

The facts

Mr Sipple had been employed as a pit services operator with Coal & Allied Mining Services (**C&A**) for a period of nearly 30 years when he was dismissed on the grounds that he was unable to perform the inherent requirements of his position.

In 2002, Sipple had undergone surgery for a non-work related medical condition. As a result of complications arising from the surgery, Sipple had been on permanently restricted duties, which were accommodated by C&A for a period of approximately eight years by allowing Sipple to work exclusively in a service cart.

In 2010, a restructure of the company meant that all pit services operators were required to be multi-skilled and capable of operating numerous pieces of heavy equipment including graders.

Sipple commenced training in the graders, but after less than two hours, he aggravated his injury and was absent on workers' compensation for an extended period.

Upon returning to work, C&A required Sipple to submit to an independent medical examination, which found that he was fit for work in a service cart but would be permanently unfit for work in graders, haul trucks and other heavy equipment.

After a show cause process, C&A terminated Sipple's employment.

Sipple argued that there was no valid reason for dismissal because the medical evidence demonstrated that he was fit to perform work as a service cart operator.

Issue

1. Is it unfair for an employer to dismiss an employee for inability to perform the inherent requirements of his or her position in circumstances where the

employee is otherwise fit to perform the inherent requirements of part of the position or another position with the employer?

Decision

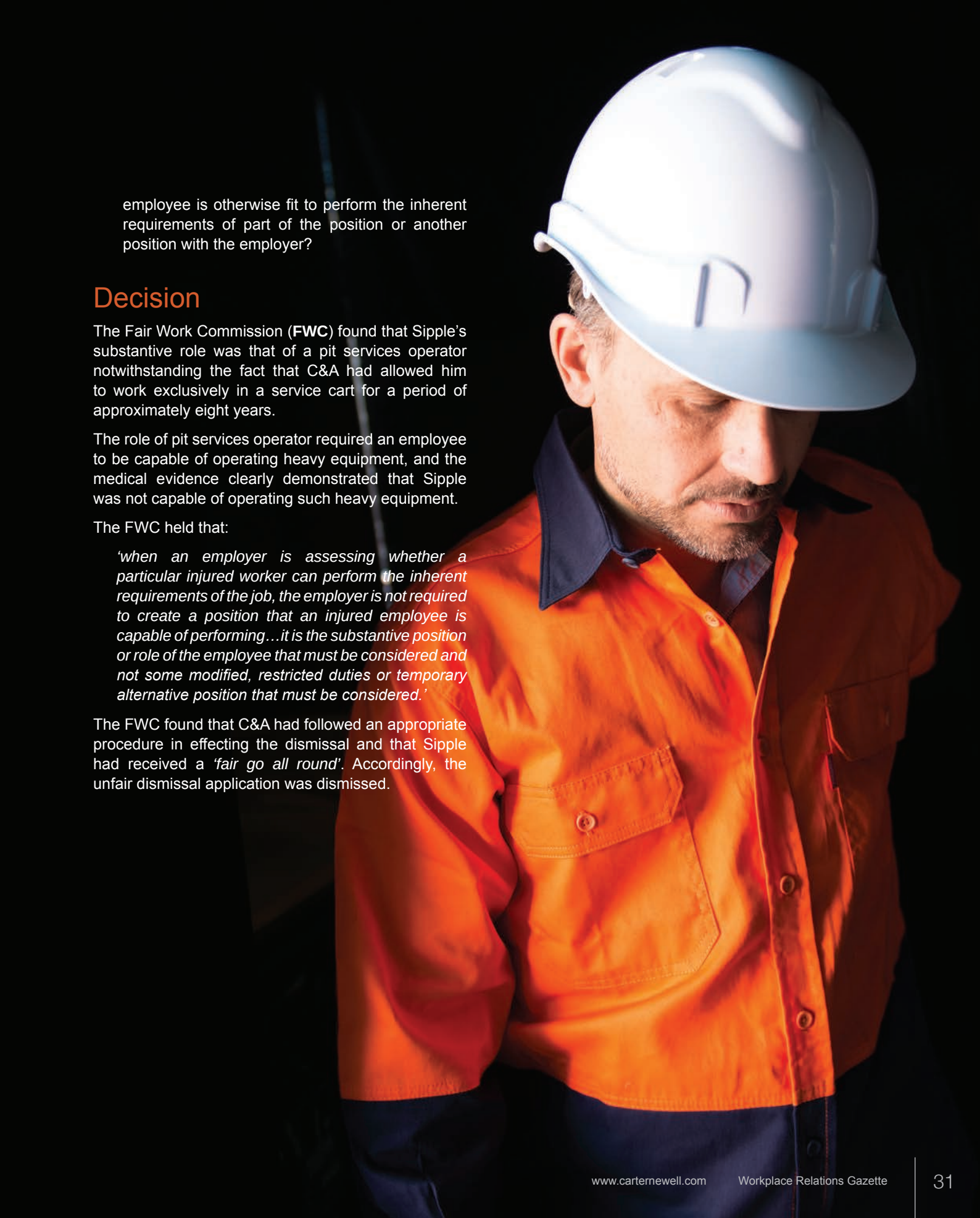
The Fair Work Commission (**FWC**) found that Sipple's substantive role was that of a pit services operator notwithstanding the fact that C&A had allowed him to work exclusively in a service cart for a period of approximately eight years.

The role of pit services operator required an employee to be capable of operating heavy equipment, and the medical evidence clearly demonstrated that Sipple was not capable of operating such heavy equipment.

The FWC held that:

> *'when an employer is assessing whether a particular injured worker can perform the inherent requirements of the job, the employer is not required to create a position that an injured employee is capable of performing…it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered.'*

The FWC found that C&A had followed an appropriate procedure in effecting the dismissal and that Sipple had received a *'fair go all round'*. Accordingly, the unfair dismissal application was dismissed.



Case Note

Skorsis v Printcess Pty Ltd [2015] FWC 20

Fair Work Commission held that the applicant was an independent contractor and was therefore not entitled to protection from unfair dismissal.

The facts

The applicant was engaged to work three days per week in return for payment of $4,600 per month at Printcess as a graphic designer from April 2012 until April 2014, when Printcess advised that her services would no longer be required due to a downturn in work.

The applicant brought an application seeking protection from unfair dismissal on the basis that she was at all times a part-time employee of Printcess. Printcess resisted the application and responded that the applicant was at all times an independent contractor and that the Fair Work Commission (**FWC**) therefore lacked jurisdiction to hear the application.

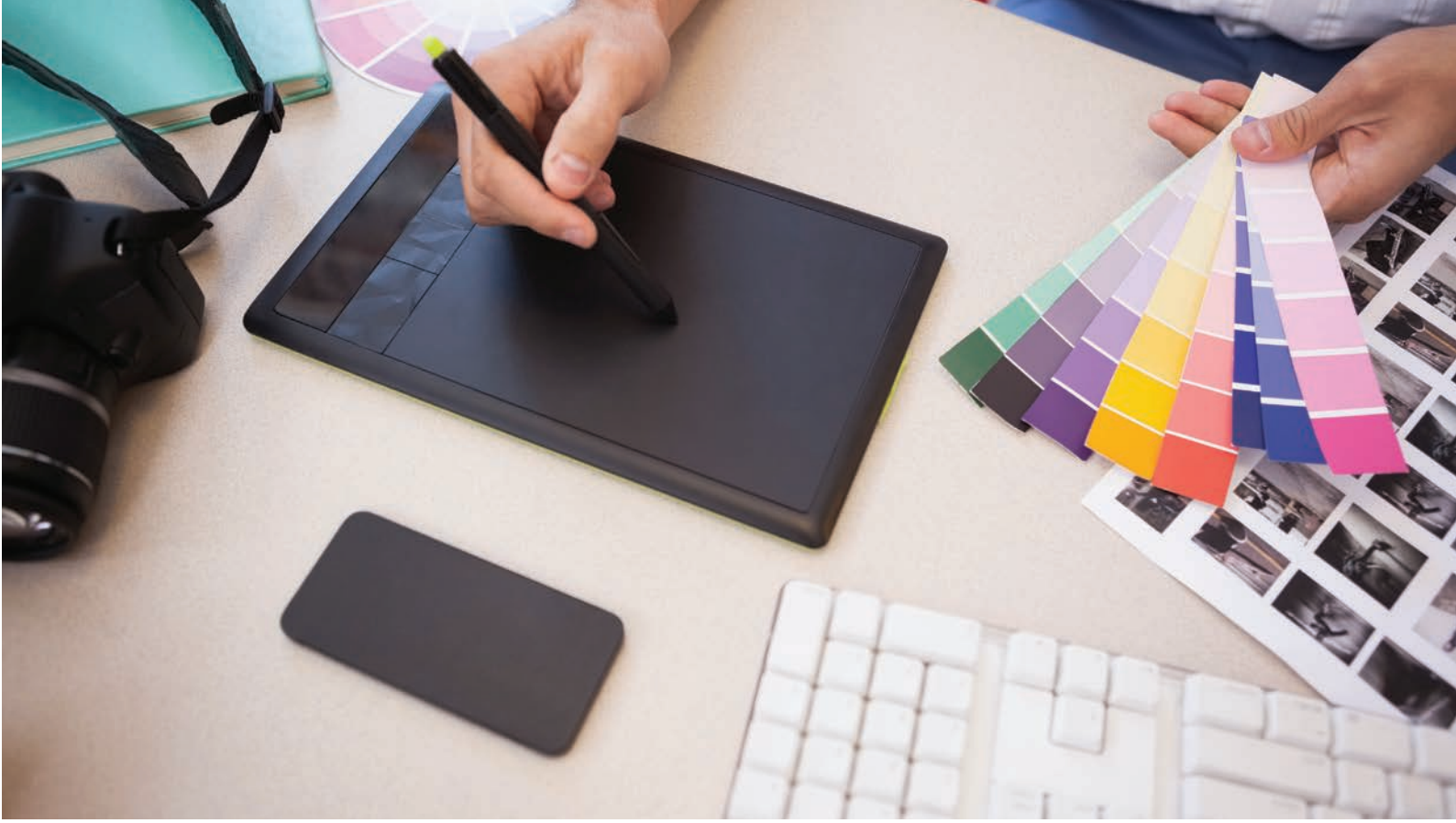
Issues

1. What are the relevant criteria for determining whether a person is an employee or an independent contractor?
2. If a person is found to be an independent contractor, are they entitled to protection from unfair dismissal?

Decision

The *Fair Work Act 2009* (Cth) (**FW Act**) does not provide any definition or guidance on what constitutes an independent contractor. Accordingly, the FWC held that common law principles continue to apply and considered the following criteria:

1. Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, the place of work, hours of work and the like. The greater the degree of control, the more likely it will be that the worker is an employee;
2. Whether the worker performs work for others, or has a genuine and practical entitlement to do so. The greater degree of exclusivity of the relationship, the more likely it will be that the worker is an employee;
3. Whether the worker has a separate place of work and/or advertises his or her services to the world at large. If so, this is suggestive of the worker being an independent contractor;
4. Whether the worker provides significant tools or equipment. If so, this is suggestive of the worker being an independent contractor;



5. Whether the work can be delegated or subcontracted. If so, this is suggestive of the worker being an independent contractor;
6. Whether the putative employer has the right to suspend or dismiss the worker. If so, this is suggestive of the worker being an employee;
7. Whether the putative employer represents the worker to the world at large as an emanation of the business. Typically, this will arise where a worker is required to wear a uniform or carry a business card bearing the employer's branding or logo. If so, this is suggestive of the worker being an employee;
8. Whether income tax is deducted from remuneration paid to the worker. If so, this is suggestive of the worker being an employee;
9. Whether the worker is rewarded by periodic wage or salary. If so, this is suggestive of the worker being an employee whereas payment based on completion of tasks tends to suggest the worker is an independent contractor;
10. Whether the worker is provided with paid holidays or sick leave. If so, this is suggestive of the worker being an employee;
11. Whether the work involves a profession, trade or distinct calling on the part of the person engaged. If so, this may be suggestive of the worker being an independent contractor;
12. Whether the worker creates goodwill or saleable assets in the course of his or her work. If so, this is suggestive of the worker being an independent contractor;
13. Whether the worker spends a significant portion of remuneration on business expenses. If so, this is suggestive of the worker being an independent contractor.

The FWC warned against a mechanical or mathematical exercise in determining whether more criteria favour one relationship or another. The criteria are to be used as tools in determining the true nature of the relationship however differing weight may be given to each of the criteria in each set of circumstances in order to form an accurate picture of the relationship.

Based on the facts of this case, it was held that the applicant was an independent contractor.

Noting that s 382 of the FW Act provides protection from unfair dismissal only if a person is an employee, the FWC held that the application seeking protection from unfair dismissal claim was made without jurisdiction and was dismissed.

Case Note

Jim Bril v Rex Australia Limited t/as K & K Glass [2015] FWC 884

Fair Work Commission finds that employee's typed resignation was forced and at the initiative of the employer.

The facts

The applicant contended that he had been unfairly dismissed, while the respondent employer contended that the applicant had resigned. It was noted at the outset that the applicant could barely read and had difficulty writing.

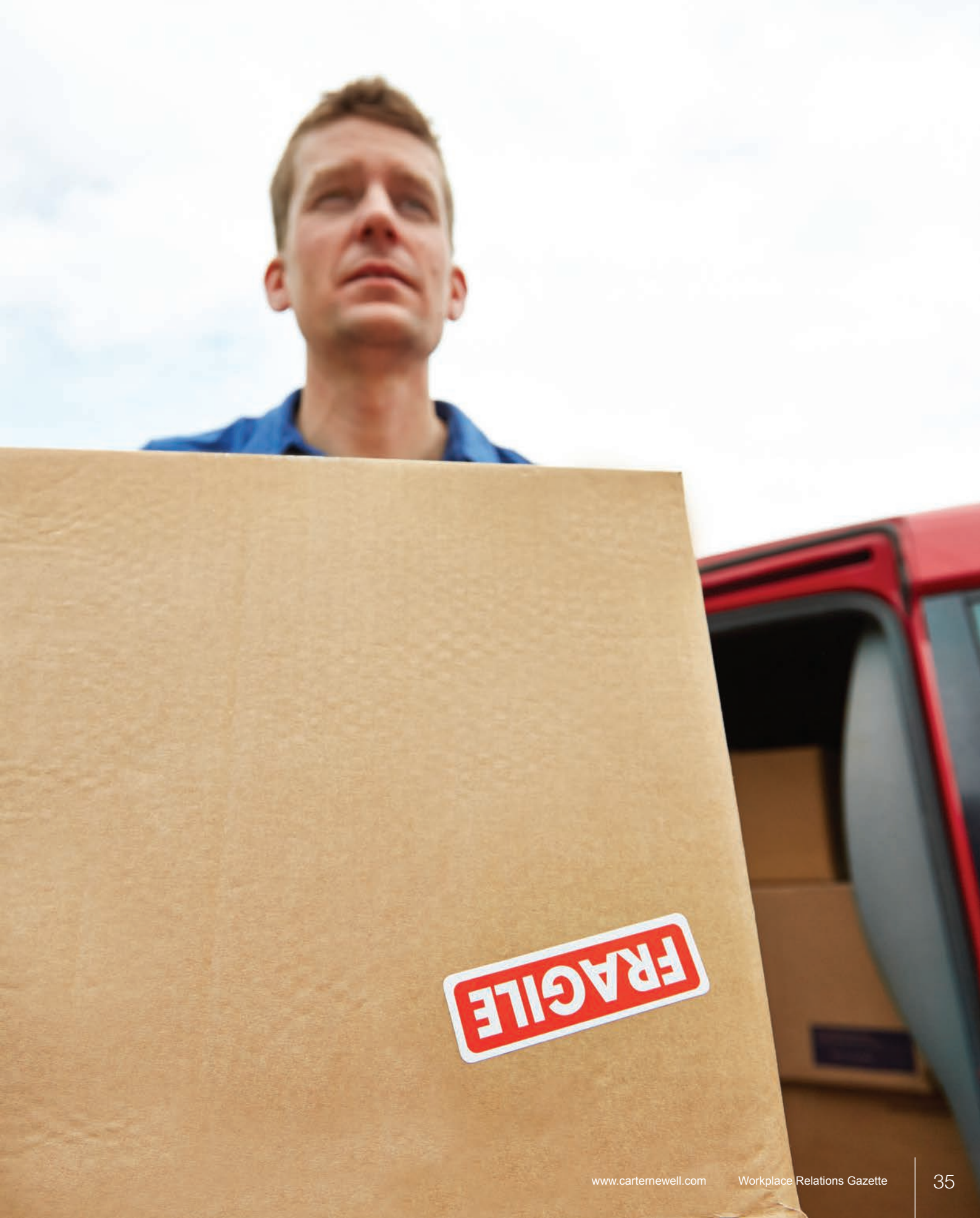
The respondent was a glass manufacturing business and the applicant had been employed as a delivery truck driver from 17 March 2008.

The applicant regularly made deliveries to a customer (**Tamar**). Whilst on annual leave the applicant ended up working as a truck driver for Tamar. Both the applicant and a witness from Tamar gave broadly consistent evidence that Tamar needed a driver urgently, that Tamar knew the applicant was on holidays during that period and that he was experiencing financial hardship. Further evidence was given, with which the applicant agreed in part, that he had told various coworkers (and had encouraged it to be spread around the employer's workplace) that he was looking to work for Tamar in order to induce the employer to give drivers (including the applicant) a pay rise.

The applicant worked for Tamar on a casual basis for four days. On the afternoon of the first day, a manager of the employer attended the Tamar workshop and saw the applicant loading a truck. A conversation was had between the applicant and that manager during which the manager expressed surprise the applicant was working there.

On his return to work, the applicant was called to a meeting and was informed that the employer was unhappy with him working for Tamar during his annual leave and that he had to decide between resigning or being terminated. The applicant had not been previously informed of the nature of the meeting, nor was he given the opportunity or forewarning to have a support person present with him. The applicant was given the opportunity to have a cigarette while considering his position, after which he elected to resign. An employer representative then typed a resignation letter for the applicant to sign.

Having '*resigned*', the applicant contacted Tamar, only to find that Tamar had employed another driver. This driver was subsequently dismissed however, and the applicant was ultimately offered employment with


FRAGILE

Tamar commencing on 23 June 2014 – a gap in employment of approximately one fortnight.

Issue

1. Had the applicant resigned or was he dismissed at the initiative of the employer (and thus protected from unfair dismissal)?

Decision

The Fair Work Commission (**FWC**) rejected the respondent's evidence that the applicant had attended the meeting with the intention to resign and had done so, finding that one of the respondent's managers was an untruthful witness. The FWC found that the resignation was forced and accordingly that the applicant was dismissed at the initiative of the employer.

Then addressing the criteria as set out in the *Fair Work Act 2009* (Cth) (**FW Act**), the FWC determined that there was no valid reason for the dismissal relating to the applicant's capacity or conduct, and the procedures adopted in dismissing the applicant were backing. Further in that regard, the applicant was not provided with any opportunity to have a support person present, prompting the FWC to state that this:

> *'was significant in this case in that there was no independent person there to act as a witness to the attempt by Mr McParland and Mr Trimarchi to fabricate a voluntary resignation on the part of (the applicant).'*

'Undertaking secondary employment which does not encroach on the primary employer's field of business does not contravene the implied contractual term of fidelity and good faith.'

As a result, the applicant's dismissal was found to be harsh, unjust and unreasonable. As the applicant had secured an alternate position, reinstatement was not sought and the FWC stated that it did not consider reinstatement to be an appropriate remedy given the loss of trust due to the applicant's unfair and poor treatment.

The FWC used the long established methodology for assessing compensation as most recently elaborated in *Bowden v Ottrey Homes Cobram & District Retirement Villages* [2013] FWCFB 431. In the absence of any submissions from the employer on the appropriate assessment of compensation, the FWC determined that the applicant would have worked for at least a further 12 months with the employer but for the dismissal, and using the methodology of differentiating between what the applicant would have earned in continued employment compared to what he actually earned within the same period, compensation was assessed at $12,864. The FWC did not consider it appropriate to make any further deductions from that sum for contingencies or for misconduct.

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