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

Mr Ian Cloutte
v
S & S Webster Investments Pty Ltd
(U2022/6164)

FAIR WORK COMMISSION

REASONS FOR DECISION

VICE PRESIDENT ASBURY BRISBANE, 26 APRIL 2023

Application for an unfair dismissal remedy - Application for an unfair dismissal remedy – Applicant dismissed for failure to comply with Vaccination Policy – Dismissal not unfair – Application dismissed.

Overview

[1] Mr Ian Cloutte (the Applicant) applies to the Fair Work Commission (Commission) for an unfair dismissal remedy under s. 394 of the *Fair Work Act 2009* (the FW Act) in respect of his dismissal by S & S Webster Investments Pty Ltd (the Respondent). The application was filed on 9 June 2022. The Applicant was employed by the Respondent as a casual bus driver from 20 January 2012 then as a permanent employee from 23 July 2012. The Applicant's dismissal took effect on 20 May 2022. The Applicant was dismissed for failing to comply with a direction to be vaccinated against COVID-19 in accordance with the Respondent's COVID-19 Vaccination Policy (the Vaccination Policy).

[2] The Respondent, trading as Kangaroo Bus Lines, is in the passenger transport industry and provides bus services in Queensland. The Respondent provides public transport to the public regardless of whether they are vaccinated or wearing a mask. The Respondent was also appointed as the Queensland Government quarantine transport provider conducting all quarantine transfers of travellers coming into the state, increasing the possibility of exposure of its staff to COVID-19. The Policy was based on State and Federal Government advice at the time, including a Queensland Government mandate requiring quarantine workers, including those employed by quarantine transport providers, to be vaccinated.

[3] The Respondent was providing quarantine transport services at the time the Applicant was dismissed. Other matters impacting the Respondent at the relevant time were that the charter arm of the business was impacted greatly due to cancellations or being unable to run charters because of COVID restrictions. Further, when restrictions were lifted there were clients who put into place requirements for vaccinated staff to perform their services.

[4] The Respondent contends that the Applicant's dismissal for refusing to comply with the Vaccination Policy was not unfair on the basis that the Policy was a critical control mechanism for minimising the risks COVID-19 posed to the health and safety of the Respondent's employees, customers and to the viability of its operations. The Respondent also submitted that direction to the Applicant to comply with the Vaccination Policy was

lawful and reasonable, the Applicant was given a number of opportunities to comply with the Policy, and the Applicant's non-compliance amounted to grounds for dismissal.

[5] The Applicant advanced various contentions in relation to why his dismissal was unfair including: lack of consultation by the Respondent about the Vaccination Policy; there were no State or Federal Government directives in the public transport industry; the Policy was a breach of the *Human Rights Act 2004* because it sought to force the Applicant to be subject to medical or scientific experimentation; the Policy was contrary to various provisions of the Constitution and inconsistent with the *Fair Work Act*; no alternative strategies were considered by the Respondent; the "*no jab no job*" Policy involved coercion of unvaccinated employees; the Respondent could have managed its operations with a 96% compliance rate and accommodated the small number of employees who did not wish to be vaccinated; the Policy was not part of the Applicant's employment contract; and the Applicant did not pose a serious risk by being unvaccinated, so as to justify his dismissal after ten years' service. In oral submissions at the hearing, the Applicant raised a new argument to the effect that the Vaccination Policy constituted a variation to his contract of employment, which could not be implemented because the terms of the contract required that a variation could only be implemented by written agreement signed by both parties, to effect a variation

Procedural History

[6] The matter was not resolved at conciliation and was allocated to me to determine. Directions were issued on 15 August requiring the parties to file statements of evidence attaching any relevant documents, and outlines of submissions, in relation to whether the Applicant had been unfairly dismissed and if so, the remedy that should be granted, addressing the matters in ss. 387, 391 and 392 of the FW Act. The Directions also provided for a party seeking to be represented by a lawyer or paid agent, to file and serve submissions addressing the matters in s. 596 of the FW Act in relation to whether permission should be granted for such representation by 22 August 2022.

[7] On 22 August 2022, the Applicant emailed the Commission advising that he had appointed Mr Alex Smith as his unpaid representative and seeking a seven-day extension to the requirement to file a submission objecting to the Respondent being legally represented. On 23 August 2022, the Respondent's legal representatives filed written submissions outlining the basis for seeking permission to represent the Respondent at the hearing. The Applicant did not file his submissions in relation to representation by 29 August and was granted a further period to do so until 5 September 2022.

[8] In summary, the Respondent's application for permission to be represented by a lawyer was based on a submission that the matter will be dealt with more efficiently, taking into account its complexity, in the context of assertions made by the Applicant which widen the matters in dispute and that it would be unfair not to allow the Respondent to be represented given it does not employ industrial advocates and has always used external legal representatives or experienced industrial advocates. Further, reference was made to the fact that the Applicant's unpaid representative Mr Smith, is associated with "DECLINE" which describes itself as a Worldwide community offering their God given gifts to hold criminal corporations responsible for their actions according to the "crimes act and civil liabilities legislation, by using their own laws, being the *Commonwealth of Australia Constitution Act*,

against them".[1] The Respondent further pointed to the fact that Mr Smith has been involved in a number of COVID–19 vaccination-related matters before the Commission and it would be unfair to refuse permission for the Respondent to be legally represented in circumstances where the Applicant has the benefit of an experienced representative.

[9] Having considered the parties' submissions, I was satisfied that the matter involved some complexity in the sense that the Applicant's contentions unnecessarily seek to widen the matters in dispute, and it would assist to deal with the matter more efficiently if the Respondent was granted permission to be legally represented. In this regard, I noted that the Applicant was raising legal arguments that have been determined in numerous cases before courts and the Commission to be irrelevant to the question of the lawfulness and reasonableness of a direction to an employee to be vaccinated, and that allowing the Respondent to be represented would ensure that the Respondent's case would be focused on arguments that were relevant to the issues in dispute. I also had regard to the fact that the Applicant was represented or assisted by Mr Smith who has experience in matters before the Commission, notwithstanding that Mr Smith was not a paid agent. For these reasons I was satisfied that it would be unfair not to allow the Respondent to be legally represented in circumstances where the Applicant had the assistance of a representative.

[10] On 23 October 2022, the Applicant sought that the Commission issue a Notice requiring the attendance of the Respondent's Chief Executive Officer at the hearing, on the basis that he was a "family member of a family-owned business – board member – decision maker" and "privy to decision making process documents – correspondence with authorities supporting justification – evidence to implement vaccination policy and terminate the non-compliant". It was asserted that the attendance of the CEO would provide direct insights into its understanding, rationale and interpretation of Government health recommendations and data and workplace health and safety risk benefit analysis. Further, it was asserted that the Commission would be assisted by any verbal/written emails or legal documents that support the legal basis upon which the Respondent acted.

[11] I refused to issue the Notice on the basis that it was for the Respondent to establish the reason for the dismissal and whether it was valid, the Respondent had provided a witness statement from a witness going to the rationale for the introduction of the Vaccination Policy, who would be available at the hearing for cross-examination and if the Respondent's evidence was not sufficient to establish the reason for the dismissal and whether it was valid, then this was a matter for the Respondent.

[12] Having regard to the views of the parties, I considered it appropriate to conduct a hearing, as this was the most effective and efficient way to determine the matter. The hearing was conducted on 10 November 2022. The Applicant gave evidence on his own behalf. As the Applicant did not file a witness statement in accordance with the Directions, he was permitted to refer to material set out in, and attached to, his Form F2 application and to tender his submissions, and to the extent that evidence was set out in those submissions, it was received. The Applicant's material in relation to the merits of his case, comprised his Form F2 and attachments, an outline of submissions dated 5 September 2022, and submissions in reply dated 26 September 2022. The material was received in a bundle.[2] The Respondent tendered a witness statement made by Ms Laurel Wood, the Respondent's Payroll & HR Officer who has held this position since 8 March 2021. As part of her role, Ms Wood works

with Mr Darren Webster, the Respondent's Chief Executive Officer, and other senior management. The Respondent also filed an outline of submissions.

[13] As previously noted, in oral submissions at the hearing, the Applicant raised for the first time, an argument about certain provisions of his contract, preventing the Vaccination Policy from being implemented without his express agreement in writing and contended that as a result, the Respondent was precluded from terminating his employment for non-compliance. The Respondent was permitted to file written submissions after the hearing in response to this issue, and the Applicant was permitted to file submission in reply. The Applicant contended that this submission was not new and was raised in his earlier written material. I do not accept this contention. The earlier written material filed by the Applicant raised an issue of whether the Vaccination Policy was incorporated into his contract of employment pursuant to clause 6 of the contract, and not whether the Vaccination Policy constituted a variation to the contract in a manner inconsistent with clause 9. This issue is dealt with in more detail later in these reasons.

[14] In a Decision issued on 17 May 2023, I dismissed the application.[3] These are my reasons for that Decision.

Preliminary matters

[15] Section 396 of the FW Act requires that I decide four matters before considering the merits of the application. There is no dispute between the parties, and I am satisfied on the evidence that:

1. the Application was made within the period required in s. 394(2) of the FW Act;
2. the Applicant is a person protected from unfair dismissal;
3. the Respondent was not a small business employer at the relevant time; and
4. the dismissal was not on the grounds of redundancy and was therefore not a case of genuine redundancy.

Evidence and Submissions

Background

[16] The Respondent is a family owned and operated passenger transport company, providing a mix of services, including: transport of school students (daily school routes, charters, excursions and tours); charter work; transport for tours and events; and daily public transport services. Ms Woods' evidence, which was not contradicted by the Applicant, is that until 21 June 2022, the Respondent performed Queensland Government quarantine transport, which included conducting all quarantine transfers of travellers coming into Queensland. There were a range of requirements which applied to drivers who engaged in quarantine transport. Although the requirements to engage in quarantine transport for the Queensland Government changed over time, at the time the Respondent's Vaccination Policy was introduced and when the Applicant was dismissed, the obligations included a requirement for drivers to be vaccinated against COVID-19. Drivers were also required to wear PPE and undergo COVID-19 testing. This testing occurred at the Respondent's depot.

[17] The Applicant was employed by the Respondent as a bus driver from 20 January 2012 as a casual employee and as a permanent employee from 23 July 2012 until 20 May 2022. The Applicant worked 38 ordinary hours per week and performed overtime work from time to time. The Applicant's average weekly wage was $1,097.57 gross per week. The Applicant had no disciplinary action recorded on his personnel file during the period of his employment. Ms Wood tendered a copy of a "*Letter of full-time engagement offer*" signed by the Applicant on 17 July 2012, which offers the Applicant employment on the "*terms and conditions*" set out in the letter. At clause 2.1 the letter states that unless more generous provisions are set out in the Schedule, the terms and conditions of the Applicant's employment will be as set out in the *Kangaroo Buslines Enterprise Agreement 2010.* At clause 6.1(c), the letter provides:

> "You will be required to:
> …
>
> (c) follow all reasonable and lawful directions given to you by the employer, including complying with policies and procedures as amended from time to time. These policies and procedures are incorporated into your contract of employment."

[18] At clause 9 the letter provides as follows:

> **"9 Entire agreement**
>
> 9.1 The terms and conditions referred to in this letter constitute all of the terms and conditions of your employment and replace any prior understanding or agreement between you and the employer.
>
> 9.2 The terms and conditions referred to in this letter may only be varied by a written agreement signed by both you and the employer."

[19] As part of his daily role, the Applicant worked on the Respondent's full time Urban roster and also performed school services and the railbus regular service to Nambour. The Applicant was in touch with a significant number of people on any given day, including vulnerable members of the public such as the elderly and disabled persons. The Applicant was required to attend the Depot twice daily and interacted with other employees including those who were engaged in quarantine transport.

[20] During December 2021 and January 2022, Ms Wood was actively involved in discussions with the Respondent's management team concerning whether the Respondent should implement a COVID-19 vaccination policy. On 16 December 2021, Mr Webster sent all employees, a notice indicating, among other things, that the Respondent was drafting a policy concerning mandatory vaccination. At this time, the Respondent's business had already been heavily impacted by COVID-19 and government responses to it. In particular, the charter arm of the business was impacted by cancellations or being unable to run charters due to COVID restrictions. The Respondent was also concerned about the risk of employees being absent due to contracting COVID-19 or being required to self-isolate, resulting in: the loss of key personnel; inability to meet regulatory requirements; inability to provide contractual and booked services; difficulties in managing annual and other sick leave; fatigue related risks associated with coverage for leave; and not maintaining revenue, resulting in an inability to fund banking loans and payroll, sick leave and other entitlements.

Implementation of Vaccination Policy

[21] On 16 December 2021, all employees were given a notice in relation to COVID-19 restrictions. The notice, tendered by Ms Wood, stated that under new Queensland Government Directives which would commence on 17 December 2021, employees would be required to check in when entering the Respondent's worksite, for the purposes of contact tracing. The notice also stated that the Respondent was "*drafting a policy around mandatory vaccination*" which would be circulated for feedback and comment the following week.[4] The Respondent's managers continued to discuss concerns about risks to passengers and clients and to employees who were undergoing medical treatments causing them to be immunocompromised or who had frail family members. These matters were also discussed with employees at toolbox talks.

[22] Ms Wood said that even when mandates were lifted in Queensland, there were several of the Respondent's clients who then put into place requirements for vaccinated staff to perform their services. There were also schools and charter clients who asked for only vaccinated drivers. The Applicant's work did involve school services, but Ms Wood was unable to confirm if he was rostered to work for the clients who requested only vaccinated drivers. However, Ms Wood said that due to the nature of the Respondent's business and rostering, it would have been extremely difficult for the Applicant to cover shifts if he were to continue to be employed and remain unvaccinated.

[23] In mid-December 2021, there were further concerns about the spread of COVID-19 because of the opening of Queensland borders and the increase in the Omicron variant of the virus. Ms Wood said that on 23 December the Company sent all employees an e-Bulletin informing them they would be required to be double vaccinated against COVID-19 and then after reconsidering that position, decided to withdraw that instruction and undertake a consultation process with employees. That Bulletin also informed employees that the Government had announced that contractors and visitors to schools must be vaccinated and that as a result, the Respondent had received instructions from a number of clients, government and non-government entities, who had decided to adopt this requirement.[5] A draft vaccination policy was circulated with a feedback form inviting consultation during the period from 23 December 2021 to 31 January 2022. During the consultation period the draft policy was amended to extend the compliance date for vaccination from 21 February to 1 March 2022 and the date for employees to advise HR if they did not intend to be vaccinated was extended from 14 January to 1 March 2022.

[24] Ms Wood also tendered a document entitled "COVID – 19 Newsletter Jan 2022" which was circulated to all employees. The Newsletter, which described managing the impact of COVID-19 on business operations as "*juggling jelly*", covered a range of subjects including: business continuity; Queensland Health Directions; and that the Respondent operated in a critically essential industry (public transport). The newsletter also stated that the Respondent had conducted a risk assessment and that the following factors were taken into account: Company data for close contacts; the age demographic of the workforce; the level of risk to frail family members of staff; and staff compliance with mask and social distancing rules. The newsletter reminded staff to provide feedback in relation to the draft vaccination policy. The Newsletter also advised that as of that date, the Respondent had ten positive cases of COVID-19 and that as many as 22 staff members had been away at one time, with close contacts frequently returning positive results, "*putting them out*" for fourteen days.[6]

[25] Several reminders were sent to employees in relation to the provision of feedback about the draft vaccination policy. The Applicant provided feedback verbally and at Ms Wood's request, sent an email in relation to the draft policy, on 25 January 2022. The Applicant's email questioned the efficacy of vaccination against COVID-19 and raised various issues including why other controls such as hand sanitiser, social distancing, cleaning of buses, masks and staying home when sick, were not being used and questioned why a mandate would not be extended to require passengers to be vaccinated. The Applicant's email also asserted that the chance of being infected and dying from COVID-19 was 6% to 0.01% in Australia and 4% to 0.0005% in Queensland and that COVID-19 represented 1% of all deaths in Australia. The email also raised human rights issues in relation to people being coerced to be vaccinated and that the draft policy indicated that employees suffering adverse effects because of vaccination would be abandoned by the Company once they had exhausted their leave.[7]

[26] The consultation period in respect of the Policy ended on 31 January 2022 and employees were informed of this on 7 February 2022, via a link in an SMS message. Ms Wood said that the Respondent received overwhelmingly positive employee feedback, with 205 out of 214 employees either acknowledging the policy or providing positive feedback. On 25 February 2022, the Respondent wrote to all employees informing them that it had decided to implement the Policy and providing a final version.. The final version was also uploaded to an on-line platform accessible to all employees. The date for compliance was again extended to 1 April 2022, and employees were reminded of the requirement to be vaccinated by that date on 9 and 18 March, 2022.

[27] Ms Wood said that a risk assessment had been undertaken which the Respondent believed adhered to government advice and best practice for workplace health and safety. The risk assessment also considered the Respondent's operational viability with its clients and customers as well as the requirements of government contracts which the Respondent held. Ms Wood said that the risk assessment could not be produced as it contained commercial-in-confidence details discussing the viability of the business and its commercial contracts and that the risk assessment was not all the evidence relied upon by the Respondent when it implemented the Vaccination Policy.

[28] Clause 4 of the Vaccination Policy states that: "*Existing Employees who are required by law to be vaccinated against COVID-19 (whether presently or by a designated date) must be vaccinated by that date in order to continue to perform work, notwithstanding the Vaccination Deadline above*". The Policy provides at clause 9 that non-compliance may result in disciplinary action, up to and including termination of employment, where there is no Legitimate Reason for non-compliance. "*Legitimate Reason*" is defined to include a Medical Contraindication to Vaccination, or a reason which is protected by law. Relevantly, "*Medical Contraindication to Vaccination*" is defined to mean one of the contraindications outlined in formal clinical advice from the Australian Department of Health to vaccine providers based on advice from the Therapeutic Goods Administration (TGA) and the Australian Technical Advisory Group on Immunisation (ATAGI). Clause 4 states that Existing Employees must be vaccinated against COVID-19 by no later than 1 April 2022. "*Vaccinated against COVID-19*" is defined as having been vaccinated against COVID-19 with the number of doses approved or recommended (whichever is greater) by the TGA of a vaccine that has been approved

(including provisionally approved) by the TGA. The Vaccination Policy also states that to avoid doubt, this includes any booster shots which are required by the TGA.

[29] Clause 7 specifies the evidence that employees must submit to demonstrate compliance with the vaccination requirement, consisting of the Company sighting the employee's Vaccination Certificate, which it will also collect, retain and where applicable disclose. The Vaccination Policy sets out the way information collected from employees in relation to their vaccination status will be retained and used. Clause 9 of the Vaccination Policy sets out the basis upon which an employee may seek an exemption from compliance with the requirements of the Policy and includes information about the process of applying for an exemption and the consequences where the basis of the exemption is not sufficient. The Respondent has a Privacy Policy, also tendered by Ms Wood, in apparent compliance with the *Privacy Act 1988* and the Australian Privacy Principles, both of which are referenced in the Privacy Policy.[8]

[30] Clause 12 of the Vaccination Policy provides that the Company retains the absolute discretion to vary, replace or rescind the terms of the Policy from time to time, in accordance with the needs of the business, and having regard to the rapidly developing nature of the COVID-19 pandemic and the responses of the Australian and Queensland Governments. The clause also provides that the terms of the Vaccination Policy are not intended to impose legally binding obligations on the Company and do not form part of any employee's contract of employment.

[31] Ms Wood was cross-examined about this aspect of the Vaccination Policy and could not explain why the Policy does not form part of an employee's contract of employment, while other policies and procedures do, as referenced in the Applicant's contract of employment. Ms Wood accepted that there were no Queensland Government mandates applying to bus drivers, other than in relation to those performing quarantine work. Drivers performing quarantine work were also required to be vaccinated, to have properly fitted masks, and to wear a particular type of PPE.

[32] Ms Wood maintained that the Respondent's drivers transported elderly to and from medical appointments and hospitals which was part of the Respondent's considerations but confirmed that this work was not done in a health care setting, so as to be covered by mandates applicable in such settings. In relation to clause 4 of the Policy, Ms Wood was not aware of specific legislation, but confirmed that she was aware of a Government mandate in relation to quarantine drivers and that the Applicant did not do quarantine work. Ms Wood also stated that she is aware of mandates applying to school bus drivers in other States. In response to questions in cross-examination about what changed to require drivers participating in the hotel quarantine program from 2020 to 2021 without being vaccinated, to be vaccinated by 1 April 2022. Ms Wood stated that although she did not work for the Respondent when it started to do airport quarantine work, COVID-19 vaccinations were not widely available in Australia at that time. Once vaccinations became generally available, vaccination requirements were implemented by the Respondent. Ms Wood confirmed that the Respondent relied in part on a risk assessment which included risks associated with vaccination, the Respondent's operational viability, and the welfare of its customers and clients, as a basis for introducing the Vaccination Policy. Ms Wood could not produce the

risk assessment, and maintained that it contained material that was commercial-in-confidence which discussed the viability of the Respondent's business and its commercial contracts.

[33] Ms Wood was also cross-examined about several emails asserted to have been sent to employees prior to the implementation of the Vaccination Policy, informing them that:

> "At this stage we're not making the vaccination mandatory. However, the advice we received strongly recommends that everyone gets it because many of our customers and clients are requesting information from us to ensure that we have got vaccinated employees and are requesting vaccinated drivers only."[9]

[34] The Applicant had copies of these emails but did not file them with his witness statement or make them available in a form that could be shown to Ms Wood. The hearing was adjourned to enable the emails to be located by the Respondent and Ms Wood viewed them on her mobile telephone while being cross-examined. In response to questions about why the Respondent changed its position about vaccination being made mandatory, Ms Wood pointed out that the email went on to state that: "*It is an ever-changing environment and things are changing quickly in this space, and we may make changes in the coming months.*"[10] Ms Wood was also referred to a further email sent to all employees in November 2021, which stated that:

> "We have undertaken a risk assessment and in the interests of workplace health and safety as we are deemed an essential business by the way of providing public transport to the general public, we have made the decision to mandate this as a safe directive around the medical advice obtained. On top of this, we have government restrictions imposed that we feel would impact our business with many clients, customers and suppliers requesting to supply vaccinated drivers only".[11]

The Show Cause Process

[35] On 5 April 2022, Ms Wood on behalf of Mr Webster, prepared and sent a letter to the Applicant, noting he had not provided evidence of his vaccination status (a failure to comply with the Policy) and that as a result the Applicant would not be rostered for work. In that letter, the Applicant was informed that failure to comply with the Vaccination Policy was viewed by the Respondent as a refusal to comply with a lawful direction, constituting serious misconduct and which may warrant termination of his employment. The Applicant was invited to a "show cause" meeting on 6 April 2022, and advised he was permitted to bring a support person to the meeting. The Applicant could not attend on 6 April due to a car accident involving his son but arranged with the Respondent to attend a meeting on 7 April 2022.

[36] On that date, the Applicant met with the Ms Tammie Perrett, Chief Operating Officer of the Respondent, and Ms Wood, and was given an opportunity to show cause why his employment should not be terminated for failure to comply with the Policy. The Applicant indicated he had reconsidered his position and if the Respondent was willing to allow him extra time to become vaccinated, he would do so. Ms Perrett and Ms Wood agreed to the Applicant's request on the following conditions, which were recorded in letter and signed by the Applicant on 13 April 2022:

> "(a) As soon as reasonably possible and otherwise by no later than 7 days from the date of a letter confirming his commitment, [the Applicant] … attend your doctor and obtain their written advice as to which Covid-19 vaccinations you should obtain and the appropriate intervals between vaccinations.

(b) You provide a copy of that doctor's written advice to Ms Wood within 48 hours of receiving it.

(c) You obtain the COVID-19 vaccinations at the times advised by your doctor.

(d) You agree to remain on unpaid leave whilst the above steps are occurring. (However, upon your request, the Respondent will grant any annual or long service leave you have accrued to be used during this period.)" [12]

[37] Also on 13 April 2022 , the Applicant provided the Respondent with a letter from his doctor, in accordance with the signed agreement indicating that he had been offered vaccination and would receive a first dose of a nominated vaccination on 9 May and a second dose on 30 May. On 10 May 2022, the Applicant forwarded an email to the Respondent stating: "*I have decided to maintain my original position and will not pursue vaccinations based on the unqualified non-medical advice of my employer*." Subsequently, on 16 May 2022, the Respondent advised the Applicant it had received his email of 10 May 2022 and that a response would be sent to him.

Termination of the Applicant's employment

[38] On 20 May 2022, Ms Wood wrote to the Applicant advising him that his employment was terminated with immediate effect, for failing to comply with a lawful and reasonable direction to be vaccinated in accordance with the Vaccination Policy. The Applicant was paid wages in lieu of notice and his accrued leave entitlements. Ms Wood said that the decision was made to terminate the Applicant's employment as given his correspondence at that point, she did not see any possibility of the Applicant changing his mind or telling her that he had a medical contraindication or other Legitimate Reason to refuse to be vaccinated against COVID-19 in accordance with the Respondent's Policy.

[39] Ms Wood said that at no time did the Applicant inform her that he had a medical contraindication or other legitimate reason, within the meaning of the Policy, to refuse to be vaccinated against COVID-19. There were no available roles in which the Applicant would not be required to come into contact with other employees or customers, for which the Applicant was suitably qualified and to which he could be redeployed, and in any case, the Respondent's COVID-19 Vaccination Policy applied to all employees. Further, the Applicant did not request to be redeployed to any other role. Ms Wood also gave evidence that it was not difficult to obtain work as a bus driver and the Respondent had employed 18 staff, who are all vaccinated, since implementing the COVID-19 Vaccination Policy and was looking for 6 drivers ranging from casual School Bus drivers to Part Time Urban Drivers.

[40] During cross-examination Ms Wood, confirmed that regardless of an employee's status with the Respondent, the Vaccination Policy applied uniformly. Ms Wood also confirmed that other employees were dismissed for non-compliance with the Policy at or around the time of the Applicant's dismissal. Additionally, Ms Wood confirmed that the Policy remained in effect and required boosters in accordance with ATAGI guidelines. When asked whether the Respondent intended to stop at a 95% vaccination rate of its employees, on the basis that that was a reasonable number of people who were vaccinated and therefore would not insist on a 100% vaccination rate, Ms Wood stated that the Policy was put into place for the whole workforce and would not stop at 95%.

Applicant's evidence/submissions

[41] The Applicant's written material was discursive and traversed a range of issues and assertions as to why his dismissal was illegal, unjust, unreasonable and harsh, which can be summarised as follows. In relation to the implementation of the Vaccination Policy, the Applicant contended that consultation was a "*token gesture*" and while the original policy was to come into effect on 1 December 2021, the four-month delay was so the Company could comply with legal requirements and necessities and feel legally safe and protected when it terminated the employment of non-compliant employees. The Applicant also contended that the Respondent probably spent more time on consulting lawyers than it did on consulting with medical health authorities and experts. Further, the Applicant said that there was no negotiation or exploration of alternative options and strategies, and the Respondent did not create an environment in which this could occur.

[42] The Policy was said by the Applicant to be unreasonable because the Respondent had a vaccination rate of 96% and demanded 100% vaccination rate by the implementation of a "*no jab, no job*" policy. Instead of terminating a small number of non-compliant employees, the Respondent could have allowed them to continue in their occupations on restricted duties such as undertaking only urban driving and thus reasonably met and limited health and safety concerns to a manageable level. The Applicant also queried what risk he posed by being unvaccinated for over two and a-half years, that suddenly and mysteriously changed or became worse, on 1 April 2022. Further, the Applicant in his reply statement said that redeployment was not an option or even possible, because of the Respondent's 100% vaccination policy.

[43] In relation to quarantine work, the Applicant said in his reply statement, that the Respondent's claim to have been concerned about health and safety issues is contradictory given that quarantine drivers were sent for commercial reasons to the "front lines in the war on COVID-19 where they would have been at the highest possible risk of contracting the virus, transmitting it to staff, family and members of the public." The Applicant also said that: "*Buses and drivers involved would afterwards return to normal duties - freely mixing with staff not involved in quarantine work, school children on school services, passengers on public transport and other customers through any general charter operations*". The Applicant said that if this was possible without vaccines, and the transmission of the virus did not occur in the Respondent's workforce, then having 95% of the staff and general public vaccinated was more beneficial and less risky, and terminating the Applicant should not have been considered, even as a remote possibility.

[44] The Applicant contended that:

> "…the Respondent has had fair and reasonable opportunity to research the validity and claimed lawfulness of the mandate/policy/direction, yet, failed to do so. Applicant further submits that no evidence, records or risk assessment was provided or produced to suggest that the Respondent acted with due care and consideration in ensuring the Applicant was presented with fully analysed and independently reviewed medical and scientific evidence of the claimed safety and efficacy of the stealth participation of a clinical trial medical service claimed COVID-19 vaccine being demanded, with threat and menace of dismissal. The Applicant subsequently submits that this is prima facie fact as the claimed COVID-19 vaccination was admitted to be the largest clinical trial, the largest global vaccination trial ever, by then Minister for Health and Aged Care, Greg Hunt, on 21 February 2021."

[45] The Applicant also pointed to the fact that there were no State or Commonwealth Government laws or mandates requiring that bus drivers be vaccinated. This was said in the Applicant's submissions in reply, to indicate that the State and Commonwealth Governments did not consider public transport a high enough risk to make vaccination mandates via public health orders necessary, despite public transport being a critically vital and essential service. Further, the Applicant raised various legal arguments referring to statutes and legal principles the Vaccination Policy was said to breach, including:

- Section 10(2) of the *Human Rights Act 2004* which provides that no-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.
- The Policy breached the Applicant's human rights to bodily autonomy, informed consent, and freedom of choice.
- The Respondent did not consider the *Privacy Act 1988* and the Vaccination Policy was an invasion of privacy on the basis that the Respondent tried to enter the relationship between patient and doctor as an uninvited and unwanted third party. The provisions of the Policy in clause 7 relating to proof of vaccination status, were also said to be contrary to the *Privacy Act*.
- Section 26 of the *Fair Work Act* excludes the Applicant, being a national systems employee within the meaning of section 13 of the Act, from being required to comply with any State directions/ mandates/ rules/ policies/ instructions/ claimed laws rendering the Vaccination inapplicable to the Applicant the Respondent's actions were *ultra vires* in enforcing claimed State Government directions upon its employees requiring them to participate in "*clinical trial=claimed vaccination=medical procedure=injection of a schedule 4 poison=medical service*".
- Neither the Respondent nor the Applicant were legally required to comply with the direction/policy. The Respondent had erroneously classified/categorised the Applicant as a "worker" under the direction/policy, which in itself is not a law. The direction/policy also has/had no jurisdiction on a national systems employee who is not required to comply with unlawful and unreasonable State direction/policy that is coercive, manipulative and in direct contravention of ts 109 and s 51(xxiiiA) of the Commonwealth Constitution.
- In relation to capacity, the Applicant was able and willing to comply with all inherent requirements of his position, as was done throughout "*the claimed non-established pandemic in a court of law*" because the direction/policy was not applicable to a national systems employee rendering the direction/policy void *ab initio*.
- The Respondent falsely claimed that the Applicant did not follow a lawful and reasonable direction within the meaning in Regulation 1.07 of the *Fair Work Act* when the Applicant did not engage in misconduct because the employer acted unlawfully by coercing and directing the Applicant to "*engage in a clinical trial=injection of a sch4 poison= medical service in order to maintain employment by means of site/property access*". The Applicant acted lawfully and reasonably by exercising free will right to decline to be coerced to participate "*in a clinical trial =medical service as per The Australian Immunisation Handbook and reinforced by s109 and s51(xxiiiA) of the Commonwealth-Constitution*".
- The Vaccination Policy was not lawful because the Respondent had not provided any laws or legal evidence to establish lawfulness.

- The Respondent failed to exercise its duty of care under the Work Health Safety Act 2011 (Cth) by subjecting the Applicant to serious risk of temporary and/or permanent injury or death by directing a policy enforcing participation with "*the claimed COVID19 vaccination=clinical trial*".
- The rule of law provides that a person cannot be punished unless a court has found a breach of a law and protects citizens against arbitrary use of power. Citizens cannot be retrospectively guilty of an offence that was not law when they committed an act and are entitled to a presumption of innocence.
- The Magna Carta also provides that none shall be condemned without due process of law which includes natural justice and procedural fairness.
- The Respondent's claim that the dismissal was lawful "is vexatious and therefore "*ultra vires*", void "*ab initio*", and *cadit quaestio*".

[46] In his written material the Applicant took issue with the fact that the Vaccination Policy states that it does not form part of any employee's contract of employment and queried how he could be dismissed for a breach of the Policy in those circumstances. In this regard, the Applicant said that he has always complied with the Respondent's reasonable policy directions but a policy mandating a trial medical procedure with an experimental drug could not be considered lawful and reasonable. The Applicant also said that such a direction was not conceivable ten years ago on commencement of employment when policies covered matters such as wearing a "*fluro*" vest, walking on marked pedestrian lines and similar matters. The Applicant also contended that he was not informed that failure to comply the Vaccination Policy could result in the termination of his employment, until a few days before the Policy was implemented.

[47] Under cross examination, the Applicant agreed that he received the email of 16 December 2021 advising that a policy around mandatory vaccination was being drafted, a Bulletin advising that a decision to implement mandatory vaccination had been taken and that a draft policy was being prepared, and a message on 23 December 2021, via a Company system known as SWAY, containing a link to the proposed policy and informing the Applicant that he had until 31 January to provide feedback.[13] The Applicant also accepted that he received an electronic bulletin on 13 January 2022, referring to the draft vaccination policy circulated on 23 December 2021, and the 31 January deadline for feedback to be provided.[14] The Applicant was taken to the draft vaccination policy and agreed that he understood that it applied to him, required that he be vaccinated and that he permit the Company to sight his vaccination certificate.

[48] Further, the Applicant agreed that the draft policy stated that employees who did not comply would be likely to face disciplinary action, up to and including termination of employment. The Applicant confirmed that he understood these provisions applied to him.[15] The Applicant conceded that his submission that during the course of the consultation period there was no mention in writing that non-compliance with the Policy would result in the termination of his employment, was wrong and that this had been communicated to him on several occasions, contrary to his evidence that this occurred only a few days before his employment was terminated.[16]

[49] The Applicant also confirmed that he understood that he could provide feedback in relation to the draft policy[17] and that he did this by email on 25 January 2022. [18] The

Applicant conceded that he had incorrectly asserted in his submission that he was not given an opportunity to respond to the Vaccination Policy.[19] The Applicant also conceded that his statement that he did not know what the Policy was and that he did not have an opportunity to consult about it, was not true.[20] Further, the Applicant confirmed that he received the Newsletter dated 28 January 2022 that was appendix 6 to Ms Wood's statement.[21] It was accepted by the Applicant that he was informed in a Newsletter dated 25 February 2022 that the Vaccination Policy had been implemented and that notice was provided of the requirement to be vaccinated by 1 April 2022.[22] The Applicant was taken to various reminders sent to employees of this requirement and agreed that he received them.

[50] Also under cross-examination, the Applicant agreed that he received the letter on 5 April asking why he had not advised of his vaccination status and inviting him to attend a meeting. The Applicant accepted that he agreed at the meeting to be vaccinated and requested an extension to allow that to occur and that he signed a letter accepting conditions for the extension he was granted to comply with the Vaccination Policy. The Applicant agreed that he provided advice from his doctor that he was scheduled to be vaccinated and then advised that he was not intending to be vaccinated. In response to questions from me, the Applicant said that his decision making at the time of his dismissal was affected by his son being injured in a car accident but accepted that he did not inform the Company that this was impacting him other than to request a change to the show-cause meeting date. Mr Cloutte also accepted that he did not ask for a further extension when the initial extension he was given expired.[23]

[51] In oral submissions at the hearing, the Applicant referred to information he obtained from the Commission's website to the effect that a vaccination policy needs to be lawful and reasonable and that for a direction to be lawful it needs to comply with any employment contract, agreement terms and common law, State or territory laws. The Applicant's representative Mr Smith made submissions in relation to the Full Bench Decision in *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd (t/as Mt Arthur Coal)* (*Mt Arthur Coal*)[24] stating that the case could be distinguished because a coal mine is "*a closed loop environment*" and there is no access to the public and all workers entering the site are vaccinated and deemed to be safe and protected from transmission and contraction. A bus driver operates in a different environment in the sense that members of the public can enter the bus at any time, whether they are vaccinated or not, so that whether a bus driver is vaccinated or not, becomes irrelevant. The Applicant also submitted that the death rate from COVID-19 is "fairly low" citing 2,200 deaths. Mr Smith, took issue with this submission and interjected, contending that there have been no deaths from COVID-19, directly contradicting the submission made by the Applicant. Mr Smith's conduct as a "representative" is a matter to which I will return.

Contract of employment issue

[52] In oral submissions at the hearing, the Applicant for the first time, advanced an argument to the effect that the Vaccination Policy was a variation to his contract of employment, and that it could not have been implemented with respect to the Applicant, other than in circumstances where the Applicant agreed in writing to the variation. This assertion provided a different focus to an argument earlier advanced by the Applicant that the

Vaccination Policy was a change in his contract of employment that was legally and lawfully declined.

[53] In written submissions made after the hearing, the Respondent said that the submission that clauses 6.1 and 9.2 of the Applicant's contract of employment precluded the Respondent from implementing the Vaccination Policy and from terminating the Applicant's employment for failing to comply with the Policy, was raised for the first time during the hearing.

[54] The Respondent submitted that if the Vaccination Policy is considered within the scope of the policies referenced in clause 6.1(c) of the contract, the clause allows for such policies to be varied so that clause 9.2 of the contract is not enlivened. Accordingly, the contract is not required to be varied to enable the Policy to be created or varied. In relation to this submission, clause 6.1(c) of the contract contemplates the Respondent amending the policies and procedures "*from time to time*" and clause 9.2 provides that the "…*terms and conditions referred to in this letter may only be varied by a written agreement*…". Even if the Vaccination Policy was a policy of the type referenced in clause 6.1(c), the creation of such policy was specifically provided for by the clause and therefore did not require agreement prior to its amendment as per clause 9.2.

[55] The Respondent also submitted that it is clear from the wording of clause 6.1(c) that the parties did not intend that the Respondent would be required to seek the Applicant's written agreement to vary the Respondent's policies and procedures on any occasion that they were amended. Rather, the better construction of clause 9.2 is that the "*terms and conditions referred to in this letter*" refer exclusively to those matters which are set out in the Contract, and not to any policy and/or procedure which may be incorporated by reference and which clause 6.1(c) allows to be amended from time to time. The Respondent reiterated that the Vaccination Policy was not incorporated by reference.

[56] If it was considered that policies within the scope of clause 6.1(c) required the Applicant's agreement to vary, the Vaccination Policy, having been made substantially after the contract was made, was not in the reasonable contemplation of the parties to the contract and therefore not caught by clause. In construing the Contract, the Contract is to be interpreted having regard to "*the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*".[25] In this regard, the contract is dated 17 July 2012 and the Policy was circulated almost a decade later in February 2022, and deals with the COVID-19 Pandemic which cannot have been within the contemplation of the parties at the time the contract was made, and in respect of which there was no predecessor policy. It cannot reasonably be sustained that vaccination against COVID-19 was a matter on which the parties intended to agree and clause 6.1(c) of the contract cannot be said to encompass the Vaccination Policy.

[57] In addition, clause 6.1(c) of the Contract should not be construed as including the Vaccination Policy, because the Policy expressly provides that it does not have contractual force and the Respondent retained the absolute discretion to vary the Policy. As Jessup J made clear in *Commonwealth Bank of Australia v Barker*[26], an appropriately clear statement by an employer that a policy is not contractual can protect an employer from contractual liability for breach, and the agreement of an employee is not needed for such a reservation

since policies of their nature are not consensual.[27] It was further submitted that the discretion to alter the Vaccination Policy militates against the Policy containing mutually binding contractual obligations.

[58] Regardless of whether the direction to be vaccinated against COVID-19 took the form of the Vaccination Policy or otherwise, the Direction constituted a lawful and reasonable direction, and such directions can be distinguished from constraints (where they exist) in the contract, on the Respondent's ability to amend policies, particularly those which confer a benefit or entitlement on employees. It was also submitted that the law implies a term into all contracts of employment to the effect that employees must follow the lawful and reasonable directions of their employer, in the absence of any contrary intention by the parties.[28]

[59] In the alternative to all other submissions, it was contended that the Respondent implemented the Policy in compliance with its work health and safety obligations, and to the extent that the statutory obligation was inconsistent with the Contract, the statute overrides the Contract (such that the Respondent was empowered to direct employees to be vaccinated against COVID-19). In this respect, the Respondent had (and continues to have) a statutory duty under s. 9 of the *Work Health and Safety Act 2011* (Qld) and at common law to ensure, so far as is reasonably practicable, the health and safety of its employees and other workers. Likewise, the Applicant had a duty to comply so far as he was reasonable able, with any reasonable instruction given by the Respondent to allow it to comply with its obligations and to co-operate with any reasonable policy or procedure of the Respondent relating to health and safety at the workplace, that has been notified to workers.[29]

[60] In submissions in response on the contract of employment issue, the Applicant pointed to clause 12 of the Vaccination Policy which states that it is not intended to impose legally binding obligations on the Company and does not form part of any employee's contract of employment. The Applicant disputed that the contract of employment issue is a new submission and contended that it was first raised in the original Form F2 Application and in other passages referred to in his submissions.

[61] In response to the Respondent's submissions, the Applicant said that a Contract of Employment is a legally binding agreement and that by incorporating policies into the employment contract under the perception their inclusion ensures employee compliance, the Respondent had engaged in a "*common error of judgement made by employers according to many reputable legal websites*". Notwithstanding this, the Applicant contended that incorporating policies and procedures into an employment contract, as has been done in the present case, makes those policies and procedures contractual in nature. The Applicant also submitted that because the employment contract was legally binding, the policy required the Respondent to seek agreement with the Applicant prior to implementing the policy. By not honoring its contractual obligation, the Respondent has breached its own contract resulting in the wrongful termination of the applicant. The Applicant said that:

> *"The respondent can consider, construe and argue about considering scopes of policies, variable policies, directions, enlivened contracts, ten year old contracts, but the fact remains that the employment contract is a legally binding document and it clearly and crucially states that* ***its policies and procedures are incorporated into the employment contract which can only be varied by a written agreement signed by both parties."***

[62] The Applicant also argued that a reasonable person would expect that the Respondent would recognise the importance of reviewing employment contracts periodically to ensure they complied with changing laws and work environments and the failure to do so is negligence and incompetence on the part of the Respondent's directors, CEO, HR Manager and legal representatives. Further, a reasonable person would expect that the respondent would have referred to the employment contract during the policy creation and certainly prior to the wrongful termination to ensure it was in full compliance with its legal and contractual obligations. The respondent deliberately breached its own employment contract and knowingly acted in a wilful and unconscionable manner and repeatedly falsely accused the applicant of serious misconduct breaches.

[63] According to the Applicant, the policy was created and implemented in breach of the employment contract and therefore has no influence or merit. The respondent failed in its contractual obligation to engage with and seek agreement from the Applicant to the contractual changes the policy instigated. The Respondent via the Vaccination Policy made a unilateral change to the employment contract to the detriment of the Applicant. The Applicant also submitted that: "*The Respondent's contentious assertions and flawed reasoning for the policy implementation (41.5) citing that their compliance with work health and safety obligations takes precedence over contractual obligations and empowers the respondent to override the employment contract is absurd and has no justification for the respondent breaching its own contract. This is the use of arbitrary power – autocratic decisions not based on law*."

[64] The Applicant contends that the Vaccination Policy breaches the contract as the Respondent failed to obtain agreement between both parties and therefore the policy should be considered null and void and rescinded. Accordingly, the contract remains the prevailing authoritative document and is legally binding and enforceable. The result is that the Respondent's policy has breached the Applicant's employment contract resulting in the Applicant being dismissed for no justifiable reason, making it unfair, unjust, unreasonable, and extremely harsh under the unfair dismissal definition. As it involves a breach of contract, the dismissal is also a wrongful dismissal. The Respondent's subsequent attempts to justify and defend both the Vaccination Policy and contractual breach are capricious, misguided, reprehensible and unconscionable and should be duly rejected.

The approach to deciding whether a dismissal is unfair

[65] In deciding whether a dismissal was unfair on the grounds that it was harsh, unjust or unreasonable, the Commission is required to consider the criteria in s.387 of the Act, as follows:

> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
> (b) whether the person was notified of that reason; and
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
> (h) any other matters that the FW Commission considers relevant.

[66] Section 387(a) requires the Commission to consider "*whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)*". A valid reason for dismissal is one that is "*sound, defensible or well founded*" and not "*capricious, fanciful, spiteful or prejudiced*."[30] The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts,[31] and validity is judged by reference to the Tribunal's assessment of the factual circumstances as to what the employee is capable of doing or has done.[32] The Commission does not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[33] However, where a dismissal relates to conduct of the employee, it is also necessary to determine whether the matter was of sufficient gravity to constitute a sound, defensible and well-founded (and therefore valid) reason for dismissal.[34] In deciding whether a dismissal is for a valid reason, the Commission does not stand in the shoes of the employer and determine whether or not the decision made by the employer would have been made by the Commission.[35]

[67] It is well established that a refusal on the part of an employee to comply with a lawful and reasonable direction, will generally constitute a valid reason for dismissal. The seminal decision concerning the requirement of employees to follow their employer's lawful and reasonable directions is found in the judgement of Dixon J in *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday*[36] (*Darling Island Stevedoring*) which summarised the common law position as follows:

> "Naturally enough the award adopted the standard or test by which the common law determines the lawfulness of a command or direction given by a master to a servant. If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable.
>
> In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable."

[68] I accept that an employee is not obligated to comply with a direction that breaches the employee's contract of employment. I also accept that there may be cases where a policy lacks a rational basis or seeks to regulate a matter that is trivial or is unreasonable so that non-compliance will not be a matter of sufficient gravity to constitute a valid reason for dismissal for the purposes of the criterion in s. 387(a). There may also be cases where a policy is unclear or ambiguous or not consistently applied so that a breach may not constitute a valid reason for dismissal. However, as a Full Bench of the Commission said in *Briggs v AWH Pty Ltd*[37], the determination of whether an employer's direction is reasonable, does not involve an abstract or unconfined assessment as to the justice or merit of the direction and it does not have to be demonstrated by the employer that the direction issued was the most preferable or most appropriate course of action, or in accordance with best practice or in the best interests of the parties.[38] The principle that the employer does not stand in the shoes of the employer, also has relevance in relation to this consideration.

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

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

Consideration

Applicant's representative

[70] Regrettably, the involvement of Mr Smith in this case has not assisted the Applicant. While the extent to which the views set out in the Applicant's material are those of Mr Smith rather than the Applicant is uncertain, it was apparent during the hearing that Mr Smith was substituting his own views for those of the Applicant. An example of this conduct involved Mr Smith speaking over the Applicant, who was submitting that 2,200 people have died due to COVID-19, to assert that there have been no deaths because of the virus.[40]

[71] I have no doubt that Mr Smith holds strong views about COVID-19, vaccinations and related matters, and genuinely believes that those views are correct. While Mr Smith is entitled to his views, the Fair Work Commission is not the appropriate forum for those views to be ventilated. I am aware, through cases in which I have been involved and from published decisions of other Members of the Commission, that Mr Smith has been informed on occasions where he has represented applicants, that a number of the arguments advanced by the Applicant in this case, have been consistently found by courts and members of the Commission including at Full Bench level, to be untenable. Mr Smith has also been informed that decisions of courts and Full Benches of the Commission are binding on individual Members of the Commission and, unless they can be properly distinguished, are required to be followed.

[72] It is of concern that Mr Smith is appearing in a case before the Commission in which arguments that have been consistently rejected or found to be untenable, are again advanced. On the assumption that the Applicant has not been informed by Mr Smith of the futility of advancing some of the arguments he has pressed in the present case, I have dealt with them below, along with arguments relevant to the matters in dispute.

Whether there was a valid reason for the dismissal

[73] The Applicant was dismissed for failing to comply with a lawful and reasonable direction to be vaccinated in accordance with the Respondent's Vaccination Policy. The duty of an employee to comply with lawful and reasonable directions given by an employer, is a well-established common law principle operating in Australian employment law. As the High Court has held: "*The employment relationship in Australia operates within a legal framework*

defined by statute and by common law principles, informing the construction and content of the contract of employment."[41]

[74] The common law exists independently of any statute and is derived from custom and decisions of courts. The common law fleshes out the employment relationship by imposing obligations on employers and employees and may also be a source of implied obligations. One of the common law terms implied into all contracts of employment is the duty of employees to follow the lawful and reasonable directions of their employer.[42] This term is implied by common law, in the absence of a contrary indication by the parties. Contrary to Mr Smith's view, expressed in the present case[43] and others, it is not necessary for the Fair Work Commission to prove the existence of the common law duty of employees to follow lawful and reasonable directions of their employer, by pointing to a statutory provision setting out that duty. It is unarguable that there is such a duty, the scope of which can be summarised as follows:

- A lawful direction falls within the scope of the employee's employment and does not go beyond the nature of the work the employee has contracted to perform;
- Directions which endanger the employee's life or health, or which the employee believes reasonably endanger his or her life or health, are not lawful unless the nature of the work is inherently dangerous, in which case the employee has contracted to undertake the risk;
- The direction must be lawful in the sense that the employee cannot be directed to do something unlawful;
- Employees are only obliged to comply with directions that are lawful and reasonable;
- Reasonableness is a question of fact having regard to all the circumstances including the nature of the employment;
- While employees are not obliged to follow a direction lacking evident or intelligible justification an employer does not need to demonstrate that a direction issued was the most preferable or most appropriate course of action or that it was best practice, for it to be found to be reasonable; and
- Reasonableness is not determined in a vacuum, but by reference to the nature of the employment, the usages associated with the employment,, common practices and the industrial instrument governing it.[44]

[75] In the present case, there is a written contract of employment. While clause 6 of the contract is inelegantly drafted (a matter to which I will return) it cannot be disputed that clause 6.1(c) provides that the Applicant is required to "*follow all reasonable and lawful directions given … by the employer including policies and procedures as amended from time to time*". As was the case in *Darling Island Stevedoring*, the Applicant's contract of employment adopts the standard or test by which the common law determines the lawfulness of a command or direction given by an employer to an employee, and the principles set out above are relevant to determining whether the direction to comply with the Vaccination Policy was lawful and reasonable.

[76] The Full Bench Decision in *Mt Arthur Coal* established that a policy requiring employees to be vaccinated is *prima facie* lawful because:

- it falls within the scope of the employment, and

- there is nothing illegal or unlawful about becoming vaccinated.[45]

[77] Further, while the policy in *Mt Arthur Coal* was not reasonable due to a failure to of the employer to consult employees as required by workplace health and safety legislation, factors weighing in favour of a finding that the policy in that case was reasonable were that the policy:

- was directed at ensuring the health and safety of workers at the Mine;
- had a logical and understandable basis;
- was a reasonably proportionate response to the risk created by COVID-19;
- was developed having regard to the circumstances at the Mine, including the fact that Mine workers cannot work from home and come into contact with other workers whilst at work;
- was to commence at a time determined by reference to circumstances pertaining to NSW and the local area at the relevant time; and
- was only implemented after Mt Arthur spent a considerable amount of time encouraging vaccination and setting up a vaccination hub at the Mine.[46]

[78] In the present case, I am satisfied that the direction to comply with the Vaccination Policy is not unreasonable and reject the submissions asserting inadequate consultation advanced by the Applicant. As early as 16 December 2021, the Respondent notified employees that it was drafting a policy concerning mandatory vaccination. After announcing that it was implementing such a policy, the Respondent reconsidered its position and commenced a consultation process. It is probable, as the Applicant pointed out, that the Respondent took this step because it was realised that consultation was required and had not occurred. This proposition was not put to Ms Wood and if it is correct, it is open to conclude that there was no sinister motive for this change, but rather the Respondent wanted to comply with its obligations to consult. Other than asserting a lack of consultation, the Applicant did not address me on the content of any obligation to consult. I nonetheless accept that the obligations were substantively the same as those considered by the Full Bench in *Mt Arthur Coal*, specifically the consultation term in the Respondent's enterprise agreement and in the *Work Health and Safety Act 2011* (Qld). The Full Bench in *Mt Arthur Coal* set out in detail the content of consultation obligations under work health and safety legislation and industrial instruments, and it is not necessary to repeat what was said in that case.

[79] In the present case, I accept that consultation undertaken by the Respondent met the requirements of the model consultation term required to be included in enterprise agreements. The Full Bench in *Mt Arthur Coal* found that the obligation to consult under legislation in identical terms to the Queensland *Work Health and Safety Act* (WHS Act), arose before a decision to implement a vaccination policy was made. I note that the documentation tendered by Ms Wood indicates that employees were consulted about the terms of the Vaccination Policy rather than the ultimate question of whether such a policy should be implemented. However, the Applicant failed to cross-examine Ms Wood about alleged lack of consultation and instead, focused on irrelevant and untenable matters, despite being informed of the relevance of consultation (and based on *Mt Arthur Coal* its significance) to the reasonableness of a direction.

[80] I also note that balancing the indication of failure to consult as required by the WHS Act, there was evidence that before the final decision to implement the Vaccination Policy was taken, employees were informed about the matters the Company was weighing up as part of its consideration. In this regard, the communications with employees tendered by Ms Wood set out in some detail the impact that COVID-19 was then having on the Respondent's business, including the number of cases at that time, and the factors that had been considered in conducting a risk assessment before deciding to implement the Vaccination Policy. The Applicant provided written feedback about the Vaccination Policy and did not request a copy of the risk assessment. It is also apparent that the Applicant was able to address the risk factors identified by the Respondent in his feedback about the Policy. On balance, I am satisfied that any deficiency in the consultation process adopted by the Respondent does not go to the validity of the reason for the Applicant's dismissal.

[81] I am also satisfied on the evidence of Ms Wood that the Vaccination Policy was directed at ensuring the health and safety of the Respondent's employees. Those employees are required, in the performance of their work, to interact with members of the public who may, or may not, be vaccinated. Contrary to the submissions advanced for the Applicant, the fact that the work environment is not a "*closed loop*" only supports the implementation of the Vaccination Policy, which was designed to minimise the risk to the Respondent's employees of contracting and transmitting COVID-19. As the Full Bench in *Mt Arthur Coal* found, an unvaccinated person is more likely to acquire COVID-19 from an unvaccinated person, rather than a vaccinated person and while other measures such as mask wearing and social distancing are demonstrated to reduce transmission, they do not provide a substitute for the constant protection offered by vaccines, nor do they reduce the risk of developing serious illness, once someone acquires an infection. The Full Bench in that case also found that vaccination is the most effective and efficient control available to combat the risks posed by COVID-19. Those findings were based on expert opinion, including advice from ATAGI, and remain current. It follows that a 96% vaccination rate in the workplace was not acceptable and it was reasonable for the Respondent to pursue an outcome where all employees were vaccinated. There is also no evidence that the Applicant or any other employee had reasonable grounds to refuse to comply with the Policy – such as an accepted medical contraindication – and was dismissed despite this.

[82] Contrary to the Applicant's submissions, the fact that the Respondent was also motivated by a desire to maintain and protect its commercial interests and operational viability and its profits, does not impugn the reasonableness of the Vaccination Policy. One of the primary purposes of operating a business is to make a profit and this benefits employees by providing them with employment and job security. Had the Respondent been compelled to wind back its operations because of the impact of COVID-19 on its workforce or because it could not provide sufficient vaccinated workers to meet the needs of its customers, and suffered a resulting decrease in its profits, employees could have suffered loss of employment and job security.

[83] The Vaccination Policy had a logical and understandable basis given the nature of the Respondent's business, the work performed by employees, the context in which the work was performed and the need for the Respondent to maintain its operations for its own profitability and for benefit of persons to whom it provided an essential service – public transport. Bus drivers cannot work from home and while not all the bus drivers employed by the Respondent

undertook quarantine work, they interacted in the workplace with drivers who did undertake that work and any driver may have been required to undertake quarantine work to fill a vacancy in the roster. On the Applicant's own evidence, before the introduction of the Vaccination Policy, buses and drivers undertaking quarantine work would afterwards return to normal work, freely mixing with staff not involved in that work and there is evidence that this practice ceased afterwards or that the Respondent could reasonably have segregated quarantine transport drivers from drivers working in its other operations. I further accept that the situation was volatile, because Government mandates could have been imposed or an outbreak in the Respondent's workplace could have occurred, so that knowing that all its drivers were vaccinated, gave the Respondent operational certainty.

[84] The timing of the introduction of the Vaccination Policy was determined by reference to circumstances then pertaining in Queensland including the impact of Government mandates on clients of the Respondent and on the availability of vaccines. Vaccine availability also explains why the Respondent did not implement the Policy from the time it commenced quarantine work. Quite simply, there would have been no point requiring vaccination at a time when vaccines were not widely available. In the interim, the Respondent took steps to implement other controls and it was reasonable to add vaccination to this suite of measures when vaccines became available. Finally, the Respondent is not BHP, it is a bus company operating in Queensland, without significant human resource management resources. Notwithstanding this, the Company went to considerable lengths to provide information to its employees about vaccination generally and the rationale for the Vaccination Policy, to encourage and support them to make an informed choice as to whether to comply with the Policy. The efforts the Respondent went to are evidenced by the further opportunity it provided to the Applicant to comply with the Policy when he initially failed to do so.

[85] I do not accept the Applicant's submission that the introduction of the Vaccination Policy was a breach of his contract of employment. While the contract is inelegantly worded, it is clear that the policies and procedures referred to in clause 6.1(c) are not terms and conditions of the Applicant's employment within the meaning in clause 9. This is apparent from clause 2 of the contract which states that unless more generous provisions are provided in the contract (referred to as "*this letter*") or in the attached schedule, the terms and conditions of employment will be as set out in the *Kangaroo Bus Lines Enterprise Agreement 2010*". Further, clause 6.2 makes clear that the policies and procedures with which the Applicant must comply, are included in the scope of the lawful and reasonable directions the Applicant must follow, and that notwithstanding that the policies and procedures are incorporated into his contract of employment, they can be amended at any time.

[86] It is terms and conditions of employment which must not be varied other than by written agreement, and not policies and procedures. Clause 9 also states that the terms and conditions referred to in the letter, constitute all of the terms and conditions of the Applicant's employment, and replace any prior understanding or arrangement between the Applicant and the Respondent. The context in which the contract was made, includes that the Applicant was initially employed as a casual employee from 20 January 2012, before signing accepting employment as a full-time employee by signing the contract on 17 July 2012. Clause 9.2 also speaks of "*variation*" to terms and conditions of employment rather than the introduction of new terms and conditions. Even if the Vaccination Policy is a term and condition of employment, it is a new term and not a variation to an existing term. Finally, the Vaccination

Policy is specifically stated not to be incorporated into the Applicant's contract of employment. For these reasons I agree with the Respondent's submission that the better construction of clause 9.2 is that the "*terms and conditions referred to in this letter*" refer exclusively to those matters which are set out in the contract, and not to any policy and/or procedure which may be incorporated by reference and which clause 6.1(c) allows to be amended from time to time.

[87] I now deal with the untenable arguments advanced by the Applicant in support of the contention that his failure to comply with the Vaccination Policy was not a valid reason for dismissal. Contrary to the Applicant's submission, I do not accept that the Respondent was required to present him with "*fully analysed and independently reviewed medical and scientific evidence of the claimed safety and efficacy of the stealth participation of a clinical trial medical service claimed COVID-19 vaccine*". There is nothing stealthy about the Vaccination Policy or COVID – 19 vaccinations in Australia and the Policy does not compel the Applicant to participate in a medical trial.

[88] Australia has an advisory and regulatory regime in relation to vaccines and vaccination. The TGA is Australia's government authority responsible for evaluating, assessing and monitoring products that are defined as therapeutic goods, including vaccines. ATAGI advises the Minister for Health and Aged Care on the National Immunisation Program and other immunisation issues. It is a matter of public record and a notorious fact, that ATAGI is an expert body whose role is to provide evidence-based advice on the administration of vaccines to the Commonwealth and the public. ATAGI has fifteen members who hold senior positions at major hospitals, universities and research institutions around the country. Its expert status cannot seriously be doubted.[47] ATAGI has been continuously evaluating the epidemiological state of the country in respect of COVID-19 at its weekly meetings and updating the advice it provides to the public on its website so that the advice is current.[48]

[89] In updates from September to December 2021 (when the Vaccination Policy in the present case was being considered) ATAGI stated that vaccination was an intervention to "*prevent infection, transmission and severe disease*". A statement on 24 December 2021 said that booster doses were "*likely to increase protection against infection with the Omicron variant*". On 17 January 2022, an ATAGI update stated that vaccination "*prevents serious disease and death and reduces disease transmission*". ATAGI continues to advise that COVID-19 vaccination is recommended for all people aged 5 years and above to protect them against COVID-19.

[90] It is reasonable for employers to rely on the advice provided by ATAGI in relation to its areas of expertise, as part of the rationale for deciding to implement a policy requiring employees to be vaccinated against COVID-19. It is also reasonable for employers to refer employees to ATAGI and information it publishes, as a source of advice about vaccination, rather than setting up their own internal advisory services for employees. Further, it is not the role of the Fair Work Commission to make findings about the correctness or appropriateness of advice from specialist expert organisations established by Government.

[91] As was accepted by the Full Bench in *Mt Arthur Coal*, and consistent with the advice of ATAGI, vaccination remains the most effective control mechanism to manage risks

associated with contracting and transmitting COVID-19. While other measures, such as mask wearing, and social distancing, are demonstrated to reduce the transmission of COVID-19, the effectiveness of these measures depends on people applying them consistently or correctly. They do not provide a substitute for the constant protection offered by vaccines, nor do they reduce the risk of developing serious illness once somebody acquires an infection.[49]

[92] All COVID-19 vaccines currently available in Australia are safe and any adverse effects are usually mild. There is a much higher risk of developing serious complications and dying from acquiring COVID-19.[50] According to advice, "*provisional approval*" means that a full and thorough assessment has been made of COVID-19 vaccinations, and they were approved by the TGA after a complete assessment of all available data. The provisional approval process involves the TGA engaging early with pharmaceutical companies about vaccines and accepting clinical data as it becomes available rather than at the end of trial processes. This engagement speeds up the review process without compromising it.

[93] The comment made by the former Health Minister Mr Greg Hunt has been misconstrued and misquoted. The comment was made in the context of a criticism about how long the approval process for vaccinations had taken in Australia and the emphasis on safety of vaccines because of our thorough system of assessment. The comment was made after Mr Hunt emphasised that the international medical evidence at the time is that the safety impact of the two initial vaccines – Pfizer and AstraZeneca – for prevention of serious illness, hospitalisation and death, had been determined to be up to 100%. What the then Minister said, was as follows:

> "*You have coverage, you also have the question of the transmission capacity and impact, although the evidence coming out of the international studies now, both clinical trials and real world data, is that the different vaccines are showing a strong transmission impact.*
>
> *But we always have to be aware of the capacity of the virus to mutate, and we have to look at what is called the longevity of the protection with regards to the antibodies that are developed and the world doesn't know that answer.*
>
> *The world is engaged in the largest clinical trial, the largest global vaccination trial ever, and we will have enormous amounts of data.*
>
> *But what's the message for the public? It's safe, it's effective, it will help protect you, but it will also help protect your mum, your dad, your grandparents, your nonna, all of Australia*."

[94] Clearly, the reference to evidence and clinical trials in the comment of the former Minister, was in relation to the effect of vaccines on the transmission of the virus, and not the safety of vaccines. As to the right to bodily integrity, as the Full Bench held in *Mt Arthur Coal*, while the existence of such a right is uncontroversial, it is not violated by the terms of a policy implemented by an employer, requiring employees to be vaccinated. As was the case in *Mt Arthur Coal* the Vaccination Policy does not confer a right on anyone to perform a medical procedure on anyone else, notwithstanding that its effect is to apply pressure on employees to surrender their bodily integrity.[51] Notwithstanding this pressure, the Applicant had a choice as to whether he would comply with the Policy and be vaccinated and provide confirmation of this to the Respondent. For the same reasons, the Vaccination Policy does not infringe s. 10(2) of the *Human Rights Act 2004*. Firstly, it appears that this is an Act of the Australian Capital Territory and has no application to the Applicant or this case, and

secondly, the Vaccination Policy does not require, result in or compel the Applicant to be subjected to medical or scientific experimentation or treatment.

[95] I do not accept the Applicant's assertions that he was being coerced into being vaccinated against his will. The Applicant was not forced to do anything. While the threat of dismissal for refusal to comply with a policy places social and economic pressure on employees to be vaccinated, it does not constitute coercion in a legal sense. The Applicant had a choice as to whether he complied with the Vaccination Policy. The fact that the implications of his choice were that he was in breach of a lawful and reasonable direction of his employer and was liable to be dismissed from his employment, did not deprive him of choice, notwithstanding that the choice was a difficult one.

[96] To put the matter in the terminology used by Mr Smith's organisation, the Applicant had a right to decline the Respondent's Vaccination Policy by refusing a direction to comply with it. The Respondent had a right to accept the Applicant's refusal to comply and continue to employ him, or to decline to employ a person who had refused to follow its lawful and reasonable direction, despite being given a further opportunity to do so.

[97] I reject the Applicant's assertion that the Respondent did not consider the *Privacy Act 1988.* The Respondent has a privacy policy which was referred to in the documentation provided to employees and tendered in these proceedings. Other than making a bare assertion that the provisions in relation to proof of vaccination status were contrary to the *Privacy Act* the Applicant provided no basis for this assertion. Further, the Respondent had no dealings with the Applicant's doctor, either as a third party or otherwise and it was a matter for the Applicant whether he consented to provide information about his vaccination status to the Respondent. The Applicant declined to do so as he was entitled to do, and the Respondent determined to dismiss him for breach of its Vaccination Policy as it had informed him would occur if he declined.

[98] Section 26 of the *Fair Work Act* is irrelevant as the Respondent's Vaccination Policy is not a law, as the Applicant correctly states. In any event, s. 26 provides that the *Fair Work Act* operates to the exclusion of State or Territory industrial laws, but by virtue of subsection (2), laws dealing with occupational health and safety are not excluded. For the same reason, s. 109 of the Constitution, which deals with inconsistency between laws of a State and a law of the Commonwealth, is not relevant, as the Policy is not a State law. With respect to the argument about retrospectivity, the policy is not a law and did not apply retrospectively. To the extent that retrospectivity is relevant to the reasonableness of a direction, the Applicant was not punished for breaking a policy that did not exist when his breach occurred. The Vaccination Policy was implemented with in excess of three months' notice, and the Applicant understood the terms of the Policy and the implications of a breach, when he decided not to follow it.

[99] The Applicant's argument that the Vaccination Policy infringe s 51(xxiiiA) of the Constitution, which confers power on the federal Parliament to legislate for, relevantly, "*the provision of … medical and dental services (but not so as to authorize any form of civil conscription)…*", was rejected by the NSW Court of Appeal in *Kassam v Hazzard*[52] as "*completely untenable*" because s 51(xxiiiA) is a limitation on Commonwealth, not State, legislative power and, moreover, "*civil conscription*" is directed to compulsive service in the

provision of medical services, not their receipt.[53] On 12 August 2022, the High Court refused an application by the *Kassam* applicants for special leave to appeal.[54] I also note that the Full Bench of the Commission in *Mt Arthur Coal* (handed down on 3 December 2021) cited the first instance decision of Beech-Jones CJ in *Kassam v Hazzard* and that decision has been relied on since at least that date as a basis for rejecting arguments about s. 51(xxiiiA) of the Constitution. It is surprising that this argument was advanced in the present case which was heard almost 12 months after *Mt Arthur Coal* was decided.

[100] Other submissions advanced by the Applicant, including the reference to the Magna Carta and that the dismissal was vexatious and therefore "*ultra vires*, void *ab initio*, and *cadit quaestio*" are unintelligible. There was a valid reason for the Applicant's dismissal, and it is the case for the Applicant on this point, rather than the case of the Respondent, that fails or is over.

Whether the Applicant was notified of the reason for dismissal

[101] I am satisfied that the Applicant was notified of the reason for his dismissal, via the letter of 5 April 2022.

Whether the Applicant was given an opportunity to respond to reasons for dismissal

[102] I am also satisfied that the Applicant was given an opportunity to respond to the reasons for his dismissal at a show cause meeting held on 7 April 2022.

Any unreasonable refusal to allow the Applicant to have a support person

[103] This consideration is not relevant. The Applicant was offered an opportunity to bring a support person to the meeting on 7 April 2022.

Whether Applicant warned about unsatisfactory performance

[104] The Applicant was not dismissed for unsatisfactory performance and this consideration is not relevant.

Impact of size of enterprise impacted on the procedures followed in effecting dismissal

[105] There is no evidence that the size of the Respondent's enterprise impacted on the procedures followed in effecting the dismissal.

Impact of dedicated human resource managers on procedures in effecting dismissal

[106] The Respondent has a dedicated human resource manager, and this is also not a relevant consideration.

Any other relevant matters

[107] I consider the following matters to be relevant to whether the Applicant's dismissal was unfair. The Applicant had ten years of unblemished service and planned to remain in the

Respondent's employment for another five years. The Applicant provided no evidence about other relevant matters.

[108] However, I also consider that the Respondent made significant efforts to allow the Applicant to retain his employment, despite his failure to comply with the Vaccination Policy. In this regard, the Respondent did not dismiss the Applicant immediately upon his refusal to follow the Policy, but rather agreed to the Applicant's request to be granted a further period to consider his position. The Respondent effectively agreed to give the Applicant a further period of 7 weeks – from 6 April to 30 May 2022 – for this purpose. The Applicant cut this period short by advising that he had changed his mind. On balance, there are no additional factors that render the Applicant's dismissal unfair.

Conclusion

[109] For these reasons, I find that the Applicant's dismissal was not harsh, unjust or unreasonable. Accordingly, I issued an Order that the application for an unfair dismissal remedy made by the Applicant be dismissed.[55]

VICE PRESIDENT

Appearances:

Mr I Cloutte, the Applicant.
Mr G Hampson of Counsel instructed by Piper Alderman, the Respondent.

Hearing details:

2022.
Brisbane (By Microsoft Teams):
10 November.

Final written submissions:

The Applicant, 14 December 2022.
The Respondent, 29 November 2022.

[1] Respondent's submissions in relation to Permission to appear Annexures A and B.

[2] Exhibit A1 – Bundle of documents setting out the evidence of Mr Cloutte.

[3] PR761147.

[4] Exhibit R1 – Annexure "4".

[5] Exhibit R1 Annexure 7.

[6] Exhibit R1 Annexure 6.

[7] Exhibit R1 Annexure "13".

[8] Exhibit R1 Annexure "16".

[9] Transcript PN533.

[10] Transcript PN535.

[11] Transcript PN536 – 537.

[12] Exhibit R1 Annexure "21".

[13] Transcript PN118 – 134.

[14] Transcript PN148.

[15] Transcript PN149 – 167.

[16] Transcript PN247 – 250.

[17] Transcript PN169.

[18] Transcript PN179 – 180.

[19] Transcript PN241 – 244.

[20] Transcript PN245.

[21] Transcript PN181 – 191.

[22] Transcript PN196 – 202.

[23] Transcript PN252 – 261.

[24] [2021] FWCFB 6059.

[25] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 and accepted by the High Court in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at [11] per Gleeson CJ, Gummow and Hayne JJ.

[26] [2013] FCAFC 83.

[27] Ibid at [345]

[28] *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd (t/as Mt Arthur Coal)* [2021] FWCFB 6059 [64], citing *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 317 at [23].

[29] *Work Health and Safety Act 2011* (Qld), section 28.

[30] *Selverchandron v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

[31] *Rode v Burwood Mitsubishi* Print R4471 at [90] per Ross VP, Polites SDP, Foggo C.

[32] *Miller v University of NSW* [2003] FCAFC 180 at pn 13, 14 August 2003, per Gray J.

[33] *Walton v Mermaid Dry Cleaners Pty Limited* [1996] IRCA 267 (12 June 1996); (1996) 142 ALR 681 at para 24.

[34] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373.

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

[36] (1938) 60 CLR 601.

[37] [2013] FWCFB 3316.

[38] Ibid at [8].

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

[40] Transcript PN709-710.

[41] *Workpac v Rossato* [2021] HCA 23 (4 August 2021) per Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ citing *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169 at 182[16] per French CJ, Bell and Keane JJ, citing citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 436.

[42] *Mt Arthur Coal* op. cit. at .

[43] Transcript of proceedings at PN628 – 629.

[44] *Mt Arthur Coal* op. cit. [68] – [80].

[45] *Mt Arthur Coal* op. cit. at [179].

[46] *Mt Arthur Coal* op. cit. at [252].

[47] *Jovan Jovcic and Filip Markovic v Coopers Brewery Limited* [2022] FWC 1931 at [38].

[48] Ibid at [39].

[49] *Mt Arthur Coal* op. cit. at [29].

[50] Ibid at [29].

[51] Op. cit. at [218] – [220].

[52] [2021] NSWCA 299.

[53] Ibid at [38]-[39]. See *Roman v Mercy Hospitals Victoria Ltd* [2022] FWCFB 112 at [29].

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

[55] PR761147.

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