Federal Court of Australia

Rochecouste v Tasman Rope Access Pty Ltd (No 2) [2021] FCA 1161

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| File numbers: | WAD 235 of 2020  WAD 236 of 2020 |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 28 September 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - application for leave to amend defences - where previous application to amend dismissed - whether late application - where amendments seek to withdraw admissions - whether adequate explanation for withdrawal of admissions - whether in interests of justice to allow application - application allowed in part |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 557A, 570 |
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| Cases cited: | *Juno Pharmaceuticals Pty Ltd v Millennium Pharmaceuticals, Inc* [2019] FCA 526  *Rochecouste v Tasman Rope Access Pty Ltd* [2021] FCA 908  *Selvaratnam v St George - A Division of Westpac Banking Corporation (No 2)* [2021] FCA 486 |
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| Registry: |  |
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| National Practice Area: |  |
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| Date of hearing: | 22 September 2021 |
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| Counsel for the Applicants: | Mr H Pararajasingham |
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| Solicitor for the Applicants: | Nicholas Legal |
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| Counsel for the Respondents: | Mr AJ Power |
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| Solicitor for the Respondents: | HLS Legal |

ORDERS

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|  | | WAD 235 of 2020 |
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| BETWEEN: | MARC ROCHECOUSTE  Applicant | |
| AND: | TASMAN ROPE ACCESS PTY LTD (ACN 604 876 324)  First Respondent  BRENDAN HALSTEAD  Second Respondent | |

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|  | | WAD 236 of 2020 |
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| BETWEEN: | MICHEAL ATWELL  Applicant | |
| AND: | TASMAN ROPE ACCESS PTY LTD (ACN 604 876 324)  First Respondent  BRENDAN HALSTEAD  Second Respondent | |

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| order made by: | COLVIN J |
| DATE OF ORDER: | 28 september 2021 |

THE COURT ORDERS THAT:

1. The amended interlocutory application for leave to amend the defences be allowed in part.
2. On or before 4 October 2021, the respondents do file and serve minutes of proposed amended defence that reflect the reasons on the amended interlocutory application.
3. On or before 11 October 2021, the applicants do file and serve any submissions of no more than five pages stating any respect in which the proposed amendments are objected to on the basis that they go beyond the reasons.
4. If such submissions are filed by the applicants then on or before 18 October 2021, the respondents do file any submission of no more than five pages in response.
5. Any question concerning the minutes of proposed amended defence shall be determined on the papers.
6. If no submissions are filed by the applicants in accordance with these orders then the minutes of defence shall stand as the amended defences in these proceedings.
7. At the final hearing, the statements of material facts, response and reply shall be disregarded.
8. The respondents shall pay the applicants' costs thrown away by reason of the amendments to the defences made in accordance with these orders in any event.
9. The respondents shall pay the applicants' costs of and incidental to the amended interlocutory application such costs to be assessed on a lump sum basis by a registrar if not agreed and to be paid forthwith.
10. There be liberty to the applicants to apply for any further order as to costs of and incidental to the amended interlocutory application.
11. On or before 5 October 2021, the parties do each file a minute of proposed orders for the programming for final hearing of all issues other than the quantum of any penalty and factual matters relevant only to quantum of penalty.
12. The matter be listed for case management hearing at 9.15 am on 6 October 2021.
13. The matter be provisionally listed for hearing on 28, 29, 30 and 31 March 2022.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

1. Mr Marc Rochecouste and Mr Micheal Atwell were employed by Tasman Rope Access Pty Ltd (**TRA**). They bring claims under the *Fair Work Act 2009* (Cth) against TRA and one of its managers Mr Brendan Halstead. Defences and cross-claims were filed by the respondents on 3 December 2020. Statements of material facts were filed by the applicants. They were the subject of a substantive answer by the respondents on 16 April 2021. The applicants' replies were filed on 14 May 2021.
2. A final hearing of all issues in both claims (save as to the quantum of any penalties) was listed for 21, 22 and 23 July 2021. On 20 May 2021, the respondents appointed new solicitors. On 24 May 2021, detailed affidavits were filed by each of the applicants. Sometime in late May or early June, the respondents appointed different solicitors, the third solicitors to act for them in the proceedings (being the current solicitors on the record). It appears that the need to change solicitors arose because those previously appointed were no longer able to have conduct of the defence of the proceedings. It is not suggested that the change in solicitors was brought about by the conduct of the respondents. The current solicitors arranged for the engagement of new counsel.
3. It was not until mid-June that an affidavit of Mr Halstead was prepared. It sets out the principal evidence to be relied upon by the respondents in answer to the claims. At that time, the respondents' solicitors indicated that they proposed to seek to amend the defences to the claims and to adduce some further evidence in addition to that contained in the affidavit of Mr Halstead. In the result, the applicants accepted that the hearing dates would need to be vacated. A new timetable was established which included a time within which the foreshadowed application to amend the defences was to be brought by the respondents.
4. The application to amend was filed on 16 July 2021. It proposed a wholesale change to the defences (and cross-claims), including the withdrawal of a number of admissions. The application to amend was heard and on 6 August 2021 the amendment application was dismissed: *Rochecouste v Tasman Rope Access Pty Ltd* [2021] FCA 908. The reasons for dismissing the application included the following at [40]‑[41]:

It may be accepted that on an application for leave to amend to expose the real issues in the proceedings that is made at a time where the other party has sufficient time to respond will generally be allowed in the interests of justice. However, for reasons that have been given, there are many aspects of the present application that mean that it would not be in the interests of justice to accede to the application.

…

For the reasons given, the application should be refused. In refusing the application I do not foreclose the possibility of a further application to amend and adduce further evidence brought without delay that is confined to what is reasonable and necessary as a matter of fairness. It is too late for the respondents to be starting again with an entirely new case. There must be identification of the amendments that are sought and why they should be allowed despite the fact that the case has proceeded to this point on the basis of the current defences. To the extent that admissions are proposed to be withdrawn there must be an adequate explanation.

1. Since then, the respondents have brought a further, more confined, application to amend. The application was filed on 18 August 2021 and was made in respect of proposed amended defences of the same date. Very lengthy submissions in support of the application were filed. They were prepared by reference to revised versions of the proposed amended applications appended to the submissions (which included changes to the versions that had been filed with the application to amend). I allowed an application to amend the interlocutory application so that it related to those revised versions which, by then, were filed as proposed amended statements of defence and cross‑claim dated 22 September 2021 (**Proposed Pleadings**).
2. In the course of argument I dealt with a number of aspects of the Proposed Pleadings and determined that leave should be given as to some aspects and that leave should be refused as to other aspects. I gave reasons at the time. However, there were three aspects of the Proposed Pleadings on which I reserved my decision as to whether to allow the amendments. They were:
3. Paragraphs withdrawing the admission of pleadings in each claim concerning the formation of the contract of employment.
4. Paragraphs introducing claims that each of the applicants were offered work over the course of their employment that they did not take up.
5. Paragraphs withdrawing admissions of allegations of unlawful adverse action based on what was described as 'stand down discrimination' and 'reduction in hours discrimination'.

## Is the amendment late?

1. It was submitted for the respondents that by reason that the trial dates had been vacated, there was no prejudice to the applicants of the kind that might arise where hearing dates had been fixed and there was a late amendment that a party might not be able to address adequately in the limited time available. It was said that there was time for the applicants to address the new matters proposed to be raised by the amendment. That submission may be accepted as far as it goes. However, that is not to say that the amendment is not to be treated as late or that there is no prejudice.
2. In the present case, the applicants proceeded with their claim promptly. If the respondents had not been late in filing the affidavit of Mr Halstead and had not sought to amend their pleadings and file further affidavit evidence then the claims would have been heard in July and, in all likelihood, judgment would have been delivered by now. The respondents were given an indulgence when the hearing dates were vacated. Despite the clear law concerning the withdrawal of admissions and the unfairness of allowing a party to amend its case late in the day, the respondents sought to make substantial changes to their case without any adequate explanation. They failed to reveal how it was that their defences were conducted on one particular basis up until when the hearing dates were imminent and then sought to make wholesale changes, including by withdrawing a number of key admissions. This produced further delay and a further indulgence that led to the making of the present application.
3. There is considerable prejudice for individuals who bring claims in relation to their employment in what is principally a no cost jurisdiction if the respondents are allowed to change their case after the applicant has fully prepared its case and filed all of its evidence. Parties are entitled to expect that the court processes which are designed to identify and narrow the issues as the final hearing approaches will be committed to by both parties. The disappointed expectation, burden of having to carry the uncertainty of an unresolved dispute and associated time and cost for all involved are all matters of real prejudice. Those aspects of prejudice are not ameliorated by being given the time to meet the new case. They are exacerbated by further delay.
4. For those reasons, the fact that the amendment application is being determined at a time when, in consequence of the conduct of the respondents the new hearing dates have not been set, does not mean that the present application is not a late application. It is. It was made late in the course of events that would otherwise have had the claims determined by now.

## Proportionality

1. As has been noted, the claims in these proceedings relate to the employment of two employees. Claims as to employment may be expected to be significant for the individuals involved. Nevertheless, relative to the legal costs that may be expended to determine every aspect of every possible argument, the present claims are not large. Indeed, the quantum of the claims in the present case and the manner in which the parties are conducting the proceedings are such that there is the potential for the value of the subject matter to be overtaken by the legal costs of conducting the proceedings. In that regard I note that the solicitor for the applicants deposed to the likelihood that $100,000 in additional legal costs would be incurred in dealing with all of the amendments proposed by the respondents by the Proposed Pleadings. As I have not allowed a number of those amendments that eventuality will not arise. Nevertheless, there remains a need to ensure that the forensic steps that are taken are kept in proportion to the subject matter of the dispute.
2. In all cases, the parties and their legal representatives have a responsibility to ensure that the issues are confined to those that are necessary to quell the key aspects of the dispute. Where the subject matter is substantial and the issues particularly novel or complex a certain amount of refinement or indeed development of a party's position may be expected. In such instances, amendments may be expected as aspects of the case are considered more deeply or new aspects of the case come to light through forensic preparation. Such attention may well be appropriate given the value of the subject matter. However, such an approach is not to be expected in cases of the present kind. To allow such an approach would be to adopt procedures that are out of proportion to the nature of the subject matter in dispute. In cases such as the present parties and their representatives are expected to identify the key points at an early stage and to confine the proceedings to the resolution of those key points. In that sense, to allow one or other of the parties involved to have another go once the case has been substantially advanced is out of proportion to the nature of the subject matter in issue between them. It is a course that it may be appropriate to reject as unfair for that reason alone.

## The respondents' position as to costs

1. The respondents seek to limit the prejudice to the applicants by accepting that leave to amend should be conditioned by an order that would require the respondents to bear the applicants' costs of the amendments in any event. Counsel for the respondents made clear that such a position was adopted not only in respect of costs thrown away but also in respect of the costs of responding to the new case as pleaded. The submission was advanced on the basis that the matters that were likely to be required to be undertaken had been deposed to by the solicitor for the applicants. As I have indicated, an estimate of the likely cost was made by the applicants' solicitor but I did not understand the submission by counsel for the respondents to go so far as to embrace that estimate. Rather, what was submitted was that to the extent that costs of the kind described in the affidavit by the applicants' solicitor were required to be undertaken then the respondents accepted that they should bear those costs.
2. There are a number of difficulties with the submission to that effect. First, for reasons that have been given, the amendments proposed will likely be productive of further delay and consequent prejudice of a kind that is not ameliorated by an order for costs. Where the work involved is likely to be considerable the delay is likely to be equally so. In short, given the extent of the amendments proposed and their significance for the case there is likely to be substantial further delay producing prejudice not salved by the proposed approach to costs. Second, the precise ambit of the protection that might be afforded by the respondents' indication is unclear. It extends beyond payment of costs thrown away but precisely how far it extends is uncertain. Third, the costs still need to be borne by the applicants in the first instance and then there will be a need to be resort to the protection afforded by any order as to costs. Claims to the amount of costs may themselves be disputed. If that occurs, there is a risk that the protection of the order will be compromised by the costs associated with determining the extent to which the costs might properly be recovered. Uncertainty as to the precise scope of what was meant by the indication given by counsel makes such disputation likely.

## Relevant principles

1. The principles to be applied in considering whether to grant leave to withdraw an admission and otherwise whether to grant leave to amend were recently summarised by Stewart J in *Selvaratnam v St George - A Division of Westpac Banking Corporation (No 2)* [2021] FCA 486 at [27]‑[28]. I gratefully adopt his Honour's summary which was as follows:

The applicable principles with regard to whether leave to withdraw an admission or other pleading that benefits another party are, relevantly, the following, noting that for simplicity I will refer only to the withdrawal of an admission:

(1) The court has a broad discretion to weigh up all matters with the overall question being to ensure that there is a fair trial.

(2) The court will require an explanation for the making of the admission which is now sought to be withdrawn; the explanation must be a sensible one based on evidence of a solid and substantial character

(3) The object of the courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases; if the mistake is not fraudulent or intended to overreach, can be corrected without injustice to the other party, and if not corrected will not lead to a decision on the real matters in controversy, it should generally be corrected.

(4) The overriding consideration is the interests of justice.

(5) The court will not lightly permit a party to withdraw an admission where the other party has acted to its detriment on the admission or is otherwise prejudiced by the withdrawal; if the other party has in good faith relied on the admission to its detriment so as to give rise to an estoppel the court will not permit the admission to be withdrawn.

There are also other relevant factors to be considered that are applicable more generally to the amendment of pleadings… [They] include the following:

(1) prejudice to another party that cannot be adequately compensated by an award of costs, which would include the inevitable prejudice of unnecessary delay where that exists;

(2) inefficiencies in the use of the court as a publicly funded resource arising from the vacation or adjournment of trials;

(3) the need to maintain public confidence in the judicial system, which has a potential to be lost where a court is seen to accede to applications made without adequate explanation or justification;

(4) the objective of doing justice between the parties;

(5) the objective that the pleadings identify the 'real' issues between the parties;

(6) the overriding purpose of the civil practice and procedure provisions in s 37M of the *Federal Court of Australia Act 1976* (Cth), namely to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible; and

(7) the nature and the importance of the amendment to the party that is seeking it.

(citations omitted)

1. In *Juno Pharmaceuticals Pty Ltd v Millennium Pharmaceuticals, Inc* [2019] FCA 526 at [38], Besanko J summarised the principles concerning the grant of leave to withdraw an admission in the following terms:

The overriding consideration in determining whether to grant leave to withdraw an admission is the interests of justice. In determining where the balance lies, a number of matters which overlap and interact are relevant. They are the circumstances in which the admission came to be made, the strength of the case now advanced that the admission is or may well be incorrect, whether the applicant has done all he or she could do to establish that the admission is incorrect, whether the applicant has acted in a transparent and straightforward fashion, any delay in making the application to withdraw the admission, the significance of the admission to the respective cases of the parties, prejudice to the applicant if the admission is not withdrawn and to the respondent if it is, general prejudice to the applicant and the respondent and finally, case management principles as discussed in *AON Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 and embodied in ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth).

1. Expressed in those terms, emphasis is placed upon the overarching significance of the interests of justice. There is no absolute significance given to the principles identified and no express significance given to the need for an explanation (as distinct from a consideration of the fairness of the way in which the party seeking to withdraw the admission has acted).

## Overview of claims by the applicants

1. In order to apply the relevant principles that guide the consideration of the application for leave to amend in the present case it is necessary to understand, at least in general terms, the nature of the claims advanced by the applicants. The following is not intended to be a complete summary of the claims or their nuances. It seeks only to paint with a broad brush so as to ascertain where the balance lies in applying the principles relating to when late amendments will be allowed to a pleading and when those amendments may be allowed so as to withdraw admissions.
2. In December 2017, TRA offered employment to Mr Atwell. The offer was made by letter addressed to Mr Atwell and was expressed in the following terms:

We have pleasure in offering you employment as Senior Operations Supervisor, with Tasman Rope Access Pty Ltd commencing on 01 January 2018.

This contract provides you with a guaranteed annual salary which is paid in equal fortnightly instalments on the basis that you work a specified number of guaranteed hours annually. The rate of pay specified in the contract also includes an amount for the pre-payment of annual leave, personal/carer's leave and public holidays.

This position reports to Operation Managers.

Please find attached two copies of your Employment Agreement. By accepting employment with Tasman Rope Access, you agree to abide by all Tasman Rope Access policies at all times as may be amended and updated from time to time. Copies of these can be found on the intranet. We request that you confirm your acceptance by signing one copy and returning it to the Human Resources Manager.

We look forward to your contribution and welcome you to our team.

1. The Employment Agreement referred to in the letter was signed by Mr Atwell on 6 December 2017 and returned to TRA.
2. Substantially the same letter with enclosed terms was sent to Mr Rochecouste in February 2018 and the Employment Agreement referred to in the letter was signed by Mr Rochecouste on 20 February 2018 and returned to TRA.
3. It may be noted that the letters refer to a 'guaranteed annual salary'. However, cl 4 of the Employment Agreement provides:

4.1. Your rate of pay for all hours worked in accordance with this contract is specified in Appendix 1.

4.2. Your salary is based on you working the number of hours specified in Appendix 1. Time spent on leave does not count towards the number of working hours.

4.3. If you work more than the prescribed working hours you will be paid at your hourly rate of pay for each additional hour.

4.4 Your work hours will be reviewed on a monthly basis to ensure that they are in line with the prescribed working hours. If you are in arrears a meeting will be held to review the situation and agree on potential options, for example reducing/suspending salary payments or establishing a plan for future work hours.

4.5 You agree to repay to the Company any overpayment of wages where

a) You have worked less than your annual contracted hours; or

b) Your employment ends and you have worked fewer hours than what you have been paid for.

The Company will seek to agree with you a period over which the overpayment will be repaid. Where you do not repay the overpaid remuneration, the Company may take action to recoup the debt. Overpayment of remuneration is calculated by multiplying your hourly rate of pay by the total hours worked.

4.6 Your remuneration will be paid in equal instalments on a fortnightly basis by electronic fund transfer to an acceptable financial institution nominated by you.

1. Broadly speaking, the claim by the applicants is that the agreement was for guaranteed employment at the agreed rate as permanent employees which gave rise to various statutory entitlements as full-time employees, including payment at overtime rates when working more than 50 hours per week. Again broadly speaking, the case that TRA seeks to advance in response is that the agreement provided for a form of banking arrangement whereby the employees received payments as continuous employees even though the nature of their work was variable because it involved undertaking shutdown maintenance under contracts secured by TRA. The work was fly in fly out with periods of work followed by periods without available work. It is said by TRA that the contract effected a form of averaging of payment over the year with an adjustment at year end. TRA says that the agreed rate included a loading to cover annual leave and other benefits that might otherwise have applied.
2. There are also claims by the applicants that when they came to assert what they say were their rights under the agreements they were discriminated against by being stood down and being offered reduced hours of work by TRA. It is claimed that TRA's conduct amounted to unlawful adverse action in contravention of the *Fair Work Act*. It is also said that TRA failed to keep proper records and that its conduct contravened other provisions of the *Fair Work Act*. The conduct of TRA is said to be such that pecuniary penalties should be ordered and that they should be paid to the applicants.

## The admission concerning formation of the Contracts

1. In the claim by Mr Rochecouste it is alleged that he was employed under a permanent full-time contract of employment which is defined as the Contract. Then there is the following plea in para 9 of the claim:

The Contract was formed on or around 20 February 2018 when Mr Rochecouste signed a letter of offer and employment agreement from TRA dated 19 February 2018.

**Particulars**

The letter of offer and employment agreement was signed on behalf of TRA by Mr Fairbrother.

1. The equivalent plea in the case advanced by Mr Atwell is in para 10 and is as follows:

The Contract was formed on or around December 2017 when Mr Atwell signed a letter of offer and employment agreement from TRA dated 4 December 2017.

**Particulars**

The letter of offer and employment agreement was signed on behalf of TRA by Mr Fairbrother.

1. In each case, the existing defence by TRA states:

The respondents admit paragraph 9 [or 10 in the case of Mr Atwell] of the statement of claim.

1. It may be noted that the principal focus of the plea in each claim is an allegation concerning the time when the Contracts were formed. There is no express claim that the letter of offer was itself a document that had operative effect as part of the Contract as formed. Rather, the reference to the alleged signing of a letter of offer and employment agreement is to identify the event which fixed the time when the Contract was formed.
2. It is said by the applicants that the form of the present defence in each case is an admission that the covering letter formed part of the Contract. In effect, it is said that the description in the letter that the contract provided 'a guaranteed annual salary' operated with contractual force and was not merely part of the letter enclosing the proposed employment agreement.
3. It was submitted for the applicants that in the above circumstances, the case for the applicants was being run on the basis that it was admitted that the contract contained a term to the effect that there was to be a guaranteed annual salary because that was stated in the covering letter in each case. If that be so, I do not see how it might have been induced by the form of the defence as a whole. Elsewhere in the defences in each case the respondents plead the existence of an inferred exception to the effect that any obligation to provide work was subject to TRA having sufficient work and that there was an obligation under cl 4.5 of the agreement to repay any overpayment of wages where the employee had worked less than the annual contract hours. There is also a cross-claim for repayment of what was said to have been overpayment that relied upon cl 4.5.
4. Further, a separate express plea by the applicants that relies upon the terms of the letter to support a claim that there must be a minimum fortnightly payment as 'guaranteed salary' (in para 13(c) (Rochecouste) and para 14(c) (Atwell) of the claims in each case) is met by a plea that relies upon cl 4.5.
5. The way in which the relevant allegation is pleaded in each of the claims is to frame an allegation as to when the Contract was formed. There is no dispute between the parties that in fact the letters of offer were not themselves signed by either of the applicants (as is alleged). To the extent that the allegation in the claim might be said to be a plea to the effect that the letter of offer had contractual force, it is relatively obscure.
6. Given the content of the defences as a whole, the significance of the issue in relation to 'guaranteed payment' and the express reliance upon cl 4.5 it would be inconsistent with the form of the existing defences as a whole to construe the current form of plea in response to the allegation about the formation of the Contract as an admission that the letter had force as a contractual instrument and, in particular, that the reference to guaranteed annual salary operated as a term of the contract.
7. The proposed amendment is to deny the paragraph and to refer to the earlier parts of the defence which set out the case of the respondents as to the terms of the Contract. This form of plea would withdraw the admission that the Contract was formed on the date as pleaded. There was no submission to the effect that the respondents intended to withdraw that part of the admission. Leave should not be given to deny the existence of the Contract.
8. In the circumstances, I indicate that in my view the respondents have explained why it is appropriate to clarify the ambiguity in the defences created by the current form of the plea concerning the letter. It is, in effect, an error brought about in part by the rolled-up form of the plea by the applicants. I do not accept that there would be any real prejudice to the applicants if the defences were amended to make clear that the respondents do not admit that the covering letter had contractual force. I accept the submission for the respondents to the effect that to refuse the amendment on the basis that the existing plea somehow operated as an admission that the letter had contractual force would mean that a matter at the heart of the dispute between the parties would be dealt with on a basis that did not reflect the genuine nature of the dispute between them.
9. It was suggested that there might be a need for the applicants to raise some form of representational claim in the alternative to support their case if the amendment was allowed. In that regard, I note that even if the covering letter had contractual force it did not follow that the claim as to how the letter and the employment agreement terms should be construed would be accepted. Yet, despite that uncertainty, the applicants have not pursued such a basis for their claims up until now.
10. For those reasons, I would allow an amendment to the extent that its purpose was to make clear that the respondents do not accept that the letter had contractual force but which maintained the admission as to the formation of the Contract in each case.

## Proposed new allegation that the applicants were offered work that they did not take up

1. The applicants claim that they were stood down on or around 3 April 2020. They say that the circumstances in which employees might be stood down did not apply. They also claim that despite being stood down they have continued to be rostered for work and have provided service under their respective Contracts.
2. In response to the stand down claims, the defences admit the claims about the applicants being stood down save to say that certain work was cancelled or postponed that impacted on the availability of work, 'alternatively the applicant was not a suitable candidate for the particular jobs, alternatively the applicant rejected a number of jobs that were offered to him'. Plainly, these pleas relate to the time leading up to the stand down.
3. The current defence for the claim by Mr Rochecouste provides no particulars of the allegation that jobs were rejected. It is proposed to introduce specific allegations that relate to rejecting jobs that were to be undertaken in the period from 23 March 2020 to 26 May 2020.
4. I accept the submission for the respondents that these pleas are no more than the detailed articulation of an existing claim. Therefore, the amendments to introduce proposed new paragraphs 20(c) and (d) to the defence of Mr Rochecouste should be allowed.
5. However, in addition, in both defences it is proposed to add a plea expressed in the following terms (as new para 2(o)):

In the alternative, deny paragraphs 2(d) - 2(j) of the statement of claim and say that the applicant repeatedly declined to work hours he had [been] paid for and took leave for periods greater than what he was entitled to as particularised in schedule 2.

1. To the extent that this (and other proposed amendments) seek to raise a claim that the applicants throughout the course of their employment (being for a number of years) took leave for periods that were greater than that to which they were entitled, I determined in the course of the hearing that amendments to that effect should not be allowed. They introduced an entirely new issue.
2. However, as has been explained, the existing plea included a general allegation (in the context of the stand down allegation) that the applicants had rejected work that was offered to them.
3. The qualifying words to the proposed new plea in para 2(o) refer to schedule 2. It emerged in the course of argument that it was intended to rely upon particulars in schedule 2 to support the general claim that the applicants repeatedly declined to work hours they had been paid for by TRA. Schedule 2 is also part of the proposed amendment to the defences. It also has significance for the cross-claim.
4. The existing cross-claim says, in effect, that TRA overpaid each of the applicants because they worked less hours than the hours for which they had been paid. The respondents claim that cl 4.5 of the Contract in each case entitled TRA to a reimbursement of such 'overpayments' and the extent of those overpayments is currently set out in schedule 2.
5. The amendments propose a new formulation of the cross-claim in the following terms:

The respondents repeat paragraphs 2(c)(iii) and 25 above and say that pursuant to clause 4.5 of the Agreement the applicant is obliged to repay TRA the payments made to him for hours he did not work or in relation to leave he took that he was not entitled to set out in Schedule 2 of this statement of claim.

1. Again, it may be noted that this brings together two types of claims, those for hours not worked and those for leave taken to which the applicants were not entitled. As to the latter, the amendment has not been allowed. As to the former, it appears to be confined to a claim of the kind articulated in the existing defence, namely that the applicants worked for less hours than they were paid and the overpayments must be repaid. So much was confirmed by counsel for the applicants.
2. However, the proposed new schedule 2 has additional information in Table 2. It specifies a value for 'Site Hours Offered but declined' for each of 2018, 2019, 2020 and 2021. These figures are not used to determine the amount of the cross‑claim which is based on the actual hours worked compared to the hours for which payment was made.
3. Therefore, the extent of the alleged hours offered but declined appears to serve some other purpose which is not evident and was not explained. It may be that it is alleged to have significance for decisions taken by TRA, but if so that significance is not apparent from the terms of the proposed defence. As has been noted there are some details provided in the defences about precise instances where the applicants were offered work but declined to take it. That appears to relate to the immediate circumstances of the stand downs.
4. The written submissions by the respondents in support of these amendments that would raise a case as to issues that extend back over a number of years seek to justify the amendments in the following way:

The Respondents should be allowed to amend their defences to refer to work refusals, so that the Court may have a proper understanding of the surrounding circumstances regarding the hours worked and not worked. In particular:

(a) that the Applicants contributed to any alleged underpayments (which are denied in any event); and

(b) the unreasonable nature of their claims, in that in some instances they want to be paid or hours that they actually refused to work.

1. Claims of that kind are not evident from the proposed amendments. If there are claims made in the alternative to the effect that if the applicants' claims are accepted then the calculation of their claims should be undertaken in a particular way by reference to particular facts then it should be pleaded in that way. The pleading as proposed and the reference to proposed Table 2 of schedule 2 is obscure. It invites further disputation to articulate precisely what is said and will also invite investigation by way of discovery of documents relating to the work that was allegedly offered to the applicants over a four year period. It is not supported by the existing plea which is confined to part of the explanation for the stand downs.
2. To the extent that the claim made is that the actions taken by TRA in about April 2021 were somehow justified by what had occurred over previous years in relation to available work and whether work was declined, it would open up a very significant new aspect to the case if those matters were to be investigated at this stage of the proceedings. The addition of a claim of that kind would be likely to delay the matter considerably. It would do so in circumstances where the precise use to which such matters are to be put in defence of the claim is not apparent from the terms of the proposed amended defence.
3. For those reasons, the application to amend to include the very general claims about hours of work offered but not taken up should not be allowed.

## Admissions of allegations of adverse action

### The relevant pleadings and proposed amendment

1. As to adverse action, the claim by Mr Rochecouste includes the following pleas:
2. On or around 3 April 2020 Mr Halstead purported to stand down Mr Rochecouste, an event defined as 'Purported Stand Down' (para 24).
3. TRA has engaged in the Purported Stand Down in relation to Mr Rochecouste but has not purported to stand down other Operations Supervisors employed by TRA, conduct defined as 'Stand Down Discrimination' (para 49(a)).
4. By reason of the Stand Down Discrimination TRA discriminated between Mr Rochecouste and other employees and therefore took adverse action against Mr Rochecouste within the meaning of the *Fair Work Act* (para 50(a)).
5. TRA engaged in the Stand Down Discrimination because of Mr Rochecouste's claim to be entitled to be paid his fortnightly salary in full (para 51(a)(i)).
6. TRA engaged in what is defined as the Reduction in Hours Discrimination because of Mr Rochecouste's claim to be entitled to be paid his fortnightly salary in full or alternatively because of complaints made by Mr Rochecouste which was a contravention of the *Fair Work Act* that has caused him to suffer loss and injury (para 52).
7. Mr Halstead organised the purported Stand Down and thereby took adverse action against Mr Rochecouste (para 75(a)).
8. Mr Halstead organised the Purported Stand Down because of Mr Rochecouste's claim to be entitled to be paid his fortnightly salary in full (para 75(b)(i)).
9. Mr Halstead organised the Stand Down Discrimination and thereby took adverse action against Mr Rochecouste (para 76(a)).
10. Mr Halstead did so because of Mr Rochecouste's claim to be entitled to be paid his fortnightly salary in full (para 76(b)).
11. Similar pleas appear in the proceedings brought by Mr Atwell.
12. As to these pleas, the existing defences by the respondents:
13. Expressly admit the matters in (1) but does so on the basis that there were reasons for the stand down (as quoted above, namely jobs were cancelled that impacted the available work, alternatively the applicant was not a suitable candidate for the particular jobs, alternatively the applicant rejected a number of jobs that were offered to him);
14. Expressly admits the matters in (2) to (4), (6) to (7) and (9).
15. Does not admit the matters in (5).
16. Does not plead to the matters in (8).
17. By the Proposed Pleadings, the respondents seek to maintain the plea in (1), admit the allegation in (2), but otherwise withdraw these pleas and substitute denials in each case. In that regard it may be noted that although there is no plea to the matter in (8), it is implicitly admitted by the plea in (9) to the effect that the conduct was engaged in for the reason alleged (and the equivalent plea against TRA is admitted).

### The explanation by the respondents concerning the admissions

1. The respondents provide no explanation as to why these particular matters were admitted when the case that the respondents now seek to advance is a denial of the allegations. Rather, the evidence speaks more generally to the admissions in the existing defences and the circumstances in which those defences came to be prepared.
2. It is to be noted that the respondents always had a case that claimed that there were reasons for the discrimination. However, the existing pleas admit that the stand down was a contravention and amounted to adverse action. In effect, the respondents now seek to claim that there was no relevant workplace right affected by the stand down and the decision was based on the reasons that applied to the discrimination claim (which were not prohibited reasons). In that respect, they do seek to withdraw an admission concerning the reasons for the stand down, but do so in a very specific context where the reasons to be relied upon have been maintained as part of the defence in relation to related conduct as to the allocation of work.
3. Ms Marnie Robinson, the current in-house counsel for TRA has deposed to the following matters:
4. TRA's in-house counsel at the time that the defences were prepared is on maternity leave.
5. Ms Robinson commenced as in-house counsel from 22 April 2021.
6. At the time she commenced a document was being prepared by Mr Halstead to assist 'in better understanding the facts regarding the allegations made by the Applicants' and in order to prepare that document Mr Halstead was undertaking a review of the business records relating to the employment of the applicants.
7. In or around late May 2021 she received the document (referred to as the Schedule) which was included in an affidavit of Mr Halstead. It may be observed that the document takes the form of two detailed spreadsheets (one for each of the applicants) notated with hours and amounts and contains no information by way of factual narrative of the relevant events.
8. The history of the engagement of external solicitors and counsel by TRA which indicated that former solicitors and counsel had become unavailable.
9. Ms Robinson undertook investigations, deposed to as 'I (in conjunction with [the external solicitors])':

(a) reviewed a number of business documents and records of [TRA] including the Schedule …;

(b) interviewed [Mr Halstead] on a number of occasions regarding his recollection of the allegations made by the Applicants' in their amended statement of claim and respective affidavits; and

(c) interviewed [the managing director of TRA's parent company] regarding his recollection of the allegations made by the Applicants in their amended statement of claim.

1. A number of documents were collected as part of her investigations, referred to (together with the Schedule) as the New Material Evidence.
2. The outcome of the investigations was as follows:

From my review of the New Material Evidence together with the original defence, I formed the view that as the New Material Evidence only became known or fully understood to the Respondents on or around late May 2021, the original defence did not reflect this New Material Evidence.

Given the discovery the New Material Evidence, I was advised by HLS Legal and Mr Jason Raftos, that parts of the original defence as previously filed were inconsistent with and did not support the New Material Evidence. There should also be amendments.

1. She has spoken to the former in-house counsel and former external solicitor and says that it is her understanding that they 'were unaware that, under the Federal Court Rules, where an allegation had not been expressly admitted or denied it would constitute a deemed admission'.
2. Amendments are sought to more accurately describe the respondents' defences and cross-claims.
3. It may be noted that Ms Robinson provides no evidence at all about the circumstances in which the express admissions in the existing defences came to be made. There is no evidence given as to what instructions were provided or how those significant admissions came to be included. There is simply no explanation at all. Nor is there any attempt to explain or identify how the New Material Evidence differed from that which was used to prepare the existing defences and how it might be relevant to the express admissions.
4. Mr Michael Baldwin, the current solicitor acting for the respondents, has also provided an affidavit. He has deposed to the following matters that are relevant for present purposes:
5. He is informed by Ms Robinson that she has spoken to her predecessor as in-house counsel and has been told by her predecessor that 'she was not instructed by TRA to admit breaching the Fair Work Act or Regulations and nor did she instruct the solicitor on the record or counsel to admit such contraventions' and she 'provided no explanation why such (extraordinary) admissions were made' and as she is on maternity leave it is difficult for her to assist further.
6. He has spoken to the former external solicitor for the respondents and he understands that it is her position that she relied on the former barrister in relation to pleading the defences and 'at the time of drafting the original defences there was a lack of information or evidence available to TRA to assist in responding to the claims'.
7. When he spoke to the former external solicitor 'she provided not [sic] explanation why such (extraordinary) admissions were made as to breaching the Fair Work Act or Regulations'.
8. There was a reluctance on the part of the predecessor in-house counsel and former external solicitor to provide information 'for fear of waiving privilege'.
9. In a brief conversation with the former barrister he was told by the former barrister that 'the original defences were drafted based on all the information he had available to him at the time (November 2020)'.
10. As to the why the admissions were made:

To date, neither I nor TRA's current in-house counsel, or anyone on behalf of TRA (to my knowledge) have been able to have a detailed conversation with any of TRA's former legal advisors to ascertain the reasons why they drafted the original defences in the manner in which they did and in particular why admissions as to contraventions of the Fair Work Act were made.

In particular I have been unable to ascertain why the Respondents admitted:

(a) the 'adverse action' breaches; and

(b) the contraventions about employment records.

I have been unable to obtain an explanation as to these two classes of admissions from anyone within TRA.

1. It may be noted that since at least early May 2021, Mr Baldwin as the current solicitor has been seeking to amend the defences. He has been aware that the changes proposed include the withdrawal of admissions. He has been aware since about mid-July that the amendments are opposed. Since 6 August 2021 at the latest, when he received the reasons as to why the previous application to amend was unsuccessful he has been aware of the need for the respondents to meet the well‑established requirement that there must be an adequate explanation before leave to withdraw admissions will be given. Further, the approach generally adopted is that the explanation must be a sensible one based upon evidence that is of a solid and substantial character.
2. The respondents have had ample opportunity to provide an explanation. To the extent that there is evidence from counsel briefed at the time the defences were prepared it is to the effect that the defences reflected the instructions at the time. There is no evidence of any attempt to impress upon former counsel the significance of the issue so as to obtain more detail. There is no evidence from Mr Halstead or the former in-house counsel who remains an employee of TRA (albeit on maternity leave) as to the instructions that were provided at the time of preparation of the present defences.
3. Notably, there is no evidence to suggest that there were reasons why instructions could not be provided at the time the original defences were provided or how it might be that the admissions concerning the reasons for the stand down and the involvement of Mr Halstead in the stand down might be made.
4. It appears to be suggested in a general way by a hearsay account that counsel may have made the admissions without instructions at least to the extent that the defences extend to the making of express admissions of contravention. In that regard it is to be noted that the pleading of the admission of the contravention is expressed in the following terms:

The respondents admit [the relevant paragraph] and the corresponding contravention but otherwise deny the balance of [the paragraph].

1. It may also be noted that at other points a 'do not admit' form of plea is adopted which reinforces the deliberate form of the plea.
2. Plainly, the plea admitting the contravention was a considered one made expressly. Therefore, the suggestion that counsel took the step of admitting certain of the contraventions alleged without adequate instructions as to the facts or contrary to instructions is a serious one. It should not be lightly inferred that such were the circumstances at the time the defences were prepared.

### The submissions advanced by the respondents

1. The first point advanced by the respondents to support the proposed amendments withdrawing the admissions relies upon the way in which the parties approached the preparation of statements of material facts.
2. On 4 March 2021, case management directions were made requiring the applicants to file a statement 'setting out in chronological order the material narrative facts contended for in support of the claim'. The respondents were directed to file a response indicating which of those facts were agreed and stating any additional facts.
3. Unfortunately, the applicants chose instead to file a document that simply recast the pleading. Instead of providing a narrative of facts in descriptive terms, the document stated the legal characterisation of the claim by reference to the statutory provisions in a way that failed to conform to the direction in any real sense. The statement of facts restated the allegation of stand down said to have occurred on 3 April 2020. It then proceeded to include the following:

20. In the alternative to paragraphs 18.b), 18.c) and 20:

a) the Purported Stand Down; or in the alternative,

b) the Stand Down Discrimination; or in the alternative,

c) the Reduction of Hours Discrimination;

caused Mr Rochecouste loss, equal to the Salary Underpayments and Superannuation Underpayments.

21. The:

a) Salary Underpayments; and

b) Superannuation Underpayments; and

c) Guaranteed Hours Breaches; and

d) Stand Down Discrimination; and

e) Reduction of Hours Discrimination;

has caused Mr Rochecouste injury by way of anxiety, stress, hurt and humiliation.

22. Mr Halstead tacitly or impliedly authorised:

a) the Purported Stand Down;

b) the s.323 Salary Underpayment Contraventions; and

c) the s.323 Superannuation Underpayment Contraventions.

23. TRA:

a) tacitly or impliedly authorised:

i) the s.323 Salary Underpayment Contraventions; and

ii) the s.323 Superannuation Underpayment Contraventions;

b) engaged in the s.323 Salary Underpayment Contraventions as part of a systematic pattern of conduct that related to Mr Rochecouste and Mr Atwell;

c) engaged in the s.323 Superannuation Underpayment Contraventions as part of a systematic pattern of conduct that related to Mr Rochecouste and Mr Atwell.

24. By reason of the Purported Stand Down, TRA:

a) injured Mr Rochecouste in his employment; and in the premises,

b) took adverse action against Mr Rochecouste within the meaning of that term in Item 1(b) in s.342(1) of the FW Act.

25. By reason of:

a) the Stand Down Discrimination; and

b) the Reduction of Hours Discrimination;

TRA discriminated between Mr Rochecouste and other employees, and therefore took adverse action against Mr Rochecouste within the meaning of that term in Item 1(d) in s.342.(1) of the FW Act.

26. TRA engaged in:

a) the Purported Stand Down; and

b) the Stand Down Discrimination; and

c) the Reduction of Hours Discrimination;

because of:

d) Mr Rochecouste's Payment in Full Right; and, or in the alternative,

e) Mr Rochecouste's complaints referred to in:

i) paragraph 13; and, or in the alternative,

ii) paragraph 15.

1. In response to the claim about the stand down, the respondents admitted that it had occurred but said that it ceased on 14 April 2020. As to the paragraphs quoted above, the respondents' statement in response said 'these paragraphs do not contain facts' and the respondents 'deny the alleged contraventions contained therein'.
2. The applicants filed a reply to the respondents' document. It included the following:

As to paragraph 17, 21 and 23 of the RSMF, the Applicant:

a) says that on 14 April 2020 the applicant was offered work to commence on 24 April 2020;

b) denies the purported Stand Down ceased on 14 April 2020;

c) the purported Stand Down included the suspension of the minimum Fortnightly Salary;

d) despite rostering the applicant for work, TRA purported to maintain the purported Stand Down, including the suspension of the minimum Fortnightly Salary;

e) TRA never notified the Applicant that the purported Stand Down had ceased.

1. The respondents say that in doing so, the applicants raised no objection to the effect that the respondents had departed from their pleaded case. They simply dealt with the material facts on the basis that the respondents now denied the contraventions. Thereafter, the applicants filed the evidence upon which they proposed to rely. In those circumstances, the applicants were proceeding to the hearing (then still scheduled for July) on the basis that the contraventions were denied. The respondents say that it was only when they sought to make broader changes to their defences that the issue in relation to withdrawal of the admission was raised by the applicants.
2. The above sequence is relied upon to demonstrate that there would be no prejudice to the applicants if the admissions were withdrawn because they have, until the issue was raised in relation to more general amendment, been content to deal with the case on the basis that the contraventions are not admitted.
3. There is much to be said for this submission and it was not answered in any substantive way by counsel for the respondents.
4. Second, the respondents point to the substantive basis upon which they seek to dispute the contraventions. They say that if leave is not given then the true position in relation to their defence will not be able to be advanced and that serious allegations of contravention would be proven in circumstances where the contravention is to the effect that in-house counsel did not provide instructions to admit the contraventions.
5. For the applicants it is said that there has been no adequate explanation, especially given the evidence that former counsel prepared the defences based upon his instructions.

### Leave to amend should be allowed

1. In determining whether to grant leave, the overriding consideration is the interests of justice. The principles that have been developed are not absolute rules. They are matters which are considered to be appropriate to guide an assessment of the interests of justice in any case where an admission is sought to be withdrawn. The principle to the effect that there must be an adequate explanation before an admission may be withdrawn is well established. There is likely unfairness and injustice if a party can change its case in that way. Nevertheless, it is necessary to have regard to the circumstances of the particular case in deciding where the interests of justice may lie.
2. In this case, I am persuaded that it is significant that there has been a period of time in which the applicants dealt with the case on the basis that the contraventions were denied and did so without objection. Also, it is not articulated how there is any real prejudice to the applicants if the admissions are allowed to be withdrawn given that they seek to rely upon matters that are already in issue. It has also been demonstrated that there is a real basis for a controversy as to whether there is a contravention. Resolution of that controversy has not been shown to be a matter that will result in further delay. Finally, in some respects, what is sought to be withdrawn is a legal admission (that the facts amount to a contravention) and in part what the respondents now seek to claim is that the stand down did not affect any work place right as a matter of law given the nature of the terms of employment.
3. Against this must be balanced the state of the evidence concerning the admissions. It is evidence that would not be adequate were the context to be different. However, in circumstances where all other considerations are in favour of leave and there is some evidence which suggests that the content of the plea did not reflect instructions, I am satisfied that the interests of justice support the grant of leave to withdraw the admissions of contravention (as listed above).

## The extent to which the application is allowed

1. As I have indicated, in the course of the hearing of the application I determined that certain of the proposed amendments should be allowed and that other proposed amendments should not be allowed. Having regard to those determinations and these reasons, the application to amend the defences will be allowed to the following extent:
2. Amendments to add references in the defence to those paragraphs where the matters pleaded in paragraphs 2(b) and (c) of the defence are relied upon as part of the answer to a particular plea in the claim.
3. Amendments to deny that the letter of offer had contractual effect.
4. Amendments to introduce a new claim by way of defence to the effect that there was leave taken to which the applicant was not entitled.
5. Amendments to introduce proposed new paragraphs 20(c) and (d) to the defence of Mr Rochecouste.
6. Amendments to withdraw the admissions of contravention by taking unlawful adverse action (as described in these reasons).
7. Amendments relating to the period of notice to be given of work (to take the form of introducing the proposed new paragraph 10(c)).
8. Amendments to deny contravention of s 557A of the *Fair Work Act*.
9. Amendments to schedule 2 to introduce Table 1 (but not Table 2).
10. Amendments to pleadings where there is no express plea in response because the pleading is in the form 'do not admit' or in the form of an objection to the plea in the claim without a substantive answer.
11. Amendments to correct typographical errors (as identified in the written submissions for the respondents).

## The statements of material facts

1. The course of the hearing of the present application has exposed the unsatisfactory terms in which the applicants prepared the statement of material facts. They are not in the form contemplated by the direction. Rather than assist, they confuse by taking the form of an alternate pleading. In order to ensure no further confusion in the conduct of the proceedings I will formally direct that the statements of material facts be disregarded in the conduct of the final hearing. Counsel for the applicants proposed that conferral between counsel for the purpose of preparing an agreed list of issues would be more productive way of proceeding. I encourage the parties to explore that possibility.

## Costs occasioned by the amendments

1. The application was brought on the basis that the respondents accepted that they must bear the costs occasioned by the amendments. As I have indicated, the submission was made on the basis that any such order would cover both costs thrown away and additional costs of dealing with new claims. It follows that there should be the usual order that the costs thrown away by reason of the amendments be borne by the respondents. However, as I have noted the precise extent to which liability for further costs was accepted was unclear. In material respects (relating to hours offered and not taken and the matters pleaded in schedule 2) the proposed amendments have not been allowed. In my assessment, it is those aspects that might have had the greatest propensity to cause significant delay and additional cost.
2. In the circumstances, I will also order that the respondents do pay the applicants' costs of the application to amend, such costs to be assessed by a registrar if not agreed and to be paid forthwith. I take those costs to be included in what the respondents proposed. Even if they were not so included, I am satisfied, on the evidence, that the respondents' unreasonable omission in ensuring that matters were properly investigated and instructions provided at the time of preparation of the original defences and in failing to properly formulate their application for amendment resulting in two applications to amend and a number of iterations of the proposed amendments are matters that justify such orders under s 570(2)(b) of the *Fair Work Act*. Otherwise, I will reserve liberty to the applicants to apply in relation to any further costs order.

## Conclusion

1. The application for leave to amend has been successful in part. There should be orders requiring the respondents within seven days to file minutes of amended defences. Within seven days thereafter the applicants should indicate any respect in which they object to the terms of the amendments by filing short written submissions of no more than five pages identifying any respect in which the amendments are alleged to go beyond these reasons. If such submissions are filed the respondents should have seven days to file any submissions in response also limited to five pages. Any such issues will be determined on the papers. There will be orders for costs as indicated and an order to deal with the statements of material facts.

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| I certify that the preceding eighty-seven (87) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 28 September 2021