FEDERAL COURT OF AUSTRALIA

Linfox Australia Pty Ltd v Fair Work Commission [2013] FCAFC 157

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| Citation: | Linfox Australia Pty Ltd v Fair Work Commission [2013] FCAFC 157 |
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| Parties: | **LINFOX AUSTRALIA PTY LTD v FAIR WORK COMMISSION and GLEN STUTSEL** |
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| File number: | NSD 1623 of 2012 |
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| Judges: | **DOWSETT, FLICK AND GRIFFITHS JJ** |
|  |  |
| Date of judgment: | 13 December 2013 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW** – unfair dismissal – order for reinstatement – no jurisdictional error in decision of Full Bench **ADMINISTRATIVE LAW –** no failure to entertain submissions made – no failure to resolve submissions as to inconsistencies in evidence – right to free speech  |
|  |  |
| Legislation: | *Fair Work Act 2009* (Cth) ss 385, 387, 390, 391, 394, 400, 562, 563, 570, 604, 607*Federal Court of Australia Act 1976* (Cth) ss 21, 22, 23*Judiciary Act 1903* (Cth) s 39B  |
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| Cases cited: | *Australasian Meat Industry Employees’ Union v Fair Work Australia (No 2)* [2012] FCAFC 103, 203 FCR 430*Australian Postal Corporation v Gorman [2011] FCA 975, 196 FCR 126* *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194*Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54, 192 FCR 78 *Commissioner of Taxation v Glennan* [1999] FCA 297, 90 FCR 538, 99 ATC 4467, 41 ATR 413 *Culley v Australian Securities and Investments Commission* [2010] FCAFC 43, 183 FCR 279*Donaldson v NSW National Parks and Wildlife Service* (1997) 74 IR 168*Federal Commissioner of Taxation v Raptis* (1989) 19 ALD 726*Fox v Australian Industrial Relations Commission* [2007] FCAFC 150*House v The King* (1936) 55 CLR 499*Lovell v Lovell* (1950) 81 CLR 513*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16, 240 CLR 611*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1, 211 CLR 441*Reece v Webber* [2011] FCAFC 33, 192 FCR 254*Soliman v University of Technology, Sydney* [2012] FCAFC 146, 207 FCR 277*Tuitaalili v Minister for Immigration and Citizenship* [2012] FCAFC 24*WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184, 75 ALD 630*WAFP v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 319  |
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| Date of hearing: | 6 and 7 May 2013 |
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| Date of last submissions: | 9 May 2013 |
|  |  |
| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 93 |
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| Counsel for the Applicant: | Mr A Moses SC with Mr J Murphy |
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| Solicitor for the Applicant: | K & L Gates |
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| Solicitor for the First Respondent: | The First Respondent filed a submitting appearance |
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| Counsel for the Second Respondent: | Mr M Gibian with Mr A Howell |
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| Solicitor for the Second Respondent: | Maurice Blackburn |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | NSD 1623 of 2012 |

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| BETWEEN: | LINFOX AUSTRALIA PTY LTDApplicant |
| AND: | FAIR WORK COMMISSIONFirst RespondentGLEN STUTSELSecond Respondent |

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| JUDGES: | DOWSETT, FLICK AND GRIFFITHS JJ |
| DATE OF ORDER: | 13 DECEMBER 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The name of the First Respondent be changed to the Fair Work Commission.
2. The parties are to bring in short minutes of orders to give effect to these reasons within 21 days.

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

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| BETWEEN: | LINFOX AUSTRALIA PTY LTDApplicant |
| AND: | FAIR WORK COMMISSIONFirst RespondentGLEN STUTSELSecond Respondent |

**REASONS FOR JUDGMENT**

# THE COURT

1. Mr Glen Stutsel has worked as a truck driver for Linfox Australia Pty Ltd (“Linfox”) since April 1989.
2. From about February 2011 and continuing until at least May 2011 Mr Stutsel posted a number of comments on his Facebook page about Linfox, the staff of Linfox generally and, specifically, about two of his managers – Mr Michael Assaf and Ms Nina Russell.
3. A number of Mr Stutsel’s Facebook “*friends*” commented on these posts and these comments were not removed by Mr Stutsel.
4. Ms Russell accessed this material on 13 May 2011. The privacy settings for Mr Stutsel’s Facebook page were such that any person with a Facebook account could view the information on his page. As such, although Ms Russell was not “*friends*” with Mr Stutsel, she was able to view the comments displayed on his page. She found the comments to be offensive. She made a complaint that evening to the Group Manager Workplace Relations at Linfox, Ms Gaylynne Neill. Ms Neill met with Ms Russell to discuss her complaint on 16 May 2011 and interviewed Mr Stutsel on 20 May 2011.
5. On 31 May 2011 Linfox terminated Mr Stutsel’s employment. The letter giving notice of his termination stated the reasons for his dismissal as follows:

1. on your Facebook profile page, which was open to the public, you made a number of statements about one of your managers, Mick Assaf, that amounted to racially derogatory remarks;

2. on your Facebook profile page, which was open to the public, you made a statement about one of your managers, Ms Nina Russell, which amounted to sexual discrimination and harassment; and

3. you made extremely derogatory comments about your managers, Mr Assaf and Ms Russell.

1. Mr Stutsel then applied for a remedy pursuant to s 394 of the *Fair Work Act* *2009* (Cth) (*Fair Work Act*). He alleged “*unfair dismissal*”, as that expression is defined in s 385. On 19 December 2011 a Commissioner of Fair Work Australia (as the Fair Work Commission was then called) concluded that the dismissal had been unfair and (*inter alia*) ordered reinstatement: *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444, 217 IR 28. Those orders were stayed on 22 December 2011. A *Notice of Appeal* was filed on 20 December 2011. “*Permission*” to appeal to the Full Bench of Fair Work Australia was granted. The appeal was dismissed in October 2012: *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097, 217 IR 52.
2. Linfox now seeks judicial review of the decision of the Full Bench of Fair Work Australia. It was determined that the appeal should be heard by a Full Court of this Court.
3. It is concluded that no jurisdictional error is exposed in the reasoning of the Full Bench of Fair Work Australia.

### The application for a remedy and the appeal process

1. The decision-making process whereby the decisions of the Commissioner and the Full Bench were taken should briefly be set forth.
2. Statutory provisions with respect to “*unfair dismissal*” are contained within Part 3-2 of the *Fair Work Act*. Since the date when the facts giving rise to the cause of action occurred, amendments have been made to the *Fair Work Act*, including references to reflect the change in name from Fair Work Australia to the Fair Work Commission. All references to the statutory provisions below are those in force at the relevant time.
3. Within Part 3.2, s 394 provided that a person who had been “*dismissed*” may make an application for a remedy to Fair Work Australia. The phrase “*unfair dismissal*” was defined in s 385 as follows:

**What is an unfair dismissal**

A person has been unfairly dismissed if FWA is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Section 390 confers a discretionary power to order reinstatement. That section thus provided as follows:

**When FWA may order remedy for unfair dismissal**

(1) Subject to subsection (3), FWA may order a person's reinstatement, or the payment of compensation to a person, if:

(a) FWA is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) FWA may make the order only if the person has made an application under section 394.

(3) FWA must not order the payment of compensation to the person unless:

(a) FWA is satisfied that reinstatement of the person is inappropriate; and

(b) FWA considers an order for payment of compensation is appropriate in all the circumstances of the case.

Section 391 provides for the form of an order for reinstatement. The Commissioner’s decision in the present case was that Mr Stutsel’s dismissal had been “*harsh, unjust and unreasonable*” and he made orders pursuant to s 391.

1. Section 604 thereafter provides for the circumstances in which an appeal may be made. That section provided as follows:

**Appeal of decisions**

(1) A person who is aggrieved by a decision:

(a) made by FWA (other than a decision of a Full Bench or the Minimum Wage Panel); or

(b) made by the General Manager (including a delegate of the General Manager) under the *Fair Work (Registered Organisations) Act 2009*;

may appeal the decision, with the permission of FWA.

(2) Without limiting when FWA may grant permission, FWA must grant permission if FWA is satisfied that it is in the public interest to do so.

(3) A person may appeal the decision by applying to FWA.

Section 400 qualifies s 604. Section 400 provided as follows:

**Appeal rights**

(1) Despite subsection 604(2), FWA must not grant permission to appeal from a decision made by FWA under this Part unless FWA considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by FWA in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

1. Section 607 is also relevant. It deals with the process for appealing a decision, as well as the powers of the Full Bench. It provided as follows:

**Process for appealing or reviewing decisions**

(1) An appeal from, or a review of, a decision of FWA or the General Manager may be heard or conducted without holding a hearing only if:

(a) it appears to FWA that the appeal or review can be adequately determined without persons making oral submissions for consideration in the appeal or review; and

(b) the persons who would otherwise, or who will, make submissions (whether oral or written) for consideration in the appeal or review consent to the appeal or review being heard or conducted without a hearing.

(2) FWA may:

(a) admit further evidence; and

(b) take into account any other information or evidence.

(3) FWA may do any of the following in relation to the appeal or review:

(a) confirm, quash or vary the decision;

(b) make a further decision in relation to the matter that is the subject of the appeal or review;

(c) refer the matter that is the subject of the appeal or review to an FWA Member (other than a Minimum Wage [Panel Member](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s12.html#minimum_wage_panel_member)) and:

(i) require FWA Member to deal with the subject matter of the decision; or

(ii) require FWA Member to act in accordance with the directions of FWA.

1. Where “*permission*” has been granted, an appeal is in the nature of a rehearing. The nature of the jurisdiction being exercised was explained by Gleeson CJ, Gaudron and Hayne JJ in respect to the former Full Bench of the Industrial Commission in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194 as follows:

[18] The Full Court was in error in thinking that the nature of an appeal under s 45 differs according to the nature of the decision under appeal. However, it was correct to hold that, in the case of a discretionary decision, the exercise by a Full Bench of the Commission of its powers under s 45(7) depends on the decision at first instance being attended by appealable error. …

[19] “Discretion" is a notion that "signifies a number of different legal concepts”. In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result”. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.

…

[21] Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in *House v The King* [(1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ] in these terms:

“If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.”

In thereafter seeking to distinguish between errors within jurisdiction and jurisdictional errors, their Honours went on to observe:

[32] In his reasons for decision, Giudice J proceeded on the basis that the Full Bench could intervene only if there was error on the part of Boulton J [the Commissioner at first instance]. In this his Honour was correct. Giudice J held that there was error on the part of Boulton J. If he was wrong in that view (a matter upon which it is unnecessary to express an opinion), that was an error within jurisdiction not an error as to the nature of the jurisdiction which the Full Bench was required to exercise under s 45 of the Act. Accordingly, it was not an error in respect of which relief could be granted by way of prohibition or mandamus under s 75(v) of the Constitution.

In explaining the nature of an appeal to the Full Bench, Kirby J there likewise observed:

[75] The appeal to the Full Bench under the present Act is by way of rehearing. However, it is not a hearing de novo. Absent a demonstration of error on the part of the member of the Commission whose decision or act is the subject of an appeal, it is not open to the Full Bench to quash or vary the decision or act concerned. …

See also: *Lambley v DP World Sydney Ltd* [2013] FCA 4 at [14] per Katzmann J.

1. No further statutory right of appeal is conferred from a decision of the Full Bench of Fair Work Australia to this Court. Section 562 of the *Fair Work Act*, however, provides that “*[j]urisdiction is conferred on the Federal Court in relation to any matter (whether civil or criminal) arising under this Act*”. Section 563 provides that jurisdiction is to be exercised “*in the Fair Work Division of the Federal Court”* in the circumstances there specified, including where *“a writ of mandamus or prohibition or an injunction is sought … against a person holding office under this Act*”. In common with both the initial *Originating Application* and the *Amended Originating Application*, the *Further Amended Originating Application* filed in Court on the first day of the appeal invoked the jurisdiction of this Court pursuant to s 39B of the *Judiciary Act* *1903* (Cth), ss 562 and 563 of the *Fair Work Act* and ss 21, 22 and 23 of the *Federal Court of Australia Act 1976* **(***Federal Court of Australia Act***)***.*
2. It is convenient to outline the reasons for decision by both the Commissioner and, on appeal, by the Full Bench of Fair Work Australia.

## Summary of Commissioner’s reasons

1. Mr Stutsel applied under s 394 of the *Fair Work Act* for a remedy for unfair dismissal. Evidence was given in the proceedings before the Commissioner by various witnesses, including Mr Stutsel, Mr Assaf and Ms Russell.
2. The Commissioner noted that there was no contest that the material providing the basis for the termination decision appeared on Mr Stutsel’s Facebook page and was contained in a series of conversations between him and others. The Facebook account had some 170 other persons with the status of “*friends*”, many of whom were Linfox employees.
3. Significantly, the Commissioner accepted Mr Stutsel’s evidence that his Facebook page was set up by his wife and daughter and that he believed it had been set up with the highest available privacy settings. The Commissioner also accepted Mr Stutsel’s evidence that he believed that comments posted on his Facebook page could only be viewed by his Facebook “*friends*” and that he was unaware that he could delete comments that other people posted on his Facebook page.
4. The Commissioner’s reasons contain a detailed summary of the evidence given in the proceedings. The Commissioner also summarised the parties’ respective submissions, which he described as “*broad-ranging*”.
5. The Commissioner acknowledged at [72] that he had to determine for himself “*whether the impugned conduct occurred and, if so, whether it amounted to a valid reason for termination of employment*” (see s 387(a) of the *Fair Work Act*). His findings included the following:
* Mr Stutsel’s comments about terrorism and the death of Osama bin Laden were an expression of his private views in a form that was not intended to be public. Although the comments were distasteful, Mr Stutsel had a right to free speech and his comments could not be characterised as a personal attack on Mr Assaf;
* Mr Stutsel’s reference to Mr Assaf as a “*bacon hater*” was in poor taste, but was not racially derogatory and was not intended to be hurtful;
* when the Facebook comments were read in sequence and as a whole, the exchanges had the flavour of “*a group of friends letting off steam and trying to outdo one another in being outrageous”* and *“a conversation in the pub or cafe, although conducted in an electronic format*”;
* some of the Facebook conversations concerned Mr Stutsel’s activities as a Transport Workers’ Union delegate, and, in that context, it was not surprising or unusual that some of the comments about Linfox managers was uncomplimentary;
* the comments of a sexual nature concerning Ms Russell were outrageous, but most of them were not made by Mr Stutsel but by others in the course of comments in a conversation on Mr Stutsel’s Facebook page;
* Mr Stutsel’s comments which triggered Ms Russell’s initial complaint might have been “*disgusting*”, but they were an attempt at humour and did not contain any credible threat to her wellbeing; and
* Linfox did not have a policy on the use of social media by employees.
1. The Commissioner concluded that Mr Stutsel was not guilty of serious misconduct in respect of the three matters set out in the termination of employment letter and that there was no valid reason for his dismissal.
2. The Commissioner then considered the other criteria set out in s 387 of the *Fair Work Act* as to whether Mr Stutsel’s dismissal was “*harsh, unjust or unreasonable*”. The Commissioner noted the differential treatment of Mr Stutsel as compared with other Linfox employees who had made offensive comments on Mr Stutsel’s Facebook page and against whom no disciplinary action was taken. The Commissioner also took into account Mr Stutsel’s employment record, age and job prospects and ultimately concluded that the dismissal was harsh, unjust and unreasonable.
3. In considering the appropriate remedy, the Commissioner had regard to ss 390 and 391 of the *Fair Work Act*. He concluded that reinstatement was practicable, desirable and appropriate. He found that Mr Stutsel was capable of resuming his duties at the National Distribution Centre and that he showed no rancour toward Linfox management. He said that he believed that the employee/employer relationship could be re-established provided that there was goodwill on both sides. He had no doubt that Mr Stutsel appreciated the foolishness of his comments and regretted the entire situation. He also noted that Mr Assaf was now based in Bangkok and there was no material to suggest that Mr Stutsel and Ms Russell were likely to come into contact with each other to any degree. The Commissioner also ordered that Mr Stutsel be compensated for lost wages for part of the period following his dismissal.

## Summary of Full Bench of Fair Work Australia’s reasons

1. The Full Bench of Fair Work Australia’s reasons for dismissing the appeal may be summarised as follows.
2. Citing *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 205, the Full Bench said that an appeal under s 604 of the *Fair Work Act* involves “*an appeal by way of rehearing*”, where the Full Bench may only exercise their powers if there is error on the part of the Commissioner.
3. The Full Bench also found that appeals against unfair dismissal decisions were different in two significant ways from other appeals. First, Fair Work Australia had to be satisfied that it was in the public interest to grant permission to appeal in respect of an unfair dismissal decision (s 400(1)). This is in contrast to the general position under s 604(2). Secondly, in an appeal concerning an unfair dismissal decision based on error of fact, the appeal can only *“be made on the ground that the decision involved a significant error of fact*” (s 400(2)).
4. On the issue as to whether there was a valid reason for terminating Mr Stutsel’s employment, the Full Bench concluded at [28] that, having “*carefully considered the evidence and material before the Commissioner and the submissions on appeal*”, the Commissioner’s decision that there was no valid reason for termination was “*reasonably open to him in the circumstances of the case and having regard to the context in which the conduct occurred and an overall assessment of the gravity of the conduct*”. The Full Bench found that no error of the kind referred to *House v The King* (1936) 55 CLR 499had been established. Senior Counsel for Linfox, it should be noted, made clear that no issue was taken before the Court as to the Full Bench’s application of *House v The King*. The Full Bench accepted Mr Stutsel’s submission that Linfox’s appeal effectively sought a different outcome from the Full Bench and without demonstrating any appellable error in the Commissioner’s decision-making process.
5. Moreover, the Full Bench found that, even if there was a valid reason for dismissal, there were other factors to be considered in determining whether the termination was harsh, unjust or unreasonable. The Full Bench found that the considerations taken into account by the Commissioner provided an appropriate basis for his conclusion that the dismissal was harsh, unjust or unreasonable. Particular reference was made to the following matters as supporting that conclusion:
* Mr Stutsel’s satisfactory employment with Linfox over a long period, his age and his employment prospects;
* the circumstances in relation to the publication of the offensive comments, particularly Mr Stutsel’s belief that his Facebook page was on maximum privacy settings and that the comments posted on his page could only be viewed by himself and his Facebook friends, together with the Commissioner’s finding that the comments were never intended to be communicated to the managers concerned;
* the conduct complained about occurred outside of the workplace and outside of working hours;
* some of the offensive statements were not posted on the Facebook page by Mr Stutsel – but by other persons – and Mr Stutsel did not know that he could delete comments from his Facebook friends after they had been posted;
* Linfox did not take action against other employees who took part in the relevant Facebook conversations; and
* the Commissioner had found that Mr Stutsel was fully aware of the fact that the relevant comments on his Facebook page were foolish and he regretted the entire situation.
1. The Full Bench concluded at [36] that it had not been persuaded that there were errors of fact or law in the Commissioner’s determination that Mr Stutsel had been unfairly dismissed. Although describing Mr Stutsel’s conduct in posting derogatory and offensive remarks about Ms Russell and Mr Assaf on his Facebook page as “*inappropriate*”, the Full Bench found there was a range of other considerations which meant that the termination of his employment was “*unfair*”.
2. As to the appeal concerning the Commissioner’s decision to reinstate Mr Stutsel and provide part compensation for lost wages, the Full Bench rejected Linfox’s arguments that the Commissioner had failed to grasp the seriousness of Mr Stutsel’s conduct and to consider the impact of his reinstatement on Linfox.
3. At [41] the Full Bench dealt with a submission by Linfox that Mr Stutsel’s failure to provide truthful answers during the investigation process meant that Linfox had no trust or confidence in him and that this should have been taken into account in deciding whether reinstatement was appropriate. The Full Bench noted that a submission had been made to the Commissioner that Mr Stutsel was first asked by Ms Neill in a general way about Facebook comments some six months earlier and that he had denied making them. But when he was shown printouts of the specific statements on his Facebook page he conceded that he had made the relevant comments. The Full Bench stated that it did not regard this conduct as demonstrating such a breakdown in the employment relationship as to make reinstatement not possible. The Full Bench observed that the Commissioner’s decision could not be challenged on the basis that the Commissioner “*failed to make specific mention in his reasons of an argument of limited significance*”. Moreover, it found that the Commissioner had considered a range of matters in determining that reinstatement was both practicable and desirable.
4. The Full Bench also rejected Linfox’s appeal against the Commissioner’s order to pay part compensation for lost wages.
5. The Full Bench’s overall conclusion is reflected in [43] of its reasons as follows:

For the above reasons, we have decided to dismiss the appeal. It has not been shown that there is any error of such significance in the Commissioner’s decision as would warrant interference by an appeal bench. The Commissioner had to consider whether the posting of inappropriate comments about managers on Facebook was a valid reason for the dismissal of an employee. In the somewhat special circumstances of the present matter, and having regard in particular to the nature of the comments made, the limited understanding of the employee as to the privacy of Facebook communications and the employee’s long and satisfactory employment record, the Commissioner decided that the dismissal was harsh, unjust or unreasonable and ordered reinstatement and payment of lost wages. Having regard to the evidence and submissions before him, **and having considered all that has been put in the appeal proceedings,** we consider that the decision was reasonably open to the Commissioner and is not attended with any error of the kind referred to in *House v The King* (emphasis added).

### The grounds of challenge

1. The *Notice of Appeal* as filed against the decision of the Commissioner on 20 December 2011 separately contended:
* in *Ground* 1 that the Commissioner erred in finding that “*there was no valid reason for the termination of the Respondent’s employment*” for any of eight reasons thereafter identified; and
* in *Ground* 2 that the “*learned Commissioner erred in ordering that the Appellant reinstate the Respondent’s employment*” for any of three reasons thereafter identified.
1. In this Court, the *Originating Application* was filed on 19 October 2012 by Linfox. The grounds upon which writs of certiorari and mandamus were sought challenging the decision of the Full Bench of Fair Work Australia were there set forth as follows (without alteration):

1. The jurisdiction of the First Respondent pursuant to ss.400(1), 604 and 607 of the *Fair Work Act 2009 (Cth)* to grant permission to the Applicant to appeal but dismiss the appeal was conditional upon the Full Bench’s determination that the Commissioner had engaged in no appealable error.

2. Appealable error in the decision and orders of Commissioner Roberts existed as a matter of jurisdictional fact and accordingly, the First Respondent misconstrued and/or did not exercise its jurisdiction according to law insofar as it dismissed the appeal.

3. On such other grounds that to the Court seem proper.

Needless to say, these “*grounds*” provide very little insight into the manner in which Linfox sought to contend that the decision of the Full Bench should be set aside.

1. An *Amended Originating Application* was filed in Court at the outset of the appeal on 6 May 2013. The amendments addressed the change in the name of Fair Work Australia to the Fair Work Commission and also sought a new order, namely that the matter be remitted to a “*differently constituted Full Bench*” for determination in accordance with law. The “*grounds*” remained the same.
2. Subsequently, leave was granted to file a *Further Amended Originating Application* in Court*.*  The relief sought remained the same, as did “*grounds*” 1 and 3, but “*ground*” 2 was amended so as to read as follows:

2. Appealable error in the decision and orders of Commissioner Roberts existed as a matter of jurisdictional fact and accordingly, the First Respondent misconstrued and/or did not exercise its jurisdiction according to law insofar as it dismissed the appeal.

a. The Full Bench should have found that Commissioner Roberts erred in finding that there was not a valid reason for the termination of the Second Respondent.

b. The Full Bench should have found that Commissioner Roberts erred in finding that the termination of the Second Respondent was harsh, unjust and unreasonable.

c. The Full Bench should have found that Commissioner Roberts erred in finding that reinstatement of the Second Respondent was not impracticable.

d. The Full Bench should have found that Commissioner Roberts erred in ordering the reinstatement of the Second Respondent.

1. It may be noted that the Originating Application includes a reference to the concept of “*jurisdictional fact*”. Linfox submitted that the Full Bench’s “*satisfaction*” that there was an error by the Commissioner is a “*precondition to the exercise of the Full Bench’s powers under s 607 of the Act*” and constituted a jurisdictional fact. Accordingly, so the argument went, it was for the Court to determine whether the Full Bench of Fair Work Australia had fallen into jurisdictional error. It was put by Linfox that the Court had to determine whether the Full Bench’s opinion that there was no error by the Commissioner was an opinion which had been properly formed.
2. The Court has great difficulty in seeing the relevance of the concept of “*jurisdictional fact*” in this context. Its use by Linfox should not be permitted to obscure the fact that the correct legal position is that:

(a) the appellate jurisdiction of the Full Bench of Fair Work Australia required the identification of some error of law or fact on the part of the Commissioner before the Full Bench could intervene (noting that the effect of s 400(2) is that an appeal on a question of fact must involve a significant error of fact); and

(b) the Court’s jurisdiction to review the Full Bench of Fair Work Australia’s decision requires the identification of a jurisdictional error (or an error of law on the face of the record, which was not raised in the proceeding).

1. There is considered to be an element of confused thought (see the comments of Gummow ACJ and Kiefel J in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 at [39], 240 CLR 611 at 624) in Linfox’s invocation of the concept of “*jurisdictional fact*” in this context. That confusion is evident in the following passage from its written *Outline of Submissions in Reply*:
	1. … Whether or not a dismissal is unfair within the meaning of section 387 of the *Fair Work Act 2009* is a finding of jurisdictional fact, as the enlivening of the Commission’s power is contingent on that fact. In the absence of a finding that the dismissal is unfair, the Commission has no power to make any order as to the reinstatement, re-employment and/or compensation. On review for jurisdictional error, the reviewing court must determine for itself whether a jurisdictional fact exists. For this Court to determine whether the Full Bench has fallen into jurisdictional error, it is necessary for it to determine whether the opinion of the Full Bench that there was *not* error on the part of Commissioner Roberts was properly formed …
2. That submission should not be accepted. It fails fully to reflect the different jurisdictions being exercised by the Full Bench in conducting an appeal under s 604 of the *Fair Work Act* and the jurisdiction of the Court in conducting a judicial review. The task of this Court is to review the decision of the Full Bench for jurisdictional error. The Court’s task is not to review the Commissioner’s decision with a view to determining for itself whether a jurisdictional fact exists. Nor was that the task of the Full Bench. As the High Court emphasised in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [31] and [32], the Full Bench would fall into jurisdictional error if, for example, it misconceived its role, misunderstood the nature of its jurisdiction, or failed to apply itself to the relevant question; but the limited nature of that review jurisdiction is important as is reflected in the passages from the joint judgment of Gleeson CJ, Gaudron and Hayne JJ in that decision which are set out in [12].
3. The bases upon which the decision of the Full Bench was sought to be impugned were said by Linfox’s Senior Counsel to be set out in its written *Outline of Submissions*. Those submissions asserted that the decision of the Full Bench could only be set aside if jurisdictional error could be established. And such an error, it was contended, was to be found in:
* the failure to address a submission that there was inconsistent evidence from Mr Stutsel about his understanding of the private nature of his Facebook page;
* the failure to deal with submissions as to whether Mr Stutsel gave truthful answers during his interview with Mrs Neill and the credibility of Mr Stutsel generally;
* the taking into account of an “*irrelevant consideration*”, namely the “*differential treatment*” as to the manner in which other employees had been treated;
* the conclusion that Mr Stutsel’s work history was such that his dismissal was harsh in the circumstances; and
* the fact that Mr Stutsel was exercising an asserted “*right to free speech*.”

There was considerable uncertainty before the Court as to whether one or other of these submissions had received attention before either the Commissioner or the Full Bench.

1. This lack of certainty as to the manner in which the case on behalf of Mr Stutsel was pursued inevitably gave rise to difficulty. Although it is readily understandable why a forensic choice may be made to seek to recast a claim on appeal to address difficulties which may have been exposed by a decision at first instance, the confined task of the Full Bench cannot be ignored by a disappointed litigant. Nor can a disappointed litigant again seek to forensically recast an argument when the jurisdiction of this Court is invoked.
2. The confined task of this Court was correctly accepted by Senior Counsel on behalf of Linfox. Notwithstanding the fact that Linfox invoked the jurisdiction of this Court pursuant to s 562 of the *Fair Work Act* and s 39B of the *Judiciary Act*, no submission was advanced that the jurisdiction conferred by s 562 was free of such limitations which it was accepted were inherent in the jurisdiction conferred by s 39B. Nor was it suggested that the position was affected by the fact that Linfox also relied on ss 21, 22 and 23 of the *Federal Court of Australia Act*. The need to identify “*jurisdictional error*” in the decision of the Full Bench, it was common ground, had to be made out. The parties’ agreement on this issue is consistent with the following statements:

“It is still necessary to distinguish between jurisdictional and non-jurisdictional errors of law”: *Australian Postal Corporation v Gorman* [2011] FCA 975 at [28], 196 FCR 126 at 133 per Besanko J.

The “distinction … has a long history of application to the work of federal industrial authorities”: *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 at [51], [55] and [65], 192 FCR 78 at 93-94 and 96 per Buchanan J (Marshall and Cowdroy JJ agreeing).

1. Given Linfox’s reliance on the asserted failure to address particular submissions, it is prudent to recall at least two propositions.
2. First, it is not necessary for those making a decision to refer to “*every piece of evidence and every contention*” made by a party: *WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184 at [46], 75 ALD 630 at 641 per French, Sackville and Hely JJ; *Reece v Webber* [2011] FCAFC 33 at [67], 192 FCR 254 at 277 per Jacobson, Flick and Reeves JJ. Although reasons for decision are not to be scrutinised with an eye to discerning error where none truly exists (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272 per Brennan CJ, Toohey, McHugh and Gummow JJ), more may be expected of experienced and legally qualified members of Fair Work Australia who have had the benefit of written submissions filed by experienced legal practitioners: *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [57], 207 FCR 277 at 295-296 per Marshall, North and Flick JJ. But there remains no unqualified and universally applicable legal requirement to refer to every submission advanced. Much depends upon the importance of the submission to the claims being made. A failure to address a submission which is “*significant*” and which touches upon the “*core duty*” being discharged (*Fox v Australian Industrial Relations Commission* [2007] FCAFC 150 at [39] per Marshall, Tracey and Buchanan JJ) or which is “*centrally relevant*” to the decision being made (*WAFP v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 319 at [21] per Lee, Carr and Tamberlin JJ; *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [55] to [56], 207 FCR 277 at 295) may in some circumstances found a conclusion that it has not been taken into account and may thereby expose jurisdictional error.
3. Secondly, a decision-maker called upon to make a decision is generally required to resolve the claims made; there is no general requirement to resolve a claim “*never made, which might have been put on another basis*”: cf. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1 at [31], 211 CLR 441 at 457 per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ. There can be neither an “*error of law*” nor a “*question of law*” where a decision-maker does not deal with a submission which is not advanced for resolution: cf. *Federal Commissioner of Taxation v Raptis* (1989) 19 ALD 726 at 728-729 per Gummow J; *Tuitaalili v Minister for Immigration and Citizenship* [2012] FCAFC 24 at [26] per Flick and Jagot JJ. As a general rule, no error is committed by a decision-maker in not addressing issues of fact and law not the subject of argument: *Commissioner of Taxation v Glennan* [1999] FCA 297 at [82], 90 FCR 538 at 558 per Hill, Sackville and Hely JJ; *Culley v Australian Securities and Investments Commission* [2010] FCAFC 43 at [5], 183 FCR 279 at 283 per Ryan, Mansfield and McKerracher JJ.
4. Considerable care should thus be exercised before too readily agreeing with a proposition that error was exposed by either the Full Bench (when entertaining the appeal from the decision of the Commissioner) or the Commissioner in not resolving a submission not previously advanced. Considerable care should also be exercised before too readily agreeing with a proposition that either the Commissioner or the Full Bench erred in not more extensively resolving a submission which may have been only indirectly advanced.
5. But such difficulties may presently be left to one side.
6. None of the arguments now sought to be advanced in this Court should prevail. The *Further* *Amended Originating Application* should be dismissed.

### Inconsistent evidence

1. The first matterrelied upon by Linfox as exposing jurisdictional error is an alleged “*failure to address a submission that there was inconsistent evidence from Mr Stutsel about his understanding of the private nature of his Facebook page*”.
2. The fact of Mr Stutsel providing an inconsistent account of his actions was common ground. When being interviewed by Ms Neill, Mr Stutsel accepted that he was aware that a statement on Facebook was “*out in the public forum*”. Mr Stutsel later, however, sought to “*back track*” from this concession. Before the Commissioner, in his written statement of evidence, he denied Ms Neill’s account and said that his “*recollection [was] that Ms Neill asked ‘Do you understand how Facebook works?’ and I answered ‘As far as I understand, its conversations back and forth between friends”.*  His written account was that his wife and daughter had set the “*privacy settings*” on the computer to “*full privacy restrictions*”.
3. This argument fails for a number of reasons.
4. First, while emphasising that it is the decision of the Full Bench which is the subject of judicial review, it is also relevant to say something about how the Commissioner dealt with this matter, having regard to how Linfox put its case. It is plain that the Commissioner did take into account this inconsistency. In his reasons for decision, the Commissioner summarised the evidence given by Mr Stutsel and made specific reference to his evidence as to the privacy settings being set by his wife and daughter to “*full privacy restrictions*” and his evidence that his understanding was that “*nothing I said or did could be seen by anyone but the people I had invited to be my Facebook ‘friends’*…”: [2011] FWA 8444 at [14]. The Commissioner also separately addressed the evidence given by Ms Neill, including her evidence that during the interview “*Mr Stutsel admitted …. that his Facebook page was in a public forum*…”: [2011] FWA 8444 at [34]. Having set forth the evidence, the Commissioner ultimately went on to address the evidence that had been given relevantly as follows:

The evidence

[78] A thorough examination of the evidence leads me to a number of conclusions which have guided me in making my decision in this matter. Firstly, I accept as truthful the evidence of Mr Stutsel that his Facebook account was set up by his wife and daughter and that he believed that the account had been set on the maximum privacy setting available and that he did nothing to vary that setting. That is, he believed that the comments posted on his page could only be viewed by himself and those persons he had accepted as Facebook friends. I further accept Mr Stutsel’s evidence that he was unaware that he could delete comments from Facebook friends once they had been posted.

Rather than there being a failure to address a submission as to the inconsistency in the evidence being relied upon, the Commissioner set forth the inconsistent evidence and thereafter proceeded to accept the account provided by Mr Stutsel.

1. Secondly, this conclusion of the Commissioner was not directly challenged in the *Notice of Appeal* as filed in December 2011. The only “*ground*” of appeal which touched upon the inconsistency in the accounts being provided was the ground that maintained that the Commissioner had “*erred in finding that there was no valid reason for the termination of the Respondent’s employment in that he: … (g) relied on irrelevant considerations with respect to the Respondent’s belief that his Facebook account had been created with ‘maximum privacy settings’ and that his Facebook account had been created by his wife and daughter…*”.
2. Such a “*ground*” falls well short of a challenge to the conclusion accepting as “*truthful the evidence of Mr Stutsel …”.* Indeed, the “*ground*” so expressed seems to accept the truthfulness of Mr Stutsel’s account and to thereafter avoid the consequences of such a finding by seeking refuge in the submission that his account was “*irrelevant*”. Moreover, neither this “*ground*” – nor any of the other “*grounds*” set forth in the *Notice of Appeal* – seek to identify “*significant error of fact*” as required by s 400(2).
3. Thirdly, even if the argument as now expressed was advanced for resolution before the Full Bench, it is concluded that the argument was addressed and resolved. When considering whether the termination of Mr Stutsel’s employment was “*harsh, unjust or unreasonable*”, the Full Bench set forth the considerations taken into account by the Commissioner and relevantly concluded:

[34] It is apparent from the recital of these matters that the findings of the Commissioner as to the Applicant’s understanding about the use of Facebook were an important part of the circumstances taken into account in concluding that the dismissal was unfair. It is also apparent that, with increased use and understanding about Facebook in the community and the adoption by more employers of social networking policies, some of these factors may be given less weight in future cases. The claim of ignorance on the part of an older worker, who has enthusiastically embraced the new social networking media but without fully understanding the implications of its use, might be viewed differently in the future. However in the present case the Commissioner accepted the Applicant’s evidence as to his limited understanding about Facebook communications. We have not been persuaded, having regard to the evidence and submissions presented, that such a finding was not reasonably open.

1. The Full Bench had earlier set forth the Commissioner’s findings as to Mr Stutsel’s evidence as to the Facebook page being set with “*the highest available privacy settings*”: at [8]. The fact that no express reference was made to Ms Neill’s account of the interview and the prior admission of Mr Stutsel, it is concluded, does not detract from the conclusion reached in respect to “*the Applicant’s understanding*…”.

### The giving of truthful answers

1. The second argument relied upon by Linfox as exposing jurisdictional error on the part of the Full Bench is an alleged “*failure to deal with submissions as to whether Mr Stutsel gave truthful answers during his interview with Mrs Neill and the credibility of Mr Stutsel generally*”.
2. In addition to the inconsistency in the account given by Mr Stutsel as to his awareness of matters on Facebook being “*out in the public forum*”, Linfox submitted that other issues going to Mr Stutsel’s credibility arose (*inter alia*) out of:
* a series of statements made by Mr Stutsel in the interview with Ms Neill; and
* a series of answers given by Mr Stutsel during his cross-examination in the hearing before the Commissioner.

The written submissions to the Full Bench concluded with the submission that “*Mr Stutsel was not a witness of credit and this should have been taken into account at first instance…*”.

1. There can be little doubt that the account being given by Mr Stutsel gave rise to a serious question as to whether his evidence was truthful and whether it should be accepted.
2. It is not necessary, for present purposes, to do more than refer to a number of such instances.
3. Thus, during his interview with Ms Neill, he was asked whether he was “*aware of any comments which Linfox could construe as offensive, insulting or derogatory*”. On the day that Osama bin Laden was killed, Mr Stutsel posted on his Facebook page the suggestion that “*we all go and hug a muslim today to help them get over the pain of them losing their spiritual leader*”. The statement continued: “*Provided we all cover ourselves in some pigs blood first*”. Notwithstanding these statements, Mr Stutsel responded to the question asked during the interview “*No, nothing that was meant to be like that*…”. He was also asked during the interview whether he had “*posted comments about Linfox managers which are threatening, offensive, insulting or racist*”. The Facebook page referred to “… *a certain bacon hater [who] is still up to his old tricks*”. Mr Stutsel’s answer during the interview was: “*I definitely don’t think so*…”. Mr Stutsel’s evidence during cross-examination was equally less than forthright. During his evidence the following exchange thus occurred:

You provide a response to a post there from Clark and you say, “Yeah, it is but a certain bacon hater is still up to his old tricks.” Do you see that?---I do, yes.

That’s Mr Assaf, isn’t it?---I’m not entirely sure; it may well be. I can’t remember the context of that discussion but it would appear ---

How do - - -?---It would appear to be – I cannot remember exactly word for word what the conversation was but from reading it, it appears it probably would be.

So that’s a fairly bad taste comment, knowing full well that he’s a Muslim and he’s approached you some years ago about being offended by some of things you did. Yet notwithstanding that you thought it fit, on a public forum, to call him a bacon hater. Is that correct?---Well, it’s not a public forum.

We will have that debate in a moment. You saw it fit to call him a bacon hater. Is that correct?---If that’s what I was referring to at the time, yes, I did.

These are but instances of the evidence of Mr Stutsel providing a relatively sound basis for a submission as to his evidence being not truthful or reliable.

1. Linfox argued that “*there was a complete failure by the Commissioner to have regard to the credibility of Mr Stutsel in determining the application pursuant to s 394 of the [Fair Work] Act*”. It further alleged that Mr Stutsel’s credibility was “*a central plank*” of Linfox’s appeal.
2. These arguments advanced on behalf of Linfox should be rejected for the following reasons. Although it is the Full Bench’s decision which is the subject of judicial review, it is convenient to first deal with Linfox’s allegation that the Commissioner failed to have regard to the credibility of Mr Stutsel.
3. First, although the Commissioner did not expressly refer to any submission that may have been made as to the necessity to resolve issues of credit or the truthfulness of Mr Stutsel’s evidence, there could be no doubting the fact that the Commissioner was well aware of the inconsistency in the evidence being given and to the explanations being provided by Mr Stutsel.
4. Secondly, the truthfulness of otherwise of Mr Stutsel’s evidence assumed only secondary importance. It was the fact of the statements being made that formed the content of the termination letter dated 31 May 2011 and formed the basis of the Commissioner’s decision. In expressing his “*Conclusions and findings*” the Commissioner thus expressed the confined nature of the task he had undertaken as follows:

[71] Mr Stutsel’s employment was terminated for serious misconduct, on the basis of comments which appeared on his personal Facebook page. The termination letter ….. set out three grounds for the termination. Some of the evidence encompasses other allegations against Mr Stutsel. In my decision making I have confined myself to the three specific allegations made in the termination letter. In this regard, I also note the evidence of Ms Neill … that the reasons for dismissal were set out in the termination letter and no further reasons are relied upon.

[72] As the Applicant’s conduct is the reason given by the Company for the termination, I have to determine for myself whether the impugned conduct occurred and, if so, whether it amounted to a valid reason for termination of employment …

The Commissioner later stated:

[77] In the case before me, there is no contest that the material upon which Linfox based its decision to terminate Mr Stutsel’s employment appeared on his Facebook page. Mr Stutsel’s Facebook account had some 170 other persons with the status of ‘friends’, many of them Linfox employees. The material complained about by Linfox was contained in a series of conversations between Mr Stutsel and others.

The Commissioner ultimately concluded, in respect to the decision to terminate Mr Stutsel:

[88] All in all, I find that Mr Stutsel was not guilty of serious misconduct relating to the matters set out in the termination of employment letter. I further find that there was not a valid reason for the termination of his employment, based on my reasoning set out above.

1. Thirdly, it is in any event erroneous to maintain that the Commissioner did not “*deal with*”submissions as to the truthfulness of the evidence given by Mr Stutsel. Notwithstanding Mr Stutsel’s reluctance to accept that the reference to a “*bacon hater*” was a reference to Mr Assaf, the Commissioner thus found (for example) that the reference “*was obviously directed as a descriptor of Mr Assaf*…”: at [80]. Given the conclusion that the truthfulness of the evidence being given by Mr Stutsel did not assume a central importance to the issues to be resolved, there was – accordingly – no requirement to deal with every piece of evidence which exposed untruthfulness.
2. Turning to address Linfox’s allegation that the Full Bench failed to deal with its submissions concerning Mr Stutsel’s credibility, that contention should also be rejected for the following reasons.
3. First, in the context of dealing with Linfox’s appeal relating to the issue whether there was a valid reason for termination, the Full Bench stated:

[28] We have carefully considered the evidence and material before the Commissioner and the submissions on appeal. We consider that the conclusion reached by the Commissioner was reasonably open to him in the circumstances of the case and having regard to the context in which the conduct occurred and an overall assessment of the gravity of the conduct. It has not been shown that the Commissioner made any error of the kind referred to in *House v The King* in the determination of this part of the matter …

 See also [43] of the Full Bench’s reasons which is set out in [34] above.

1. Secondly, Linfox’s *Notice of Appeal* to the Full Bench did not claim that the Commissioner should have found that there was a valid reason for dismissal because of Mr Stutsel’s alleged untruthfulness. The only ground of appeal referring to his alleged untruthfulness was set out in *Ground* 2(b), which related not to the issue of whether there was a valid reason for terminating his employment, but rather to whether the Commissioner erred in ordering that he be reinstated.
2. Thirdly, there can be no doubt that the Full Bench did address the issue of Mr Stutsel’s alleged untruthfulness in the context of the appeal against the Commissioner’s order that Mr Stutsel be reinstated, as is evident from the following passage:

[41] It was also submitted by the Company that the Applicant’s failure to provide truthful answers during the investigation process meant that the Company had no trust or confidence in him. It was said that this should have been considered by the Commissioner in his reasons as to whether reinstatement was appropriate. In this regard, we note that what was submitted to the Commissioner was that the Applicant was first asked by the Group Manager for Workplace Relations, in a general way, about Facebook comments made some six months earlier, and he denied making them. However when he was shown printouts of the specific statements, he conceded he made them. We do not consider that this conduct demonstrated such a breakdown in the relationship between employer and employee as to make reinstatement not possible. The decision reached by the Commissioner on reinstatement cannot be challenged on the basis that he failed to make specific mention in his reasons of an argument of limited significance. The Commissioner considered a range of matters in determining that reinstatement was both practicable and desirable in the circumstances of the case. He clearly did not consider that there had been any such conduct on the part of the Applicant which was so destructive of the employment relationship as to make reinstatement inappropriate.

1. There was no failure on the part of the Full Bench to deal with any submission as to the lack of “*truthfulness*” on the part of Mr Stutsel.

### Differential treatment

1. The third of the matters relied upon by Linfox as exposing jurisdictional error was said to relate to the Full Bench’s non-acceptance of Linfox’s argument on appeal that *“[r]eliance by the Commissioner on differential treatment in the absence of ‘sufficient evidence’ of such treatment was an error, as absence of evidence of differential treatment was not a relevant consideration under s 387*”.
2. The “*differential treatment*” was a reference to the fact that no disciplinary action had been taken by Linfox as against other employees who had been involved in the exchanges which were recorded on Mr Stutsel’s Facebook page.
3. The comment made by the Commissioner of present relevance was as follows:

[92] I now come to the question of differential treatments by Linfox of persons who made offensive comments on Mr Stutsel’s Facebook page. Disparity in the treatment of different persons has been dealt with in several decisions of the Tribunal and its predecessor. In Sexton v Pacific National (ACT) Pty Ltd, Vice President Lawler said:

“It is settled that the differential treatment of comparable cases can be a relevant matter under s 170CG(3)(e) to consider in determining whether a termination has been “harsh, unjust or unreasonable”. In National Jet Systems Pty Ltd v Mollinger the Full Bench concluded that in the particular factual circumstances it was appropriate for the member of the Commission at first instance to have regard to different treatment afforded to another employee involved in the same incident.”

[93] There is nothing before me to indicate that persons other than Mr Stutsel who were in the employ of Linfox and made offensive comments on Mr Stutsel’s Facebook page were the subject of any sanction by the Company. This factor has not been determinative in my decision making but has had some influence in my ultimate finding relating to harshness.

1. The comment by the Commissioner that there was “*nothing*” before him to indicate that others had been the subject of any sanction does not seem to take into account exchanges that occurred during the cross-examination of Ms Neill. One such exchange was as follows:

In your statement you haven’t given any indication of disciplinary action being taken against Scott Rowley?---No, I haven’t.

What about Brad Prindable?---No.

Matt Stering?---No.

Melissa Gebetsberger?---No.

Or the person known as George Papa?---No. That does not mean that there hasn’t been appropriate disciplinary action taken, it just was not included in my statement.

You knew that you needed to include all relevant information in your statement, didn’t you?---I did, but I didn’t believe the disciplinary action taken against other employees was relevant to this particular statement.

You understand that inconsistent application of disciplinary procedures is itself, or can be, a source of unfairness. You know that, don’t you?---I don’t believe I’ve been inconsistent here.

I will ask the question again: you know that inconsistent application of discipline procedures can of itself constitute unfairness?---yes, I do.

So why didn’t you include information about action taken against other employees in your statement?---Because I didn’t feel it was appropriate to have action about other employees put into this statement.

A little later, the cross-examiner returned to the same theme and the following exchange then also occurred:

We will just go to Mr Prindable. Has any disciplinary action been taken against Mr Prindable? I’m not suggesting it should have been, I’m just asking you if it has been?---No.

It may readily be accepted, however, that the extent of the material placed before the Commissioner on this topic was within a limited compass.

1. Before the Full Bench, the dearth of evidence as to the fate of other employees was addressed by a table which was prepared by Linfox and which disclosed the absence of any disciplinary action being taken as against any of the other employees, other than one employee who was “*stood down*” and later interviewed. The Full Bench proceeded to address the question of “*differential treatment*” as follows:

[33] In our view, the abovementioned and other considerations referred to by the Commissioner in his decision provided an appropriate basis for concluding that the dismissal was harsh, unjust or unreasonable. This would be so even if it was found that the postings on the Applicant’s Facebook page provided a valid reason for dismissal. In particular, we consider that the following matters support this conclusion:

…

(e) The Company did not take action against other employees who took part in the relevant Facebook conversations; and

…

1. These were the conclusions of both the Commissioner and the Full Bench – and the evidence before both the Commissioner and the Full Bench – to which the present challenge is to be applied.
2. Notwithstanding the difficulties inherent in the manner in which the present alleged error is expressed, it is concluded that:
* “*differential treatment*” as to the manner in which employees are treated is a consideration relevant to a determination as to whether the dismissal of an employee is “*harsh, unjust or unreasonable*”. Such a consideration falls within s 387(h). As observed by Madgwick J in *Donaldson v NSW National Parks and Wildlife Service* (1997) 74 IR 168 at 180: “*Few things have such a tendency to give rise to a sense of grievance by employees as perceived differential treatment of themselves or their fellow employees without strong justification*”; and
* there was some evidence before the Commissioner and more than adequate evidence before the Full Bench as to the fact that no disciplinary action had been taken as against other employees.

Moreover:

* any error committed by the Commissioner in observing that there was “*nothing*” to indicate the fate that had befallen other employees was either an error within jurisdiction or a non-prejudicial error. The submission advanced on behalf of Linfox that “*no weight*” should have been given to the fact that no comparable treatment had been meted out to the other employees given the state of the evidence would not expose either appellable error before the Full Bench (cf. *Lovell v Lovell* (1950) 81 CLR 513 at 533 per Kitto J) or jurisdictional error before this Court. Any error as to whether there was “*sufficient evidence*” before the Commissioner of the lack of differential treatment was non-prejudicial because the fact was that no other employee had been dismissed and because the table prepared for the purposes of the appeal before the Full Bench exposed the absence of any relevant sanction being imposed on any of the other employees.
1. Left to one side is any question as to whether the involvement of those other employees was truly comparable to the conduct of Mr Stutsel. No relevant comparable action was taken against those employees. That was a consideration relevant to the decisions to be made by both the Commissioner and the Full Bench. The fact that no comparable disciplinary action was taken was common ground.
2. This aspect of Linfox’s judicial review challenge exposed no error, let alone jurisdictional error, on the part of the Full Bench (or, for that matter and to the extent that it is relevant, the Commissioner).

### Work history

1. The fourth matter relied upon by Linfox as exposing jurisdictional error is the alleged failure “*to examine or refer to the fact that Mr Stutsel had been previously required to apologise to Mr Assaf for offending his religious beliefs by playing excerpts from the Koran over the two way radio whilst speaking*…”.
2. This matter was not pressed during the hearing. Accordingly, it need not be further addressed.

### The right to free speech

1. The final matterrelied upon by Linfox as exposing jurisdictional error on the part of the Full Bench is the allegation that the “*Full Bench seemingly ignored the fact that Commissioner Roberts, in determining the application of Mr Stutsel placed significance on Mr Stutsel’s asserted ‘right to free speech’ to make comments which were relevant to the Islamic faith*…”.
2. Again, this argument is one without substance.
3. The Commissioner, it may be accepted, placed some significance upon what was referred to as a “*right to free speech*”. His reasons for decision thus record in part as follows:

[79] I further accept Mr Stutsel’s evidence that comments he posted about terrorism and the death of a terrorist, were an expression of his private views at the time and that he later came to regret the making of some or all of those comments. Whether Mr Stutsel’s contrition in that regard is genuine need not concern me as I consider his comments to be within his right to free speech in such matters even though many, including myself, would find much of the Facebook discourse which is in evidence to be distasteful. It is a bridge too far in my opinion to make a connection between those comments and any personal attack on Mr Assaf. The Applicant’s Facebook page was not a web blog, intended to be on public display. It was not a public forum.

1. But it cannot be accepted that the Full Bench “*ignored*” the reliance placed by the Commissioner upon this asserted “*right*”. The Full Bench thus expressly referred to the submission made on behalf of Mr Stutsel both in respect to the issues to be resolved on appeal ([2012] FWAFB 7097 at [14]) and when granting “*permission to appeal*” ([2012] FWAFB 7097 at [19]). It is thus an overstatement to advance any submission that the Full Bench “*ignored*” the potential relevance of the asserted right. Nor should it be lightly assumed that, having referred to the “*right*” and the submissions being advanced on behalf of Mr Stutsel, the Full Bench thereafter did not take that submission into account when reaching its ultimate conclusion to dismiss the appeal.

# CONCLUSIONS

1. The *Further Amended Originating Application* should be dismissed.
2. No error has been exposed in the reasons for decision of the Full Bench, let alone a jurisdictional error. None of the submissions relied upon by Senior Counsel on behalf of Linfox in this Court exposes anything other than a challenge to the factual merits of the decisions made by both the Commissioner and the Full Bench. Such challenges fall well short of establishing jurisdictional error on the part of the Full Bench. The very difficulty experienced by Senior Counsel for Linfox in identifying a submission which had been advanced before the Full Bench and which had not been entertained and resolved by the Full Bench, let alone the difficulty in identifying matters now relied upon as having been raised in the *Notice of Appeal*, exposes the absence of jurisdictional error. With respect to Senior Counsel, the present hearing revealed little other than a valiant attempt to recast a failed factual outing before the Commissioner as jurisdictional error on the part of the Full Bench. That attempt ignored the constraints imposed by s 400(2) of the *Fair Work Act* when advancing the appeal before the Full Bench and thereafter ignored the constraints imposed by the need to discern jurisdictional error on the part of the Full Bench.
3. Linfox did not seek any order for costs in its Originating Application. Presumably that was upon the basis that an application invoking the jurisdiction of this Court pursuant to s 39B of the *Judiciary Act* may nevertheless remain a proceeding to which s 570 of the *Fair Work Act* applies: cf. *Australasian Meat Industry Employees’ Union v Fair Work Australia (No 2)* [2012] FCAFC 103, 203 FCR 430. Section 570(2) provides (*inter alia*) that an order for costs may only be made where the Court is “*satisfied*” that a party has “*instituted the proceedings vexatiously or without reasonable cause*”. No such submission was advanced by either party during the course of the hearing.
4. The parties are to bring in short minutes of orders to give effect to these reasons. If any claim is made for costs, short submissions may be filed.

# ORDERS

1. The name of the First Respondent be changed to the Fair Work Commission.

2. The parties are to bring in short minutes of orders to give effect to these reasons within 21 days.

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| I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Dowsett, Flick and Griffiths. |

Associate:

Dated: 13 December 2013