FEDERAL COURT OF AUSTRALIA

Gregory v Qantas Airways Ltd [2016] FCAFC 7

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| File number(s): | NSD 554 of 2015 |
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| Judge(s): | **BUCHANAN, BROMBERG AND RANGIAH JJ** |
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| Date of judgment: | 3 February 2016 |
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| Catchwords: | **INDUSTRIAL LAW** – applicant’s employment terminated for conduct while abroad – applicant alleged he could not recall behaviour that was the basis of his termination – applicant alleged his drink had been spiked – scientific expert evidence produced – no discussion of expert evidence in Commissioner’s decision – applicant claimed jurisdictional error in failure to address expert evidence – Commissioner did not find that termination was harsh, unjust or unreasonable – apparent from Commissioner’s reasons that he was able to reach decision without reference to expert evidence – challenge to Commissioner’s decision does not identify jurisdictional error  **INDUSTRIAL LAW** – application for leave to appeal considered by Full Bench of Fair Work Commission (“FWC”) – Full Bench gave direction that only question of permission to appeal would be dealt with in written and oral argument – Full Bench decided the matter by reference to the full ambit of the appeal – counsel had no adequate opportunity to develop or put a submission about merits |
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| Legislation: | *Fair Work Act 2009* (Cth), ss 385, 385(b), 387, 387(a), 387(b)–(g), 387(h), 394, 400, 400(1), 400(2), 604, 604(1)  *Judiciary Act 1903* (Cth), s 39B |
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| Cases cited: | *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 75 ALD 630  *Byrne v Australian Airlines Limited* (1995) 185 CLR 410  *Gregory v Qantas Airways Limited* [2015] FWC 1154  *Gregory v Qantas Airways Limited* [2015] FWCFB 2599  *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157; (2013) 240 IR 178  *Lu v Heinrich* [2014] NSWCA 349  *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389  *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431  *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99  *Osland v Secretary, Department of Justice* (2008) 234 CLR 275  *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320  *O’Sullivan v Farrer* (1989) 168 CLR 210  *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336  *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636  *Toms v Harbour City Ferries Pty Ltd* (2015) 229 FCR 537  *Villani v Holcim (Australia) Pty Ltd* (2011) 198 FCR 81 |
|  |  |
| Date of hearing: | 16 November 2015 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | Fair Work Division |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 88 |
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| Counsel for the Applicant: | Ms K Nomchong SC with Mr I Latham |
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| Solicitor for the Applicant: | Turner Freeman Lawyers |
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| Counsel for the First Respondent: | Mr R Warren |
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| Solicitor for the First Respondent: | Ashurst Australia |
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| Solicitor for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | NSD 554 of 2015 |
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| BETWEEN: | STEVEN GREGORY  Applicant | |
| AND: | QANTAS AIRWAYS LIMITED  First Respondent  **FAIR WORK COMMISSION**  Second Respondent | |

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| JUDGES: | BUCHANAN, BROMBERG AND RANGIAH JJ |
| DATE OF ORDER: | 3 FEBRUARY 2016 |

THE COURT ORDERS THAT:

1. So much of the application as alleges jurisdictional error by Commissioner Cambridge in his decision on 27 February 2015 in *Gregory v Qantas Airways Ltd* [2015] FWC 1154 be dismissed.
2. A writ of certiorari be issued to quash the decision of the Full Bench of the Fair Work Commission (“FWC”) on 24 April 2015 in *Gregory v Qantas Airways Ltd* [2015] FWCFB 2599.
3. A writ of mandamus be granted requiring the FWC to deal again, according to law, with the notice of appeal filed by the applicant on 19 March 2015.

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

REASONS FOR JUDGMENT

BUCHANAN J:

## The present proceedings

1. These are proceedings for judicial review of two decisions of the Fair Work Commission (“FWC”) established under the *Fair Work Act 2009* (Cth) (“FW Act”) (*Gregory v Qantas Airways Limited* [2015] FWC 1154 and *Gregory v Qantas Airways Limited* [2015] FWCFB 2599). They are, respectively, a decision by Commissioner Cambridge on 27 February 2015 which dismissed an application by the present applicant that he be reinstated to his employment with the first respondent and a decision by a Full Bench of the FWC on 24 April 2015 which dealt with an appeal filed against the decision of Commissioner Cambridge. The Full Bench refused permission to appeal and dismissed the appeal. I will refer to the powers exercised by each of Commissioner Cambridge and the Full Bench in due course.
2. The proceedings in this Court were commenced on 18 May 2015. They rely on s 39B of the *Judiciary Act 1903* (Cth), seeking that a writ of mandamus be issued to the FWC requiring that the application for reinstatement be heard again, supported by claims that writs of certiorari be issued to quash both decisions. Relief of this kind is only available to the applicant to address jurisdictional error. The merits of the application for reinstatement do not arise for consideration in this Court.

## The factual background

1. The applicant was dismissed from his employment as a First Officer flying B747 aircraft on Qantas international services on 7 May 2014, as a result of events which occurred in Santiago, Chile on the evening of 8 February 2014 and into the early morning of 9 February 2014 (Santiago time). There was no suggestion in the proceedings before the FWC that the applicant had other than a satisfactory record as a pilot with the first respondent over a period of 20 years.
2. The immediate cause of the termination decision was that the applicant touched and “massaged” the breast of a female Second Officer (“S/O”) in a taxi. The circumstances of that incident require further explanation.
3. On 8 February 2014, the applicant flew with Captain David Hawkins, S/O Ryan Pratt, and the female S/O (who was anonymised by Commissioner Cambridge) to Santiago. After landing they arrived at their hotel at about 2 pm local time. They were not due to leave Santiago until early afternoon on 10 February 2014 to return to Sydney.
4. On the afternoon of 8 February 2014, the pilots drank some rum (S/O Pratt drank only cola) and then went to dinner. All then drank beer and some wine. They then went to a bar, arriving at about 11.25 pm. The applicant left the others and returned about 25 to 30 minutes later. They noticed a significant change in his demeanour and behaviour. The applicant appeared to be very intoxicated and, for various reasons, his behaviour made them uncomfortable. They decided to take him back to the hotel.
5. The applicant would later suggest that while he was away he must have taken a “spiked” drink although he could not remember much of the events of the evening after arriving at the bar. Drug tests performed on a urine sample taken in Santiago showed that the applicant had elevated levels of cannabinoids in his system, suggesting that he had ingested or smoked cannabis on the evening in question.
6. On the taxi ride back to the hotel the applicant inappropriately touched the female S/O. She was upset by the incident, which was noticed by S/O Pratt and which was, a short time later, reported to Captain Hawkins who had apparently not observed it, having travelled in the front seat while the others were in the back seat.
7. A short time after their return to the hotel, Captain Hawkins found the applicant “passed out” on the floor of his hotel room. The applicant did not respond to a phone call from Captain Hawkins at around 9.30 am that morning. Captain Hawkins rang again at around 1.30 pm and on this occasion woke the applicant. He advised the applicant that he would be stood down for the return trip. When told by Captain Hawkins of the reported inappropriate touching of the female S/O the applicant immediately apologised and claimed no memory of the previous evening, from shortly after their arrival at the bar when he left the others.
8. A short time later, the female S/O rang the applicant and he then apologised directly to her. She accepted his apology. In discussions the female S/O suggested that the applicant’s drink may have been spiked, a theory which the applicant later pursued.
9. On the morning of 10 February 2014, the first respondent confirmed that the applicant was withheld from service for the return flight to Sydney and directed a drug test by urine sample before the applicant left Santiago. He flew home separately on 11 February 2014. On 13 February 2014, after speaking with his GP, the applicant took a further drug test at his own volition. It proved “negative” but the sample taken in Santiago returned positive results.
10. The applicant remained suspended from duty while the first respondent investigated further. The decision to terminate the applicant’s employment was based on the inappropriate touching of the female S/O rather than the elevated levels of cannabinoids although, as the urine sample for the drug test was given at about 4.30 pm Santiago time on 10 February 2014, it is apparent that the applicant would, if allowed to fly, have done so with those elevated levels present while on duty.

## The statutory provisions at first instance

1. The application made to the FWC on 27 May 2014 relied on s 394 of the FW Act, alleging unfair dismissal. Relevantly here, the critical matter to demonstrate was that the dismissal was “harsh, unjust or unreasonable” (see FW Act, s 385(b)). Section 387 of the FW Act provides:

**387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

1. In the circumstances of the applicant’s case, having regard to the procedures by which he was afforded an opportunity to address the first respondent’s concerns, the only matters which arose for consideration by Commissioner Cambridge were those stated by s 387(a) and (h).

## The first decision

1. Commissioner Cambridge recorded the following matters put on behalf of the applicant which were relevant to s 387(a) and (h):

**The Case for the Applicant**

…

**[28]** Ms Nomchong submitted that the first theory as to the applicant’s activities at the Irish pub involved a number of conclusions which had been broadly adopted by Qantas. In this first theory the applicant left his colleagues and went upstairs to another bar and got himself stoned or drunk or a combination of both, during the 25 to 30 minutes that he was away from the others. In this first theory, as had been adopted by Qantas, the actions of the applicant were deliberate to the extent that he was responsible for his highly intoxicated state when he returned to his colleagues and then subsequently inappropriately touched S/O x.

**[29]** The second or alternative theory which was advanced by Ms Nomchong proposed that the applicant separated from his colleagues at the Irish pub when he went upstairs to look for a table and go to the toilet. On his way to the toilet the applicant ordered a beer then **while he was in the toilet the drink was spiked.** After he came back to the bar and consumed the spiked drink he was given food which contained Cannabinoids or THC. Ms Nomchong further submitted that if this second theory was correct, the actions of the applicant which followed was involuntary and the inappropriate touching of S/O x could not be held to have been intentional and was therefore not serious misconduct. Ms Nomchong said that in these circumstances the absence of serious misconduct meant that there was not a valid reason for the dismissal of the applicant.

**[30]** Ms Nomchong made further submissions which she said supported the prospect that the second theory, as opposed to the first theory, was more likely to be the correct basis upon which to attribute the activities of the applicant in that period of time that he and the other flight crew were at the Irish pub immediately before the inappropriate touching of S/O x. In support of the second theory, Ms Nomchong relied upon the soundly established unblemished work record of the applicant. According to the submissions of Ms Nomchong, it would be completely out of character and inconsistent with the exemplary work record of the applicant for him to lie about what he did when he separated from his colleagues shortly after arriving at the Irish pub.

**[31]** Further, Ms Nomchong submitted that the second theory was supported by what she described as the commonsense test. Ms Nomchong said that it did not make sense for the applicant to deliberately consume cannabis and/or large amounts of alcohol in the presence of Captain Hawkins who was at the time, the Acting Captain of the Qantas B747 fleet. As it was put by Ms Nomchong, it did not make sense for anyone who wanted to “go on a bender” to do so in the presence of their boss.

**[32]** In addition, it was submitted by Ms Nomchong that if the applicant was lying about his activities at the Irish pub and he was endeavouring to fabricate a proposition involving his drink being spiked, he could have easily supported that fabrication by falsely stating that upon checking his wallet the next day money had been missing. Instead the applicant had advised his colleagues that he calculated that he must have spent only about 6000 pesos while he was at the Irish pub. According to Ms Nomchong, further support for the second theory was also provided by factors such as; the applicant’s contrition; the apology which was accepted by S/O x; the applicant’s immediate cooperation with the investigation into the incident; the absence of any formal complaint by S/O x; and, the evidence that S/O Pratt could not smell marijuana when he was in the close proximity of the applicant in the taxi.

**[33]** Ms Nomchong urged the Commission to conclude that the second theory as she had described and advocated, correctly accounted for the applicant’s activities at the Irish pub. Therefore, according to Ms Nomchong, **the subsequent inappropriate touching of S/O x could not be held to have been the intentional action of the applicant as he was an innocent victim of drink spiking.** Ms Nomchong said that it consequently followed that there was no valid reason for the dismissal of the applicant.

**[34]** As an alternative submission advanced by Ms Nomchong, it was proposed that even if the applicant voluntarily consumed a large quantity of alcohol and a large quantity of cannabis, notwithstanding those activities, the dismissal would be too harsh a penalty in the circumstances. In support of this submission, the personal circumstances of the applicant, including his long and unblemished career with Qantas, were factors which were said to provide a basis to conclude that the decision should be held to have been harsh.

**[35]** Ms Nomchong summarised her submissions by concluding that the dismissal of the applicant was unfair because the reason given for dismissal was not a valid reason. She submitted that the absence of valid reason arose from a conclusion that should be drawn from the evidence which she said strongly supported the proposition that the applicant had his drink spiked at the Irish pub.

**[36]** Further, Ms Nomchong submitted that the personal circumstances of the applicant including in particular, his long and exemplary work record should render a dismissal made in respect of one incident, to be harsh. Ms Nomchong urged that the Commission find in favour of the applicant and as there was no impediment to reinstatement, appropriate Orders for reinstatement, continuity of service and restoration of lost pay should be provided.

(Emphasis added.)

1. The first respondent’s submissions were recorded as follows:

**The Case for the Employer**

…

**[38]** Mr Warren commenced his submissions by stating that the matter involved important factual issues which were not in contest. In particular Mr Warren stated that what had happened in the taxi was not in dispute. Further, Mr Warren stated that by any measure what had occurred in the taxi was sexual harassment of a gross kind. Mr Warren submitted that the crucial issue to be determined was whether the applicant voluntarily or knowingly committed the sexual harassment or did he voluntarily put himself into such a state that he did not know what he was doing.

**[39]** Mr Warren made submissions which analysed the evidence of the activities of the applicant whilst he was at the Irish pub. Mr Warren said that **further medical evidence including the drug test results,** when considered together with the evidence of the applicant’s activities at the Irish pub, **did not support the proposition that the applicant had been a victim of drink spiking.**

**[40]** Mr Warren submitted that the evidence confirmed that at the time of the sexual harassment incident the applicant had consumed a significant amount of alcohol, and he also had a significant level of cannabis (THC) in his system. Further, Mr Warren said it was important that subsequent testing had revealed no elevated level of benzodiazepines. According to the submissions made by Mr Warren, **there was no medical evidence to support the applicant’s proposition of drink spiking,** but instead, there was a strong foundation for the proposition that the applicant had deliberately smoked cannabis during the 25 to 30 minute period when he had separated from his colleagues.

**[41]** Mr Warren submitted that there was no dispute that when the applicant returned to his colleagues at the Irish pub he had become highly intoxicated within a fairly short period of time. Mr Warren said **there was no evidence to support the proposition that the dramatic change in the applicant’s level of intoxication should be attributed to drink spiking** but instead there was a simple and logical explanation which involved the applicant smoking cannabis. Mr Warren submitted that on the basis of an objective analysis and consideration of all the evidence, the conclusion to be reached supported cannabis and not drink spiking as the reason for the applicant’s quick and dramatic intoxication at the Irish pub.

**[42]** According to the submissions made by Mr Warren the applicant was responsible for consuming significant amounts of alcohol followed by cannabis at the Irish pub. Therefore it was submitted by Mr Warren that the applicant had clearly conducted himself in a manner which meant that he was responsible for the level of intoxication and that this conduct and any subsequent conduct such as the sexual harassment, amounted to conduct which undermined the employment contract and operated to provide sound, defensible and valid reason for dismissal.

(Emphasis added.)

1. Although, only the first respondent’s reference to the “medical evidence” was recorded by Commissioner Cambridge, the case theory advanced by senior counsel for the applicant depended very substantially on expert evidence also. It was reliance on that expert evidence with which counsel for the first respondent was dealing in his own submissions, in part by referring to the evidence of a Qantas employed medical practitioner.
2. Commissioner Cambridge observed, early in his own discussion:

**387 (a) - Valid reason for the dismissal related to capacity or conduct**

**[48]** The reason for dismissal in this instance has involved the deplorable incident that occurred in the taxi in Santiago. What happened to S/O x in the taxi should not have occurred. The applicant has exhibited genuine remorse and contrition for his actions. The applicant has paid a very high price for his misconduct. The loss of long-standing, unblemished employment as an international pilot particularly in the circumstances revealed in this instance, amounts to a catastrophic fall from grace. In this context, the Commission must very carefully approach the determination of the contested issue as to whether valid reason for dismissal can be substantiated.

1. The following findings were made:

**Intentional Molestation or Intoxicated Unconsciousness**

**[51]** There were numerous aspects of the evidence which provided support for a finding that, **in all likelihood,** the level of intoxication of the applicant at the time that he molested S/O x, was of such magnitude that **the applicant** had lost a significant level of self-control and **was acting without conscious intention.**

…

**[54]** Against all of this evidence, **there is little, if any, material to support the proposition that the applicant was consciously making sexual advances** towards S/O x. Consequently, I am satisfied in finding that at the time that the applicant sexually harassed S/O x, he was highly intoxicated to such an extent that **he was dispossessed of an ability to act with conscious intention.**

**Innocent Victim of Drink Spiking or Responsible for Intoxication**

**[55]** **The next issue to be examined has involved the question of whether the applicant can be held to have been reasonably responsible for the highly elevated level of intoxication that gave rise to his dissociated state. This issue represents what may be described as the fulcrum of this matter.** If there was endorsement, on the balance of probabilities, for the applicant’s proposition that his level of intoxication was substantially caused by drink spiking, then it would follow that he could not be held responsible for the sexual harassment of S/O x and the basis for dismissal, serious misconduct, would not be valid.

(Emphasis added.)

1. The importance to Commissioner Cambridge’s reasoning of the identification of the issue identified in the first sentence at [55] appeared from the following two paragraphs in these terms:

**[56]** Although the applicant’s case also involved an alternative or supplementary submission which contended that even if the Commission found that the applicant was responsible for the elevated level of intoxication which led to his behaviour, the penalty of dismissal was too harsh because of the personal circumstances of the applicant including, in particular, his long-standing, unblemished employment record. I am not at all attracted by this alternative proposition as I find it counterintuitive to contemplate providing an unfair dismissal remedy for a person who would have, on its most generous representation, provided evidence that was incomplete and misleading.

**[57]** As a consequence, there has been vital significance attached to conclusions that would be drawn from a careful and detailed examination of the evidence of the activities of the applicant in the time between when the flight crew arrived at the Irish pub, and when the applicant returned to the group after going missing for some 25 to 30 minutes. The evidence of these activities in this period of time has been central to a determination of whether the applicant was an innocent victim of drink spiking, or whether it was more likely that he consciously smoked or otherwise imbibed cannabis or a cannabis derivative.

1. Thereafter, Commissioner Cambridge gave close attention to the evidence of the applicant, and the other flight crew, about the events at the bar:

**The Toilet, a Conversation with a Local, and a Drink Alone**

…

**[68]** The applicant’s evidence clearly sought to downplay the conversation that he had with the unknown person or persons and it contrasted significantly with the evidence provided by S/O Pratt and Captain Hawkins. A careful consideration of all of the evidence regarding the applicant’s conversation with the unknown person or persons has established that there was more than a fleeting, casual exchange with a passerby or two. On any objective assessment the applicant engaged in a significant conversation with this unknown person (or persons) and this occurred at a point in time that the applicant says was before his memory loss. However the applicant did not offer any evidence about the substance of the conversation or conversations that he had with any unidentified person or persons.

**[69]** Regrettably for the applicant I have concluded that I am unable to accept as an inference from his evidence that his conversation or conversations with unidentified persons shortly after arrival at the Irish pub were matters of insignificance. Almost directly after this conversation the applicant separated from the other flight crew and he went upstairs. I have earlier rejected that the applicant went upstairs to look for a vacant table as he suggested. Further, it is plainly implausible that on the way to the toilet, having left his colleagues downstairs with whom he had been drinking all night, the applicant decided to purchase a drink from himself and leave that drink on the bar while he then went into the toilet. There is also an amplified implausibility attached to the proposition that the drink was spiked with cannabis or that the drink was spiked with GHB and then the applicant ate food which contained THC.

1. Commissioner Cambridge concluded:

**[73]** I have made a careful and thorough assessment of all of the evidence which both supports and detracts from the competing propositions as to whether the applicant was or was not an innocent victim of drink spiking. The conclusion that I am compelled to make is that, on the balance of probabilities, having regard for the elevated level of satisfaction required because of the serious nature of the conduct under examination, the applicant was not an innocent victim of drink spiking. The significantly more plausible proposition which is most strongly supported by the totality of the evidence is that the applicant separated from his colleagues as a deliberate act in the pursuit of imbibing cannabis, or a cannabis derivative, or some other substance. In all likelihood, this action of the applicant occurred because of an invitation or suggestion made by the person or persons with whom he had engaged in conversation shortly after arriving at the Irish pub.

**[74]** It must be recognised that the applicant would not have intended to have become as intoxicated as he did. There was considerable logic and reason inherent in the commonsense argument as was advanced by Ms Nomchong. However, the applicant, as a novice or perhaps experimental cannabis or other substance user, may not have even known what he was given to inhale or he may have dramatically underestimated the strength of the substance. Whatever may have been the precise reason for his elevated level of intoxication, the applicant took a decision which had clear risk attached to it. Unfortunately for the applicant that risk was realised and therefore personal culpability for his subsequent sexual harassment misconduct must follow.

**[75]** Consequently, the applicant was dismissed for valid reason. In view of the findings that I have made regarding particular aspects of the evidence provided by the applicant there may be only limited prospect that some other factor may militate against the valid reason. Nevertheless, a dismissal for valid reason can be unfair because of other factors and therefore I am required to address all of the elements contained in s.387 of the Act.

1. The provisions of s 387(b)–(g) were then identified as not relevant. As to s 387(h), Commissioner Cambridge said:

**387 (h) - Other relevant matters**

**[82]** Other matters, such as the personal circumstances of the applicant, including his long unblemished work record, his genuine remorse and contrition, and the financial and career impacts suffered as a result of the dismissal have all been considered.

**[83]** In particular, I have great sympathy for a person in circumstances where their unblemished long-standing career has been decimated as a result of one bad decision. If I was personally assessing the disciplinary action in this instance I would have probably avoided dismissal. However, it is not the role of the Commission to stand in the shoes of the employer. Further, I understand and accept that because of the nature of the applicant’s occupation and in particular, the requirement for the employer to have confidence in the decision-making capabilities of its pilots that it determined that dismissal of the applicant was appropriate.

1. The various conclusions were drawn together and summarised as follows:

**Conclusion**

**[90]** In this instance the applicant was dismissed for serious misconduct which involved the sexual harassment of a female colleague. The particular actions of the applicant involving the molestation of S/O x were not disputed. However, it was asserted that these actions did not constitute serious misconduct because the applicant was an innocent victim of drink spiking and therefore he could not be held responsible for his actions.

**[91]** Upon hearing and careful examination of the evidence I have concluded that **the actions of the applicant were not consciously intended.** The applicant did not know what he was doing when he molested S/O x, **he was not in control of his faculties at that time.** However, from my analysis of the entire evidence which was presented I have concluded that the applicant made a significant error of judgement earlier in the evening which has established his personal culpability for the sexual harassment.

**[92]** The level of personal culpability for the consequences which have regrettably followed from the applicant’s defective decision making are properly assessable in an occupational context. The standards for personal responsibility are very high in the case of an occupation such as a commercial pilot. Consequently, the substantive reason for the applicant’s dismissal has been held to be valid.

**[93]** Other matters relating to the personal circumstances of the applicant and the loss of long-standing, unblemished employment are tragic. However, any personal sympathy does not negate or diminish the seriousness with which the employer was entitled to treat the misconduct of the applicant. In such circumstances it would be wrong for the Commission to disturb the decision made by the employer to dismiss the applicant.

(Emphasis added.)

1. I have set out the foregoing extracts at some length so that it may readily be seen that, in his own analysis, Commissioner Cambridge made no reference to the expert, or medical, evidence. Instead, he reached conclusions based on other material to the effect that the actions of the applicant, when he arrived at the bar, were voluntary and ones for which he must take responsibility regardless of their subsequent effect on him.

## Jurisdictional challenges to the first decision

1. One challenge to Commissioner Cambridge’s decision by way of suggested jurisdictional error concerned an alleged failure to deal with expert evidence about the “most likely scenario” for the applicant’s symptoms of apparent intoxication, namely that his drink had been spiked after he left the others.
2. Any theory on the part of the applicant this his drink had been spiked had to be accommodated to the factual circumstance that the applicant still had elevated levels of cannabinoids about 40 hours later. Accordingly, the applicant’s preferred explanation involved not only drink-spiking but some form of administration of cannabis as well. Assessment of both those possibilities was therefore required.
3. A conspicuous omission from the consideration of the issue of possible drink-spiking was any reference to expert evidence on both sides about whether it was likely, or unlikely, that the applicant’s symptoms and behaviour could be satisfactorily explained without active consideration of the possibility that his drink had been spiked. His own evidence did not go so far because he professed no memory of the events. But the suggestion of drink-spiking had come from one of the persons best placed to observe his behaviour, the female S/O. She had been the subject of his uninvited but (she accepted) non-volitional attention.
4. The expert evidence was inconclusive in the sense that it ultimately left open the possibility that the applicant had acted without proper attention to the amount of alcohol and cannabis he ingested (assuming both were voluntary). It, therefore, did not establish that the applicant’s behaviour was involuntary in the sense referred to by Commissioner Cambridge at [55].
5. Nevertheless, the expert evidence did provide an explanation which was not foreign to the first respondent’s own knowledge that its aircrew were sometimes targeted in this way (i.e. by drink-spiking), although normally with a view to robbery.
6. It is possible that the first sentence in [73] is a reference to the expert evidence, although that would not explain the lack of any further discussion. The better view is that the first sentence of [73] refers to the evidence discussed to that point.
7. The consequence is that, apart from occasional references to counsel for the first respondent having referred to “the medical evidence”, there was no reference to the competing expert evidence which was not all medical. The applicant’s primary expert witness was a forensic pharmacologist and toxicologist. There was no discussion of the expert evidence, the nature and character of which was not identified directly or indirectly.
8. Where a judicial officer fails to refer to “material evidence” an inference may be available that the evidence was overlooked or discarded (see e.g. *Lu v Heinrich* [2014] NSWCA 349 at [80], citing *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 at [116]). I accept that a similar inference may arise in the case of a non-judicial tribunal. In the present case, however, I do not think it is likely that the expert evidence was overlooked: it was a central feature of the applicant’s case. It was the “fulcrum” on which the case was balanced. What would be the significance if it was discarded?
9. In *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 75 ALD 630, a Full Court said at 641 [47]:

**[47]** The inference that the tribunal has failed to **consider** an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be **dispositive** of the tribunal’s review of the delegate’s decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

(Emphasis added.)

1. Remarks to a broadly similar effect may be seen in the judgment of a Full Court in *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157; (2013) 240 IR 178 at [47].
2. It seems plain from Commissioner Cambridge’s reasons that he felt able to reject the applicant’s central thesis without any reference to the expert evidence. He did so by reference solely to his assessment of the likelihood that any form of drink-spiking had occurred. He obviously formed the view that the more likely explanation was that the applicant had voluntarily put himself in harm’s way, contributed to his own intoxication and should take responsibility for any consequences, including sexual contact with the female S/O, however prepared she was to excuse his behaviour.
3. In *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431, a Full Court considered a line of cases which have considered whether a failure to advert to particular claims or evidence amounts to jurisdictional error. The Full Court found that there was no “bright line” (at [64]), but generally approved observations by Robertson J in *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 to the effect that the identified failure must affect “the exercise of a power”.
4. In the final analysis, it is not open to conclude in my view that Commissioner Cambridge overlooked or simply discarded the expert evidence. The better view is that he concluded that he did not need to discuss it. That judgment on his part does not disclose jurisdictional error, although I do not doubt that a contrary view of the desirability of some form of discussion of that evidence might readily be reached on any appeal on the merits within the FWC. That, however, is not a matter for this Court, at this stage.
5. Another attack on Commissioner Cambridge’s decision concerned his observations at [83]. The challenge was put this way in written submissions:

12. The Commissioner misconstrued the statutory test under ss. 385(b) and 387 of the FW Act by effectively applying a test that required a finding that the employer was in error in dismissing the Applicant. The decision was therefore affected by jurisdictional error.

1. In my respectful view, this challenge does not identify any jurisdictional error. Indeed, in my view it misapprehends the effect of Commissioner Cambridge’s observations. It was correct to observe that the FWC does not possess the range of discretions available to an employer, and is not in a position to substitute any judgment of its own for that of an employer, particularly where those judgments bear on aspects of business management. The task of the FWC is to apply the provisions of the FW Act, in accordance with any relevant statutory directions. Commissioner Cambridge had already concluded that there was a valid reason for termination. At this point he was examining whether there was any other matter which he considered to be relevant to the question of whether the dismissal was, nevertheless, harsh, unjust or unreasonable.
2. A broad judgment was required. The judgment made may be seen at [93]. I can see no failure in this respect to understand or apply the statutory scheme. I shall, however, return again later to the nature of the judgment required at this point.
3. Although other challenges to Commissioner Cambridge’s decision, when the proceedings were commenced in this Court, suggested that he had denied the applicant procedural fairness in particular aspects, or misunderstood where the onus of persuasion might lie, those were (correctly in my view) not pursued in written submissions or at the hearing.
4. For the reasons I have given in relation to the specific matters argued, I would not accept that any jurisdictional error at first instance has been established in the proceedings in this Court.

## The statutory provisions on appeal

1. The exercise of a right of appeal against a decision of a single member of the FWC depends upon the FWC (i.e. a Full Bench) giving permission to appeal (FW Act, s 604(1)). Giving permission to appeal depends upon an assessment of whether it is in the public interest to grant permission to appeal. In the case of a decision about claimed unfair dismissal, the FWC must *not* grant permission to appeal unless it considers that it is in the public interest to do so (FW Act, s 400(1)). Further, s 400(2) provides:

**400 Appeal rights**

…

(2) Despite subsection 604(1), an appeal from a decision made by the FWC 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. Thus, in a case which turns on findings of fact, two significant obstacles to an appeal are erected: the appeal can only be made on the ground that the decision involved a significant error of fact, and a Full Bench must conclude that it is in the public interest that permission to appeal be granted.
2. The notice of appeal before the Full Bench alleged that there had been significant errors of fact and that the public interest mandated permission to appeal. It set out further detailed grounds of appeal.

## The procedure directed by the Full Bench

1. The Full Bench listed the question of whether it should grant permission to appeal for a separate hearing. The directions issued in connection with that hearing confined the applicant (as appellant) to written submissions of no more than three pages, to be supplemented by oral submissions of no more than 30 minutes. The written submissions were to address *only* the question of permission to appeal.
2. At the hearing on the question of whether permission to appeal should be granted senior counsel for the appellant addressed the characterisation of the appeal said to make it one involving the public interest, and the nature of the errors of fact said to be significant. Those submissions, having regard to the preliminary nature of the proceedings and the constraints imposed by the FWC, clearly were not intended to represent any full or developed argument about the individual grounds of appeal, or to deal in any more than a descriptive way with the detailed challenges which would be pursued if permission to appeal was granted.
3. The first respondent chose to focus upon a defence of the core of Commissioner Cambridge’s findings – that the appellant had voluntarily taken the course which he did. The argument may be understood as one to the effect that the appeal had no respectable possibility of success because that fundamental finding would not be disturbed.
4. One difficulty with the Full Bench accepting an approach of this kind (I intend no criticism of the first respondent) is that it calls for a conclusion about central and critical aspects of a case where an appellant has had no opportunity to make the contrary case, in writing or orally. In some cases such a summary approach may be justified but normally only if it was apparent *without* further argument that the appeal could not succeed. Such a case may fairly be said to be one where it was not in the public interest to grant permission to appeal.
5. Other cases may require attention to the nature and character of the issues raised by the appeal and their general significance for the work of the FWC, or raise the respectable possibility of an error which, in fairness, should be corrected and which warranted permission to appeal for one of those reasons.
6. I do not intend to do more than mention those as some examples, because the concept of “the public interest” is a very broad one.
7. The phrase “the public interest” has no fixed and precise content: see *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [75]. In *O’Sullivan v Farrer* (1989) 168 CLR 210, the High Court said (at 216):

… the expression “in the public interest”, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view”: *Water Conservation and Irrigation Commission (N.S.W.) v. Browning*, per Dixon J.

(Citation omitted.) (Editing in original.)

1. This statement has repeatedly been affirmed by the High Court: *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320 at [13]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [30]; *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 at [39] and [127].
2. In other words, assessment of what is in the public interest, so far as it concerns matters coming before the FWC, and the assessment of when the public interest requires a grant of permission to appeal in an unfair dismissal case, is primarily a matter for the Full Bench, unless it pays regard to some matter extraneous to its task or to that evaluation, or fails to pay attention to relevant matters or misunderstands the nature of the examination required.
3. In the present case, as it seems to me, the Full Bench moved outside the limitations it had imposed on the parties. It proceeded to deal with the substance of the appeal, but without a proper hearing.

## The Full Bench decision

1. At [4], the Full Bench identified, as a matter for its attention:

**[4]** It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. …

1. The notice of appeal to the Full Bench was detailed. It contended, with some justification in my view, that the Commissioner had failed to deal with a central element of the applicant’s case. That may not, for the reasons I have explained, have constituted jurisdictional error but it may be thought to have provided a foundation for a respectable argument about appealable error.
2. Another ground of appeal was expressed as follows:

5. The learned Commissioner erred by failing to consider and/or place due weight on other relevant evidence that supported the Appellant’s argument that the Appellant had been the victim of drink-spiking, viz:

(a) drink spiking in the Bellavista area of Santiago was prevalent and had been recognised as a danger by the Respondent such that it had published warnings to staff in an internal staff notice;

(b) Second Officer “X” drew the conclusion that drink spiking had occurred because the Appellant’s conduct changed markedly over a short period of time and the inappropriate touching was entirely out of character;

(c) the Appellant had only spent 6000 pesos whilst he was absent from his colleagues, being an insufficient amount to purchase enough marijuana or the additional alcohol necessary to induce the high level of intoxication demonstrated.

1. Such matters appear also to be ones where a failure by the Commissioner to refer to them or discuss them may have justified some attention on the appeal.
2. Notwithstanding the direction it had given that only the question of permission to appeal was to be dealt with in written and oral argument, the Full Bench seemed to suggest that it had considered the matter before it by reference to the full ambit of the appeal.
3. The Full Bench said (at [14] and [15]):

**[14]** We have considered all grounds of appeal put forward by the Appellant. We note that the reasoning process of the Commissioner is clearly set out at paragraphs [73]-[74], in particular the following comments at [73]:

“I have made a careful and thorough assessment of all of the evidence which both supports and detracts from the competing propositions as to whether the applicant was or was not an innocent victim of drink spiking.”

**[15]** This is a clear reference to all evidence regarding the issue of drink spiking being considered by the Commissioner in his decision. The Commissioner has explicitly noted that he considered all evidence and formed the view that, on balance, the inference that the Appellant’s drink was spiked was not plausible and did not weigh up against the evidence that he knowingly consumed large amounts of alcohol and cannabis. **This was a finding reasonably open to him on the evidence.** We are not persuaded that there is an error in the Commissioner’s reasoning or that he was required to give further reasons.

(Emphasis added.)

1. This appears to suggest that the Full Bench had considered the evidence for itself, and made some evaluation of it. The difficulty with that approach would be that counsel for the appellant had had no chance to develop submissions about the evidence, in writing or orally, on the merits of the appeal. On the other hand, if the evidence as a whole was not considered the Full Bench would not be in a position to make such a finding either, in the absence of considering full argument.
2. After some discussion of some further findings of Commissioner Cambridge, which had been emphasised by the first respondent in its submissions, the Full Bench referred to how Commissioner Cambridge had dealt with whether termination was too harsh, saying (at [18]‑[19]):

**[18]** With respect to the Appellant’s submission that there was a failure to properly consider harshness in light of authorities of single instance misconduct in an otherwise long and unblemished career, we are not persuaded that there was any such failure. The Commissioner explicitly considers this fact and makes the following findings and conclusions:

“[83] In particular, I have great sympathy for a person in circumstances where their unblemished long-standing career has been decimated as a result of one bad decision. If I was personally assessing the disciplinary action in this instance I would have probably avoided dismissal. However, it is not the role of the Commission to stand in the shoes of the employer. Further, I understand and accept that because of the nature of the applicant’s occupation and in particular, the requirement for the employer to have confidence in the decision-making capabilities of its pilots that it determined that dismissal of the applicant was appropriate.”

**[19]** We consider that this conclusion was reasonable and open to the Commissioner and does not cause manifest injustice to the Appellant.

1. Again, such a conclusion suggests full consideration of the issues bearing on that question. This is a further area in which counsel for the appellant had no opportunity to develop, or put, a submission about the merits of the appeal and, in particular, whether dismissal from employment (for sexual harassment, not intoxication or inability to perform duties) was disproportionately harsh.
2. The now classic distillation of the concept of a “harsh, unjust or unreasonable” termination of employment, which identifies the elements of the composite term, may be found in the judgment of McHugh and Gummow JJ in *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 at 465:

… It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one **termination of employment** may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and **may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.**

(Emphasis added.)

1. I earlier referred to the judgment which Commissioner Cambridge made about this issue, and expressed the view that no jurisdictional error was apparent. However, the Full Bench was not dealing with a question of jurisdictional error; its only task at this stage was to evaluate whether there was an arguable case of appealable error and an apparent public interest in hearing an appeal on the merits.
2. It was a notable circumstance that the applicant’s termination of employment was not attributed to his state of intoxication, either from alcohol or cannabis. He was dismissed for inappropriate touching of the female S/O. Commissioner Cambridge found (at [51] and [54]) that the applicant had no conscious intention to do that, even though on the Commissioner’s analysis of the facts the applicant was not the innocent victim of drink‑spiking.
3. In his discussion, the Commissioner was also very critical of the first respondent’s decision not to call Captain Hawkins as a witness, notwithstanding that he was one of the few people able to give direct evidence of the facts. In particular, the Commissioner said (at [85]):

**[85]** I believe that it is open and reasonable to infer that in certain respects, the witness evidence of Captain Hawkins would not have assisted the employer’s case. **I have inferred that if he had given evidence as a witness, Captain Hawkins would have confirmed, in particular, that the excessive level of intoxication of the applicant on the night in question meant that he was dispossessed of his faculties and not conscious of his behaviour. Further, I have inferred that Captain Hawkins would have confirmed the genuine remorse and contrition shown by the applicant on the day and days following the incident.** However, these are issues of fact that I have found in favour of the applicant and which do not go directly to the more significant evidence surrounding the activities of the applicant at the Irish pub in the period of time immediately before he went missing.

(Emphasis added.)

1. Such matters were capable of bearing directly on the question of whether the decision to terminate the applicant’s employment was disproportionate to the circumstances of his conduct as found by the FWC on the evidence before it, including all the expert evidence of the likely cause and effects of the applicant’s state of intoxication, which the first respondent did not have when it decided to dismiss the applicant. The grounds of appeal also raised matters of that and a similar kind as follows:

15. The learned Commissioner erred in failing to find that the dismissal of the Appellant was harsh in light of his findings that:

(a) it had been “soundly established” that the Appellant had a[n] unblemished work record;

(b) the Appellant had been employed by the Respondent for 20 years;

(c) the Appellant had not intended to become as intoxicated as he did;

(d) the actions of the Appellant were not consciously intended and he had lost a significant amount of self-control and that at the time of the inappropriate touching he was dispossessed of the ability to act with conscious intention;

(e) the Appellant had exhibited genuine remorse and contrition;

(f) there were considerable financial and career impacts arising from the dismissal; and

(g) if personally assessing the disciplinary action, the learned Commissioner would have avoided dismissal.

16. Further, in failing to find that the dismissal was harsh, unreasonable and/or unjust, the learned Commissioner failed to take into account and/or place due weight on the fact that Second Officer “X”:

(a) considered the Appellant’s conduct as completely out of character;

(b) accepted that his conduct was due to drink-spiking;

(c) unconditionally accepted the Appellant’s apology the following day;

(d) felt so comfortable in the Appellant’s company that she went out to dinner with the Appellant the night after the event;

(e) advised the Respondent that she had no difficulty flying home in the same crew as the Appellant;

(f) never made any official complaint;

(g) was not called by the Respondent to contradict any of the above matters.

1. The Full Bench, however, immediately after dismissing the challenge to the harshness of the decision at [19], concluded by saying (at [20]):

**[20]** The appeal process is not intended to provide an avenue for an unsuccessful party to rerun their case, absent error on the part of the primary decision-maker. We are not persuaded that there is any evidence before us of an appealable error that would warrant the grant of permission to appeal.

1. Those statements are not consistent with an examination focussed upon whether the appellant had an arguable case of appealable error. They do not appear to address the public interest in any wider dimension. They do not refer to whether there was any possibility of showing a significant, relevant, error of fact. The statements appear to be conclusions about matters which had not been argued in the limited proceedings undertaken by the Full Bench.
2. I have not done justice to the full scope of the proposed appeal, but even the selected matters I have mentioned or extracted might appear to be ones which might merit attention by way of review in a merits appeal. This does not appear to me to be a case where the facts and questions of principle are so straightforward that it might confidently be said at the outset that no useful purpose could be served by further attention to them.
3. Those matters are ultimately matters for judgment by the FWC, rather than by this Court. However, in the circumstances of the present case they raise for more direct consideration whether it was really open to the Full Bench to decide in a preliminary way that permission to appeal should not be given because the appeal could be said to have no apparent prospects of success.
4. In my view, without hearing the parties on the merits of the appeal, the present was not a case where all the elements of the applicant’s appeal, including those going to the exercise of judgments about whether the dismissal was harsh in all the proven circumstances, could be rejected by the Full Bench with statements that the findings made by him were “open” to the Commissioner.
5. That is a test which more often applies to the undoubted existence of a discretion, rather than the establishment of a statutory standard. The present case is not one where that important distinction requires further consideration because, in my view, the Full Bench clearly applied the wrong tests to the performance of its own functions and committed jurisdictional error as a result.
6. The Full Bench was not dealing with the appeal; it had decided not to do that in the first instance. It could not determine the question of permission to appeal upon a view of the overall merits of the appeal without hearing the parties, unless it was open to conclude that the appeal, if argued fully, had no reasonable prospects of success, and it was therefore not in the public interest to grant permission to bring it, whatever other features it had. But the Full Bench reasons do not state any such process of analysis. In my respectful view, the Full Bench based its decision on matters which had not been adequately argued and were not matters for its attention at that stage unless plainly beyond respectable argument. That was a jurisdictional error.
7. In my view, the Full Bench misunderstood and failed to perform the task committed to it by s 400(1) of the FW Act. It also exceeded its jurisdiction by purporting to deal with the merits of the appeal without a proper hearing.

## Conclusion

1. I would dismiss so much of the application as alleges jurisdictional error by Commissioner Cambridge.
2. I would quash the Full Bench decision of 24 April 2015 by a writ of certiorari and grant a writ of mandamus requiring the FWC to deal again with the notice of appeal filed on 19 March 2015 according to law.
3. The procedural course (full hearing or preliminary hearing about permission to appeal) is a matter for the FWC to determine.

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| I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan. |

Associate:

Dated: 3 February 2016

**REASONS FOR JUDGMENT**

**BROMBERG J:**

1. For the reasons given by Buchanan J, I respectfully agree that the decision of the Full Bench of the Fair Work Commission (**FWC**) is affected by jurisdictional error. I also agree that Commissioner Cambridge’s decision is free of jurisdictional error and make the following observations as to why I have come to that view.
2. In challenging Commissioner Cambridge’s decision, Mr Gregory contended that the Commissioner failed to apply his own assessment that Mr Gregory’s dismissal was harsh, and instead rejected Mr Gregory’s contention that the dismissal was harsh on the basis that there was no error in the approach taken to that issue by Qantas. In so doing, Mr Gregory contended that Commissioner Cambridge had misconstrued the statutory test under ss 385(b) and 387 of the *Fair Work Act 2009* (Cth) (**FW Act**).
3. It is clear, as Mr Gregory contended, that the FWC must take into account the considerations specified by s 387 of the FW Act and make its own assessment, pursuant to s 385(b), as to whether it is satisfied that the impugned dismissal was harsh, unjust or unreasonable. The words of the statute are plain and indicate that the relevant state of satisfaction is that of the FWC: *Villani v Holcim (Australia) Pty Ltd* (2011) 198 FCR 81 at [16] (Gray, Marshall and Bromberg JJ); *Toms v Harbour City Ferries Pty Ltd* (2015) 229 FCR 537 at [30] (Buchanan J, Allsop CJ and Siopis J agreeing). It is not the FWC’s task to review for error the decision of the employer to dismiss. However, contrary to Mr Gregory’s contention, I do not accept that there is a proper basis for concluding that Commissioner Cambridge misconstrued the statutory test.
4. Commissioner Cambridge concluded that there was a valid reason for termination. That was only one of the matters that he was required to consider in answering the overarching question whether he was satisfied that the dismissal was harsh, unjust or unreasonable. He went on to consider the matters set out in s 387(b)–(g), and at [82] turned his attention to para (h)—any other matter he considered relevant. Commissioner Cambridge’s reasons dealt with that matter including at [82] and [83], and returned to discuss the same subject matter at [93], as follows (emphasis added):

**387(h) Other relevant matters**

[82] Other matters, such as the personal circumstances of the applicant, including his long unblemished work record, his genuine remorse and contrition, and the financial and career impacts suffered as a result of the dismissal *have all been considered*.

[83] In particular, I have great sympathy for a person in circumstances where their unblemished long-standing career has been decimated as a result of one bad decision. *If I was personally assessing the disciplinary action in this instance I would have probably avoided dismissal. However, it is not the role of the Commission to stand in the shoes of the employer.* Further, I understand and accept that because of the nature of the applicant’s occupation and in particular, the requirement for the employer to have confidence in the decision-making capabilities of its pilots that it determined that dismissal of the applicant was appropriate.

…

[93] Other matters relating to the personal circumstances of the applicant and the loss of long-standing, unblemished employment are tragic. However, any personal sympathy does not negate or diminish the seriousness with which the employer was entitled to treat the misconduct of the applicant. In such circumstances it would be wrong for the Commission to disturb the decision made by the employer to dismiss the applicant.

1. The words emphasised in [83] are open to the suggestion that Commissioner Cambridge took the view that it was for the employer, and not for him, to “personally assess” whether the disciplinary action taken by Qantas was harsh, unjust or unreasonable. However, it is clear from [82] (and the heading above it) as well as the introductory words at [75] (“… and therefore I am required to address all of the elements contained in s. 387 of the Act”), that Commissioner Cambridge was engaged in considering for himself those considerations relevant to the issue of whether the dismissal was harsh, unjust or unreasonable. The emphasised words in [82] (“have all been considered”) are surely to be read as indicating that Commissioner Cambridge had himself made that consideration. Read in all of that context, I think that, at [83], Commissioner Cambridge intended to do no more than to express his view that, despite his conclusion that the dismissal was not harsh, unjust or unreasonable, if he had been the employer, he would not have dismissed Mr Gregory. I do not accept that Commissioner Cambridge misunderstood the statutory task that ss 385(b) and 387 required of him.
2. For those reasons, I agree with the orders proposed by Buchanan J.

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| I certify that the preceding six (6) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg. |

Associate:

Dated: 3 February 2016

REASONS FOR JUDGMENT

RANGIAH J:

1. I agree with the reasons of Buchanan J and the additional reasons of Bromberg J.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 3 February 2016