

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

Ruttley v Willis Brothers Installation (Qld) Pty Ltd [2022] FedCFamC2G
430

File number(s): BRG 479 of 2020

Judgment of: **JUDGE TONKIN**

Date of judgment: 9 June 2022

Catchwords: **INDUSTRIAL LAW** – Adverse action – whether adverse action taken because employee exercised a workplace right – whether employment terminated because employee suffered from a disability – whether employer discharged presumption imposed by section 361 (a) of the *Fair Work Act 2009* (Cth) – whether employer contravened sections 340 and 351 (1) of *Fair Work Act 2009* (Cth) – order for compensation

Legislation: *Anti-Discrimination Act 1991* (Qld)
Disability Discrimination Act 1992 (Cth)
Fair Work Act 2009 (Cth)
Fair Work Regulations 2009 (Cth)

Cases cited: *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83
Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd [2011] FCA 333
Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32
Construction Forestry Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 2)
Construction, Forestry, Mining & Energy Union v Endeavour Coal Pty Ltd [2013] FCCA 473
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2014] HCA 41
Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd [2015] FCA 275
Hodkinson v The Commonwealth [2011] FMCA 171
Ingersole v Castle Hill Country Club Limited [2014] FCCA 450

Roohizadegan v Technology One Limited (No 2) [2020]
FCA 1407

Division: Division 2 General Federal Law

Number of paragraphs: 228

Date of last submission/s: 13 December 2021

Date of hearing: 11-14 October 2021

Place: Brisbane

Counsel for the Applicant: Ms Blattman

Solicitor for the Applicant: Shand Taylor Lawyers

Counsel for the Respondent: Ms A-Khavari

Solicitor for the Respondent: K & L Gates

ORDERS

BRG 479 of 2020

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **TIMOTHY JOHN RUTTLEY**
Applicant

AND: **WILLIS BROTHERS INSTALLATION (QLD) PTY LTD ACN**
132 309 936
Respondent

ORDER MADE BY: **JUDGE TONKIN**

DATE OF ORDER: **9 JUNE 2022**

THE COURT DECLARES THAT:

1. The Respondent Willis Bros Installations (Qld) Pty Ltd contravened:
 - (a) section 351(1) of the *Fair Work Act 2009* (Cth) in that the Respondent took adverse action by terminating the applicant's employment because he was a person with a physical disability;
 - (b) section 340 of the *Fair Work Act 2009* (Cth) in that the Respondent took adverse action in injuring the applicant in his employment because the applicant exercised his workplace right by making a worker's compensation claim under the *Worker's Compensation and Rehabilitation Act 2003* (Cth); and
 - (c) section 340 of the *Fair Work Act 2009* (FW Act) in that the Respondent took adverse action by terminating the applicant's employment because he exercised a workplace right to make an inquiry in relation to his employment.

THE COURT ORDERS

2. Pursuant to section 545 of the FW Act the respondent shall pay to the applicant compensation in the amount of \$162,631 in addition to interest as calculated pursuant to section 76 (3) of the *Federal Circuit Court of Australia Act 1999* (Cth) within 28 days of service of this order on Willis Bros Installations (Qld) Pty Ltd

3. The Court will hear the parties at 10:00am on 3 August 2022 regarding the imposition of pecuniary penalties (if any) upon the respondent with respect to the abovementioned contraventions of the *Fair Work Act 2009* (Cth).

Note: The form of the order is subject to the entry in the Court's records.

Note: This copy of the Court's Reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE TONKIN

INTRODUCTION

- 1 The applicant Timothy Ruttley (“Timothy”) seeks compensation and pecuniary penalty orders against the Respondent, his former employer Willis Bros Installations Qld Pty Ltd (“Willis Bros”), for breach of the general protections provisions of the *Fair Work Act* 2009 (Cth) (FW Act) which resulted in the applicant’s termination.
- 2 The applicant contends that adverse action was taken against him because he exercised a workplace right particularly his right to take leave to which he was entitled, or alternatively because of his physical disability (silicosis) or alternatively because of his mental disability (psychological injury).
- 3 The applicant contends that the Court should find that the adverse action was taken in breach of the general protections, having regard to the events which led to the applicant’s termination and asserts that the respondent has failed to discharge the statutory presumption. The applicant seeks a declaration that the respondent contravened sections 340 (1) and 351 (1) of the FW Act, compensation and pecuniary penalties.
- 4 The respondent seeks an order dismissing the application.

Documents relied on

- 5 The applicant relied on his Amended Form 2 claim filed 17 August 2021 and Amended Reply filed 23 August 2021, his affidavits filed on 30 November 2020, 17 February 2021, 31 August 2021 and 8 October 2021, affidavit of Simon Ruttley filed on 30 November 2020, 18 February 2021, 31 August 2021 and 8 October 2021, affidavit of Phillip Cole filed 17 February 2021, affidavit of Alanah Baulch filed 18 February 2021 and 31 August 2021 and affidavit Ruby Nielsen filed 31 August 2021.
- 6 The respondent relied on the Amended Response filed 11 August 2021, affidavits filed by Duncan Willis on 27 January 2021, 9 February 2021, 2 September 2021, affidavits filed by Renee Coleman on 27 January 2021, 2 September 2021 and 6 October 2021, affidavit of Justin Willis filed 27 January 2021 and 3 August 2021, affidavit of Siasaia Milioni filed 27 January 2021, affidavit of Alexander Di Russo filed 27 January 2021 and 25 August 2021 and affidavit of Lisa Wilson filed 25 August 2021.

MATTERS NOT DISPUTED

7 The applicant (“Timothy”):

- (a) was at all material employed by the Respondent as a Production Manager;
- (b) was a National System Employee for the purposes of Part 3 -1 of the FW Act;
- (c) was entitled to the benefit of the National Employment Standards as contained within Part 2 -2 of the FW Act;
- (d) as an employee of the respondent had a workplace right being an entitlement to the benefit of a workplace law pursuant to section 341 (1) (a) of the FW Act;
- (e) as an employee of the respondent was entitled to the benefit of a workplace law being the *Worker’s Compensation and Rehabilitation Act 2003* (Qld) (“WCR Act”) which provides for a worker’s compensation scheme for workers who sustain an injury in their employment;
- (f) as an employee of the respondent was able to make complaint or enquiry in relation to his employment and the respondent’s compliance with a workplace law pursuant to section 341 (1) (c) of the FW Act;
- (g) was previously a director of the Respondent;
- (h) was the Queensland Building and Construction Commission (QBCC) license nominee for the Respondent; and
- (i) is a natural person with standing to sue pursuant to sections 539 and 540 of the FW Act; and

8 The respondent:

- (a) is and was a “*constitutional corporation*” within the meaning of section 12 of the FW Act;
- (b) is and was a “*National System Employer*” as that term is defined in section 14 of the FW Act;
- (c) is and was an “*employer*” as that term is defined in section 335 of the FW Act;
- (d) is and was at all material times one of Willis Group companies which include:
 - (i) Group Manufacturing Pty Ltd;
 - (ii) Willis Bros Installations (Qld) Pty Ltd;
 - (iii) Willis Bros Sydney Pty Ltd;

- (iv) Willis Bros Victoria Pty Ltd;
 - (v) Willis Bros Holdings 2012 Pty Ltd; and
 - (vi) WB Holding Unit Trust
- (e) trades as Willis Bros Marble and Granite;
- (f) employed the applicant between 20 July 1997 until 11 May 2020 (“ the period of employment”); and
- (g) is a corporation duly incorporated in accordance with law, capable of suing and being sued.

9 Duncan Willis (“Duncan”) is and was at all material times the majority shareholder and managing director of six of the Willis Group of companies but was not a director of the respondent.

10 Justin Willis (“Justin”) was appointed a director of the respondent on 16 December 2019.

11 Renee Coleman (“Renee”) is and was at all material times the Chief Financial Officer for the respondent.

12 On or about 6 October 2017 Work Health and Safety Queensland issued a prohibition notice which stated that Group Manufacturing Pty Ltd was to stop cutting or grinding stone without adequate controls to protect workers from being exposed to respirable crystalline silica.

13 The applicant was diagnosed with lymph node silicosis on 20 November 2018.

14 The applicant submitted a worker’s compensation claim to WorkCover Queensland in relation to his silicosis diagnosis which was accepted by Work Cover on 23 January 2019.

15 On or about 19 July 2019 Simon Ruttley (“Simon”) the applicant’s brother was made redundant from Willis Bros.

16 On or about 30 April 2020 the applicant was removed as a director of the respondent.

17 On or about 11 May 2020 the applicant’s employment was terminated.

Background

18 Willis Bros Installations (Qld) Pty Ltd was established by Duncan and Justin Willis on the Gold Coast in about 1997 and carries on the business of manufacturing and installing stone benchtops and is one of a group of companies that operates a business installing and

manufacturing stone benchtops for kitchens and bathrooms. Willis Bros Installations (Qld) Pty Ltd is part of the Willis Group of companies which include Group Manufacturing Pty Ltd, Willis Bros Sydney Pty Ltd, Willis Bros Victoria Pty Ltd, Willis Bros Holdings 2012 Pty Ltd; and WB Holding Unit Trust. The controlling mind of the company group, including the respondent, is Duncan Willis.

- 19 Group Manufacturing Pty Ltd employs 22 employees, holds accounts for the entities' creditors and receives the income and pays the expenses that are related to manufacturing and installation activities. Willis Bros employs 16 employees, and is the entity which holds the QBCC licence to undertake the work related to the manufacturing and installation of stone benchtops. Willis Bros. Holdings 2012 Pty Ltd owns the assets of the company including the vehicles used by Willis Bros.
- 20 Duncan Willis has held the position of managing director of Group Manufacturing since 3 September 2018 and has not held any executive or director position at Willis Bros since October 2012.
- 21 Justin Willis left Willis Bros in 2008 to join the fire brigade. He returned to work at Willis Bros at Duncan's request and was appointed a director of Willis Bros on 16 December 2019.
- 22 Renee Coleman commenced employment with Willis Bros in about 2011, was appointed Chief Financial Officer of Willis Bros in around 2017 and is currently the general manager of the Willis Group.
- 23 The applicant commenced work for the respondent on 20 July 1997 at 18 years of age initially as an apprentice stonemason, cutting and installing stone products. In 2006 the applicant was promoted to foreman in 2006 and in 2007 to production manager. He remained production and installation manager until his employment was terminated. According to Duncan the applicant was employed by other associated companies of Willis Bros in various positions from 1997 and as production manager for Willis Bros from July 2008. He was a previously a director of entities within the Willis Group from 6 October 2008 to September 2018 and director of the respondent from 12 January 2016 until 30 April 2020.
- 24 The applicant and his brother Simon Ruttley acquired an interest in Willis Bros. Duncan is the majority shareholder for Willis Bros whilst Simon's interest is 30% and the applicant's interest 17%.

25 In about 2017 Work Health and Safety Queensland directed Willis Bros to have its workers screened for silicosis. Both Simon and the applicant were diagnosed with lymph node silicosis. The applicant contends that following that diagnosis Duncan had decided to exit both Simon and Timothy from Willis Bros.

26 On 19 July 2019 the applicant's brother Simon's employment with the respondent was terminated.

27 The applicant alleges that from July 2019 to January 2020 Duncan behaved in a bullying and aggressive manner towards him in an attempt to exit him from the business. He was removed as a director from Willis Bros on 30 April 2020 and his employment was terminated on 11 May 2020.

Applicant's claim

28 The applicant contends that the respondent contravened sections 340 and 351 of the FW Act for the prohibited reason set out in the table below. If proved the Court may make any order it considers appropriate if satisfied that a person has contravened a civil remedy provision under the FW Act.

<i>Reason</i>	<i>Prohibited by</i>	<i>Relevant Workplace Right</i>
Use of Personal Leave	s. 340(1) FW	ss. 96 and 97 FW
Use of Annual Leave	s. 340(1) FW	ss. 87 and 88 FW
Complaints and Inquiries about Employment	s. 340(1) FW	s. 341(1)(c)(ii) FW
Disability	s. 351 FW	s. 4 Disability Discrimination Act 1992 (Cth)

29 The respondent does not contend that the applicant's silicosis made him unable to perform the inherent requirements of his employment or that he was dismissed because of such a belief.

APPLICANT'S EVIDENCE

Timothy Ruttley

30 Timothy said when he commenced working for Willis Bros in 1997 as an 18 year old apprentice for the first 12 months of his employment he was not provided with personal protective equipment or a face mask. He used a T shirt around his face when grinding and cutting stone bench tops. After 12 months Duncan provided him with a face mask after his trade school advised him it was mandatory to wear a face mask. He worked 12 hours a day and was not paid any overtime. He completed his stonemason apprenticeship in mid - 2001.

- 31 He continued to work “*on the tools*” (grinding and cutting stone bench tops) working half the time in the factory shaping marble and half the time installing stone benchtop products. After he finished his apprenticeship Duncan installed industrial ceiling fans which helped suck the silica dust from the factory floor. The fans had no filters which meant airborne particles produced from the bench top products circulated overhead.
- 32 His brother Simon commenced working for Willis Bros in 2001 aged 16 years. In 2003 after Simon finished his apprenticeship Simon and Timothy discussed opening their own business. According to both Simon and Timothy, Duncan found out about their intention to open their own business and encouraged them not to leave Willis Bros. He offered each of them a 10% interest in Willis Bros which they accepted.
- 33 Timothy was promoted to foreman in 2006 and was responsible for supervising the Willis Bros factory. In 2007 he was promoted to production manager where he was responsible for scheduling Willis Bros jobs and ensuring that jobs were performed correctly, visiting and inspecting each job and tidying up the work that had been completed.
- 34 In 2008 Duncan’s brother Justin left Willis Bros and Simon and Timothy agreed to acquire Justin’s shareholding increasing their interest in Willis Bros to 17% each. On 6 October 2008 Timothy was appointed as a director of the respondent.
- 35 In 2013 Timothy said he, Duncan and Simon agreed that they would all be paid the same annual salary by Willis Bros. Before this he and Simon were paid an hourly rate for hours worked each week. From 2013 his and Simon’s salary comprised a weekly wage, allowances for a vehicle for personal and work use, a vehicle for their spouse and allowance for fuel, registration and telephone expenses. Simon confirmed this in cross examination and said there was nothing in writing however this was a verbal agreement between each of them including Duncan.
- 36 In 2013 it was agreed that Simon would receive an additional 13% interest in Willis Bros as he was assisting in managing the company with the result that Simon holds a 30% interest in Willis Bros, the applicant a 17% interest and Duncan a 53% interest and the majority shareholder.
- 37 In 2017 Work Health and Safety Queensland increased their site visits after multiple workers in the stone benchtop industry were diagnosed with silicosis due to exposure to silica dust particles. WorkCover directed all workers with silicosis to refrain from performing work in

an environment containing silica dust. By the end of 2018 some 48 workers were unable to attend work.

38 Timothy agreed that in September 2018 he ceased being director of all entities in the Willis Group with the exception of the respondent in these proceedings. Duncan remained the managing director and was responsible for overseeing the company's business operations, financial performance and performance generally and was required to ensure that company policies and legal guidelines were followed. During cross examination Timothy was asked whether he made that request because he was concerned about exposure to prosecutions by work health and safety due to the number of workers in the business being diagnosed with silicosis. He agreed he had concerns regarding the ramifications of the number of workers who were diagnosed and recognised there may be a significant financial impact on the business.

39 In October 2018 he was screened for silicosis and underwent a chest x ray. In November 2018 he underwent a CT scan and on 20 November 2018 saw Dr Deller. He was told by Dr Deller that he had "*lymph node silicosis*" and that dust had not entered his lungs yet but he had a "*terminal disease which I was required to monitor and manage for the rest of my life.*" He was told it was difficult to predict his prognosis and discussed treatment options with Dr Deller such as a lung transplant and flushing out the lungs to remove the silica dust. He said he found the diagnosis overwhelming and stressful and he was scared about his future. After seeing Dr Deller he returned to the factory and Duncan asked him how he went and he told him he had silicosis. Duncan then asked if he intended to go off work. He said he was not going off work just yet. Dr Deller provided a report confirming Timothy's diagnosis and recommended that he continue to monitor his condition with clinical review each six to twelve months.

40 On 20 November 2018 Simon was diagnosed with lymph node silicosis.

41 On 26 November 2018 a worker's compensation claim was registered for the applicant with WorkCover as a result of the health screening all Willis Bros workers were directed to complete. On 23 January 2019 WorkCover accepted Timothy's claim.

42 Timothy said he continued to work long hours following the diagnosis with December 2018 a busy time. The absence of staff made it difficult to keep up with orders. He was required to reschedule jobs and extend installations due to the staff shortage. Duncan was unhappy about

the rescheduling and in January 2019 when he was advising a customer about delay Duncan became irritated and told him to “*get back on the tools*” to finish the job off. The applicant said he told Duncan he could not do that “*because of his silicosis*.” This made Duncan angry and he yelled at Timothy to “*get back on the fucking tools*.” He said he refused and felt bullied by Duncan’s behaviour. Duncan was an experienced stonemason and could have assisted to complete the job himself as he did not have silicosis. Duncan told him on at least three occasions to “*get back on the tools*” in 2019 when finding out that he had to reschedule jobs because they did not have enough staff to complete the work. He felt pressured to work in an unsafe environment and felt uncomfortable and anxious.

43 In March 2019 Timothy said he met with Simon, Duncan, Renee and the respondent’s accountant regarding a shareholder loan ledger which had been ongoing since 2017. He said the existence of shareholder loans came as a surprise to him as he had not borrowed any money from Willis Bros and was unaware of the existence of the loans. Both he and Simon told Duncan they had never discussed any money which was allegedly loaned to them by Willis Bros and according to Timothy Duncan told them not to worry about the loans as they existed on paper for tax reasons and did not require repayment. He said he asked Duncan to confirm that in writing and he agreed to do so and asked Renee to contact a lawyer to have a shareholder agreement prepared about the non - repayment of the loans.

44 In June 2019 he and Simon were given a document titled “*Shareholder Agreement for Willis Group Entities*” however the agreement did not include a section which dealt with the non – repayment of the shareholder loans. Timothy said Duncan refused to include any reference to the non – payment of the shareholder loans and told both he and Simon “*it was this agreement or nothing*.” Duncan told Timothy and Simon that if they signed the agreement “*he would add a bit of paper at the back which would address the shareholder loans*.” He and Simon did not sign the agreement. Simon corroborated Timothy’s account.

45 Timothy said Simon attempted to find out more information about the shareholder loans and was advised that the accountant would not meet Simon and Timothy without Duncan and Renee being present. A series of emails were sent by Simon in an attempt to understand how the shareholder loans had come to exist. Timothy said there were multiple emails regarding this issue and nothing was resolved “*because the accountant could not explain items on the shareholder loan ledger*.” According to Timothy drawings were split evenly between Simon, Duncan and Timothy even though Duncan held a 53% interest in Willis Bros. He said

Duncan became angry with Simon and Timothy for speaking with Renee about the issue and said to Timothy “*I should never have asked her*” and “*keep that fucking thing out of it*” because “*she is only acting on my authority.*” He was told by Duncan that he should have “*come straight to the horse’s head.*” Timothy said Duncan spoke in an aggressive manner and repeatedly interrupted Timothy when he tried to ask questions about the shareholders loans and spoke loudly over the top of him. When Timothy complained that the accountant was not giving Simon clear answers Duncan said “*stop talking to our fucking accountant.*” Timothy said he felt bullied by Duncan.

46 In about June 2019 Timothy, Simon and Duncan met to discuss the business including the employees off work due to silicosis and the following conversations occurred:

Duncan: So I think that as I said ...have been said there is such much uncertainty I told you mate I was at a cross road the other week and I don’t know mate. I think now Luke’s gone I think that fucking ...rattled me. You guys are sick. What are you’s going to do. I think the balls in your court really. Might be good and well for me to say I’m going to do that at the end of the day the ball’s in your court. What do you’s want to do. You’ve obviously spoken about it.

Applicant: the work needs to pick up.

Duncan: Well mate it’s all fucking ...we couldn’t fucking more work or lose the money then mate.

Applicant: More work?

...

Duncan: I honestly think I’ve been thinking since the last time we spoke mate I want to fucking have sheds there mate at least one of them

Simon: well there is no reason why we can’t

Duncan: No there is not. And I’ll tell you I will be honest with you what worries me is fucking you guys with silicosis. I’m the only one here without it. Everyone is pointing their fucking finger at me. Fucking poor Luke’s got it. You guys have got it.

Simon: Yeah we’re not going to walk – like – that’s why we are here mate, we haven’t walked away from anything.”

Duncan: Yeah I know it needs to be spoken about mate, because the older you get both of you’s I don’t know mate what do we do because I don’t want to go back to the old days.”

Simon: What’s the old days?

Duncan: Working our fucking guts out mate

.....

Applicant: and then Simon’s credit cards have been cut.....sorry for the questions but we want to know obviously you must be thinking something

Duncan: I haven't

Applicant: Put it on the table

Duncan: I want to buy Simon out.

Applicant: You want to buy Simon out of the business

Duncan: I want to buy him out yeah whatever

Applicant: Well can the business even afford that?

Duncan: I'll buy it.

Applicant: You'll buy it?

Duncan: Yeah

Applicant: Have you got anything in your funds to buy him out?

Duncan: Uhuh

Applicant: Have you already looked into it?

Duncan: Uhuh

Applicant: Well this obviously can't keep going the way that it's going. Everything's happening around behind me

Duncan: If you are going to keep running like we are now, we will all be out of a fucking job mate

Applicant: Will can I see.....

Duncan: I'm not here to dog anyone or fucking shaft anybody

Applicant: Ok. What do you think about that?

Simon: Why...I want to know why?

Duncan: Well just I think that's the next step in my business. I'm not happy with the way that the company is going

Simon: So I'm the ...so you are pin pointing me because?

Duncan: Because you have got the most shares. By any means it's nothing personal it's just business. I'm not going to lie to you it is what it is so you can have a crack at me I've got silicosis up my arse I'm fucking worried I've been scared as we all have been..

Simon: you obviously have a figure in mind if you already know what it is

Duncan: I'll talk more formal... have a think about it.

...

Simon: And then you just said that you were happy with the way it runs so obviously

Duncan: No mate I am not happy. If I think that the change that I've had like honestly I think the biggest thing is for me is that you guys you know well how long are you going to be here for mate? Like you know what I mean. Your health you know what I mean? I haven't seen anything but you are both not sick. I'm fucking,

I'm looking after me mate. It's only business mate it's nothing personal. If you are fucking sick and can't be here what do I do mate? Shut it down? You know I'll shut it down. I've got the shits, I've got to get organised. If I don't start talking about it and to be honest with you mate. I don't know. I've still got a million thoughts in my fucking head to be honest with you mate a million fucking thoughts. I haven't been fucking sleeping since our first chat. The original chat. We have had a chat after that...

Simon: What chat? We haven't had any chats about this

Duncan: No well this is where I was going in this direction right now mate. About a week ago. I thought about it I didn't think it was doable."

47 Timothy was cross examined about the conversations. He agreed that he and Simon were the two most senior members of Willis Bros in terms of working with the production and installation side of the business. Counsel suggested that the conversation occurred at a time when there was uncertainty in the business, employees had gone off work and there had been a significant financial downturn in the business. Timothy disagreed and said when the conversation occurred,

...all the restructure had happened. Because Luke, my brother, stayed on in the business, and then when Luke stayed on as long as he could, and kept postponing his appointment with Dr Deller, knowing that he would be put off. And then when he did eventually go off, that's when the conversation happened...It was nearly 12 months later.

48 On 28 June 2019, Duncan emailed Timothy advising that he was being issued with a new salary package including a weekly wage and QBCC allowance however the email did not state exactly how much Timothy would receive. Timothy said Simon refused to sell his shares to Duncan and on 19 July 2019 Simon's position with the respondent was made redundant. He was paid a sum of money in lieu of notice of termination of his employment.

49 Following Simon's termination Timothy's workload increased as he took on Simon's duties which included liaising with the respondent's suppliers and overseeing work on job sites. He said he estimated he took 200 calls a day and also trained new employees working in the factory. He asked Duncan for assistance with workers in the factory and Duncan refused to assist and told him to "*get back on the tools*" despite being aware that he had been diagnosed with silicosis. He said Duncan's refusal to provide him with assistance caused him to suffer stress and he felt exhausted and overwhelmed.

50 Timothy said after Simon left Duncan became extremely antagonistic towards him. He complained that on occasion Duncan entered his office uninvited stood over him while he was on a call, stared at him and then left the office. On another occasion he entered the

applicant's office and stood so close that his leg touched his office chair and stood over him in silence. He walked out of the office without saying anything. A few times a week Duncan ate Timothy's food without asking by picking up the food he was eating at his desk. On a few occasions Timothy said he told Duncan to "*fuck off*" however Duncan's behaviour persisted. He said Duncan often referred to him as a "*fuckwit*" or "*fucking idiot*" and he felt belittled.

51 In November 2019, Timothy attended Dr Deller for review and was advised there had been no change in his diagnosis.

52 In late November 2019 Duncan advised Timothy that he intended to appoint Justin as a director of the respondent and told him he had two choices either sign the document consenting to the appointment on the spot or he would convene a meeting and "*push the appointment through by ordinary resolution as he was majority shareholder.*" He refused to sign the document. I am satisfied that Duncan having formed an intention to exit Timothy from the business sometime after July 2019 acted on that intention in requesting that Justin return to work for Willis Bros. Justin was appointed a director of Willis Bros on 16 December 2019.

53 Prior to Christmas 2019 Duncan requested Timothy attend his office to discuss the employees who had requested their holiday leave entitlements be cashed out because they had been diagnosed with silicosis. Duncan commented "*how are these dogs sitting at home nothing wrong with them.*" Timothy responded that the workers "*did have something wrong with them*" which Duncan ignored and continued to make derogatory remarks. He said he felt stressed at work at the way Duncan was treating him including the excessive workload he had at that time.

54 In late November 2019, Timothy said he asked Lisa Wilson the respondent's payroll and administrative employee to check his leave entitlements. Lisa told him that Duncan told her that he was not allowed to have access that information. He asked Lisa to check his leave through the MYOB system and she brought up his records. He observed that he had no hours of accrued leave and took a photo of that record. He said he was concerned as he was aware that he had accrued a significant amount of leave. Previously he had had a conversation with a former employee responsible for payroll and administration in about 2015 and was told that he had accrued so much leave "*he could take a year off and then some.*" He said this was correct as he had not taken many holidays during his employment but would take two weeks off each Christmas each year when the factory closed down. In addition he took two weeks

off for his honeymoon in 2017. I accept Timothy's evidence that he had accrued leave entitlements in November 2019 and no record was kept of those entitlements. I am unable to quantify those entitlements on the evidence.

55 On 12 December 2019 Timothy was working late in the factory when Duncan came into his office and asked him where his money was. Duncan was aware that Timothy had recently sold his house and wanted to know what he did with the money. He told Duncan he had purchased a new home. Duncan then raised the issue of the shareholder loans and said that "*I needed to get my house in order.*" Timothy replied he did not owe any money on any shareholder loans and Duncan said "*on paper you do.*" He told Duncan the only evidence Duncan had was a ledger that he had concocted with Renee and his accountant and said that was "*hocus pocus.*" Duncan told him he could make the loans "*stick.*" He said that made him feel uneasy and uncomfortable particularly asking him questions about his personal finances.

56 From 23 December 2019 to 12 January 2020 the factory was closed. Timothy said he usually returned to work in the first week January however he felt overwhelmed and burnt out and returned to work later on 13 January 2020.

Events of 14 January 2020

57 On 14 January 2020, Timothy said Duncan entered his office at 7.30 a.m. and without greeting him said "*I want my fucking shares back you hear me.*" He slammed his hand on the desk loudly which shook the desk and startled Timothy and walked out of the office without saying anything further. At 10.00 a.m. on 14 January 2020 Duncan emailed Timothy a director's resolution from Willis Bros Holdings Pty Ltd requesting that he surrender the BMW vehicle driven by his wife. The request required the vehicle be returned by 28 November 2019 or alternatively that the applicant purchase the vehicle for \$58,862.60 plus GST before 31 January 2020. On receiving the email Timothy said he walked out to the yard where Duncan was and asked why the vehicle had to be returned and if Duncan's wife was also returning her vehicle. Duncan asked why he needed to do that. Timothy said that his family would be without a car and told Duncan his email was a "*fucking joke*" to which Duncan replied "*it is what it is.*" Timothy told Duncan that he and Renee were making all the decisions and he (Duncan) needed to "*take his nuts out of her handbag*" because what he was doing was a "*low act.*" Duncan ignored him and walked towards Renee's office and continued to ignore Timothy when spoken to.

58 Timothy said he walked out to the yard and rang Simon about the email. While on the phone he walked back into his office to get his wallet and keys to leave and as he walked out he said to Simon *“I don’t know what Renee’s got over him.”* He turned around and Renee was standing behind him so close they were almost touching and she said *“how dare you.”* Her voice was raised and she was pointing her finger at him. Timothy said he stepped back and said to her *“how dare you come down here go back upstairs where you belong.”* Renee turned and left and he drove home. He said he was shaken by the events of the morning and drove to see Dr Freeman and reported he had been under enormous stress at work and had been bullied by Duncan for months. He was given a mental health plan and referred to a psychologist. The medical certificate provided stated that he was *“suffering from workplace stress and will be unfit for duty up to and including 14 February 2020.”* He said after the appointment he called Duncan and told him he was taking the week off work. I am satisfied that the applicant suffered hurt, humiliation and distress as a consequence of Duncan’s conduct towards him over the previous few months

59 On 15 January 2020 Timothy emailed Duncan to advise that he had sought medical advice regarding the extreme stress he was under in the workplace. The email read *“Due to yesterday’s events and the events of the last few months I have been under extreme stress and have now sought medical advice in regards to my mental health. It is my doctor’s opinion that I do not return to work at this stage. Please refer to the below medical certificate.”* Late in the evening on 15 January 2020 Timothy received an email from Duncan accusing Timothy of bullying and intimidating Renee and advised him that he intended to seek legal advice. He stated *“the restructuring had nothing to do with Renee.”*

60 On 16 January 2020 Duncan emailed Timothy requesting he surrender the Landcruiser and advising him that he would be diverting his work phone to the office. Timothy responded by email advising that he needed the vehicle to drive to medical appointments. Duncan said he would arrange a replacement vehicle. On 16 January 2020 Timothy said he tried to use his fuel card which was declined. He said his health continued to decline and he attended his G.P. and psychologist. He was given a medical certificate up to and including 30 April 2020.

61 On 21 February 2020 the respondent’s solicitor’s O’Reilly Workplace Law sent an email to Timothy’s lawyer demanding the return of the Landcruiser and advising that his QBCC allowance would not be paid while he was on sick leave. The email was not received by Timothy’s lawyer until 27 February 2020. On 27 February 2020 Timothy said when he

received his pay it was “*short*.” On 28 February 2020 his lawyer sent an email to the respondent’s lawyer in relation to his salary package seeking an explanation why his salary had been reduced. He received no reply.

62 On 2 March 2020 Nautilus Law Group for the respondent wrote to Timothy’s lawyer seeking payment of the shareholder loans claiming moneys were loaned to Timothy and Simon by Group Manufacturing Pty Ltd. On 3 March 2020 O’Reilly Workplace Law emailed Timothy’s lawyer demanding the return of the Landcruiser and advising that a replacement vehicle would be made available. Timothy returned the Landcruiser on the same day however no alternate vehicle was ever made available.

63 On 3 March 2020 Timothy’s lawyer wrote to O’Reilly Workplace Law advising that his wage had been reduced, his fuel card cancelled and his mobile phone disconnected and requested that his entitlements be re-instated in accordance with his salary package. On 5 March 2020 the Nautilus Group wrote to the Timothy’s lawyer disputing his entitlements.

64 On 2 April 2020 Timothy did not get paid his weekly wage. He emailed Renee asking why he had not been paid and asked when he was going to receive payment. In addition he enquired why his pay had changed on 27 February 2020 and requested his wage be back paid. Renee replied via email on 4 April 2020 directing him to contact the office because she had been on personal leave.

65 In early April 2020 Timothy received an agenda for a meeting of the company to be held at Nautilus Group’s office on 30 April 2020 the purpose being to remove him as a director of the respondent.

66 On 6 April 2020 Justin emailed Timothy advising him that he had exhausted his leave entitlements. Timothy replied by email that he disputed that and requested a reconciliation of his personal, annual and long service leave entitlements. On 9 April 2020 Timothy emailed Justin and Duncan requesting they provide him with the information he had asked for in the email of 6 April 2020. No response was received and no information was provided.

67 On 21 April 2020 Timothy attended the respondent’s factory to obtain bank records. He asked Duncan what his entitlements to sick leave, annual leave and long service leave were. Duncan told him to ask his lawyer to request that information and said “*we do not accumulate leave entitlements*.” Timothy said that was untrue as he had always accrued leave entitlements.

68 On 28 April 2020 Timothy attended Dr Freeman and was provided with a further medical certificate up to and including 31 May 2020.

69 On 30 April 2020 the respondent passed a resolution removing Timothy as director effective from 1 May 2020.

70 On 11 May 2020 Timothy received an email from Justin attaching a letter terminating his employment “*because he had taken excessive leave and because his absence was not based on the Worker’s Compensation and Rehabilitation Act.*”

Cross examination of the applicant

71 Timothy was asked questions about his salary package and said that his salary had been “*verbally agreed between himself and the other directors.*” He accepted there were “*no written documents which set out the terms...*” but an email existed sent to him by Duncan. He denied that in early 2019 there a discussion or agreement that he would be paid \$130,000 plus super by way of salary. He denied there was an agreement he would be paid a QBCC licence allowance in the amount of \$1243 a week and was unaware he was receiving any QBCC allowance. The only discussion that took place related to the financial circumstances of the business.

72 Regarding the email he received about his salary he said “*I had to take a photo of it because Duncan or Renee deleted it out of my computer and then when I tried to rely on it Duncan said ‘what are you talking about? That doesn’t exist. There’s no such thing. I never sent that to you’ until I told him the date from my photo*” confirming the existence of the document.” He denied that “*if there was a stronger period of time that a higher salary would be provided*”.

73 He was asked about the 2019 tax position for the Willis Group of companies and specifically about the “*accounting profit and loss before reserves and distributions.*” He said he had not seen any financial statements for the Willis Group and denied that he received \$164,014 in salary. He agreed that he declared a total income for the 18/19 financial year of \$193,478 and accepted that his salary was a combination of wages and dividends. He was shown a payslip issued by Willis Bros and said he never received any payslips other than one payslip which was “*forwarded to me to give to the bank.*” He agreed he had seen the payslip he provided to the bank but said he did not check it and only looked at the right-hand corner. He and Duncan had agreed that he would receive \$2500 in the hand each week. The payslip was dated 19

December 2019. He accepted the figures on the payslip indicating an annual salary of \$130,000 and a further amount for a QBCC licence. He did not accept that his salary as of December of 2019 was \$130,000. He was asked whether for the period from 16 to 29 January 2020 his payroll advice indicated that he was in receipt of \$130,000 by way of an annual salary. He did not accept that. He said he may have been paid a QBCC allowance in January of 2020 but that was without his knowledge. He said *“after I found out – once they stopped paying it, that’s when I found out and found these payslips on the advice of my lawyer and I found the payslips and went back and had a look and realised there was a QBCC licence allowance on it and I never knew nothing about it. It was hidden from me.”* He didn’t think he would be deceived in the manner he was by Duncan and Renee.

74 Counsel for the respondent suggested that in July 2019 Simon’s salary was \$130,000. He did not think that was correct. He was shown a payslip for Simon and accepted the payslip stated \$130,000 however he disagreed he or Simon were receiving that amount.

75 Timothy agreed that on 14 January 2020 he was involved in some discussions with both Duncan and Renee and spoke with Duncan about the email he sent requesting the surrender of the BMW. He had a conversation with Duncan that took about 15 or 20 minutes and then called his brother when Duncan wouldn’t answer him and told him *“I can’t do this anymore.”* He spoke with his brother for a couple of minutes and walked back into his office and was on the phone to Simon when Renee confronted him, yelling at him from behind his back. He was asked about the length of his phone call to Simon and denied he was not on the phone when Renee confronted him. He said Renee said *“How dare you”* and denied she asked *“Timothy, can I talk to you for a moment.”* Counsel for the respondent suggested that he *“pointed his finger at her and started screaming words to the effect of, “Get out of my fucking face” and “You’re nothing but a cunt”* He denied that.

76 Timothy agreed that Duncan previously confronted him about phone calls he made to Simon between July 2019 and December 2019 and accused him of speaking with his brother every day by phone. He told Duncan the reason for that and agreed he called Simon frequently as he had taken on his work. Prior to leaving Willis Bros Simon had looked after 50 per cent of the workload. There was no handover and he took on Simon’s workload. Duncan had nothing to do with production and as *“he didn’t know where he was at with it so he called him in regards to ‘What’s going on with this job? What’s wrong with that job? What’s the story to*

do – do with this job?” He agreed that some calls were personal. He agreed Simon had started at Dream Benchtops a business competitor and Duncan raised that as a concern.

77 Timothy agreed that on 15 January he received an email accusing him of behaving in a bullying and intimidating manner towards Renee. He denied that conduct.

78 He agreed that he used the Group Manufacturing line of credit to purchase an outdoor setting in or around 20 December 2019 but denied he did not have authority to do so. He could not recall if Duncan contacted him about that but then accepted he received an email from Duncan on 14 January 2020 which stated “*Willis Brothers has lost a lot of money in the last 12 months, and you still want to put personal items on your drawings.*” Counsel suggested that Duncan expressed concern about his conduct. He said “*That email was hocus pocus. It was put together knowing what Duncan would do...because I had a conversation with Duncan the day before, and we – he never bought any of this up to me, and then all of sudden this email turned up, and I said, ‘We’ve worked together for 20 years. We would normally sit down and have a discussion. He didn’t reach out. He just sent an email.’*” He agreed he told Duncan to put the cost of the outdoor setting “*on his drawings*” and Duncan replied “*this will not be happening*” and he would need to let him know how it will be paid back and how it should be deducted from his wage in part or in full.

79 Timothy agreed that he made a number of allegations of bullying and harassment against Duncan and maintained those incidents occurred. Timothy denied that when he was on the phone Duncan would wait a while to see if the call was going to finish and stand at the door. He said “*he stood so close to me...on another occasion, Duncan entered my office while I was completing scheduled paperwork. He stood so close to me that his legs touched my office chair.*” Counsel suggested that the office lay out was such that it would not have occurred. He disagreed.

80 Regarding the request to surrender vehicles Timothy agreed that the vehicles and phone were company assets owned by Willis Bros Holding.

81 Regarding annual leave Counsel for the respondent suggested that there was a longstanding agreement between the directors that leave entitlements would be taken at the discretion of a director and as such there was no need for the respondent to keep track of leave accruals or records in the system. Timothy denied that. He agreed he did not submit an application for leave but said all leave was discussed face-to-face with Duncan and Simon. He agreed he had

never checked whether his leave had been deducted from his accrual of leave in the system as he had no access to that system. He agreed that other employees of the Willis Bros that worked under his directorship applied for and had leave accrued in the system. Counsel for the respondent suggested that the reason Timothy made no formal application for leave or checked his leave balances was because he was a director of the company. He denied that and disputed that his leave was not recorded in the system. He said *“I believe it was. Yes. Because I had a conversation with the pay clerk, and one of the guys asked how much leave he had and I went and checked, and asked, ‘How much would he have? He would have a fair bit, because he does a fair few hours.’ And she gave me an indication of what he had there, so I could tell him. And she made a comment to me. She goes, ‘Well, you’ve got enough leave there to have a year off.* Timothy agreed that he did not see the records in the system on that occasion.

82 Regarding the medical certificate that he provided to the respondent in January 2020, Timothy agreed that he had previously never provided a medical certificate to Willis Bros to indicate that he was sick from work. Counsel suggested that if he was sick from work he would just take the day off. He said he was very rarely sick, and even then he would go into work. If he was too ill to attend work he would inform work and then take the day off. Counsel asked if he was absent for more than two days or a longer period whether he provided a medical certificate. He said he was never away that long.

83 Regarding the diagnosis by Dr Deller in November 2018 of lymph node silicosis Timothy agreed that he made a claim with WorkCover. Counsel suggested that Dr Deller had reported that *“there was no clear evidence of pulmonary parenchyma abnormalities.”* He said

I don’t understand what that means, but I’m not sure. I just spoke to the specialist, and he said that, ‘You need to avoid silica at all extent.’ So I stopped going out to the workshop, and helping the guys onsite, for that reason. I don’t – I’m not sure about – what those words mean, but after speaking with the specialist, that’s what he said – that’s what he told me. And I had a conversation with Duncan after that, and told him, ‘I’m trying to not go out there’ for that reason, to avoid the silica.

84 He confirmed the he told Dr Deller that *“between 2002 and 2006 he had been involved in shaping and installing equally and dry cutting techniques without a mask.”* He agreed he told him that *“over the last 11 years he spent most of his time in the office environment but on occasion he worked with shaping, shared mainly during busy periods, such as up to the lead up to Christmas.”* He told Dr Deller during busy times he *“got on the tools.”* He said Dr Deller told him to stay away from the tools as much he could. Counsel suggested that Dr

Deller had written in his first report “*I do not think further investigations are required at this time, and I would agree with ongoing monitoring.*” He agreed Dr Deller made no mention in his report recommending that Timothy avoid exposure to silica. Counsel suggested that in November 2018 when he told Duncan about his diagnosis and said he was not going off work he did not mention to Duncan that he was unable to be around silica dust. He said “*Yes. I did. Yes. We had that conversation on more than one occasion.*” He agreed that he didn’t provide Dr Deller’s report to Duncan at the time.

85 Timothy agreed that he had a further consultation with Dr Deller in November of 2019 who indicated that there had been no change in his capacity to work and his work was unrestricted. He maintained that Dr Deller told him “*You need to stay away from the silica*” and said to him “*What do you want to do? Do you want to leave the industry*” and he replied “*Well, I can’t leave the business in turmoil. If you put down there that I have to leave the industry, what’s going to happen to the business?*” He said after the involvement of Work Health and Safety wet cutting techniques were mandated, and the use of a respirator had become common practice in the factory.

86 In terms of his duties as a production manager when working for Willis Bros Timothy said he was expected to perform general factory tasks including forklift loading trucks, measuring, emptying bins, and giving workers a hand, from time to time and was required to have a presence on the factory floor. Counsel suggested that in performing these supervisory roles, as well as lending a hand he was not required to perform stone masonry work. He denied that and said Duncan would tell him that he needed to get back on the tools to finish jobs off due to a lack of resources and he put pressure on him to do that. Counsel suggested that Duncan never directed him to do stone masonry work and in doing that work it was his choice and he simply elected to do that. He said that was untrue.

87 Counsel suggested there was no medical reason or restriction on him working on the tools in 2019 as Dr Deller placed no restriction on him. She suggested that was consistent with an email dated 1 February 2021 from Dr Deller that “*As you have enlarged lymph nodes only, returning to the industry is reasonable as long as there is a very high compliance with dust reduction avoidance, and use of respiratory protection.*” He said Dr Deller didn’t have the air monitoring results from the shed which indicated there was silica in the air, even in the office, which was non-avoidable. He said “*You can’t wear a mask and answer telephones.*” He had discussed with Dr Deller in the consultation room that if silica had a role then he couldn’t

work on the tools. Timothy accepted that he subsequently got an alternative medical opinion which verified that it was not safe for him to return to the industry.

88 He agreed that he found the news of his diagnosis quite overwhelming and stressful and since that time he has made a WorkCover claim in relation to psychological injury in relation to his silicosis diagnosis. He said *“I did make a claim but withdrew it, because I started to seek my own health – looking after my own health, instead of going – so I withdrew it. But it wasn’t just to do with silicosis. It was with regards to Duncan bullying me.”* He agreed he filed a WorkCover claim in relation to silicosis on 8 July 2021. He was asked whether he told Dr Freeman his G.P. that he had been under enormous stress at work and that he had been bullied by Duncan for months. He agreed. Counsel suggested that the medical certificate from Dr Freeman indicated that his incapacity commenced on 14 January 2020 and the cause of the workplace stress is unknown on his further two medical certificates. He said he explained to the doctor the cause of his illness but it was not written on the medical certificates.

89 Counsel suggested that the only discussion he had with Duncan about his alleged psychological condition due to Duncan’s conduct, was in an email to Duncan on 14 January 2020. He could not recall and agreed he withdrew his WorkCover claim about Duncan’s alleged conduct towards him because he was *“embarrassed of it”* He accepted he could have continued with that claim if he had wanted to.

90 He was asked about his new WorkCover claim dated 8 July 2021 (Exhibit R1) where it was written that he had sustained lymph node lungs respiratory symptoms and silicosis. The second injury alleged was a psychological injury including depression and anxiety. He agreed he had not indicated in the WorkCover claim that he had suffered a prior psychological injury due Duncan’s bullying conduct. He said he intends to rectify that.

91 He agreed that the medical certificate issued by his general practitioner, Dr Lynn Freeman related to a primary condition of silicosis and a secondary or related condition of anxiety and/mood disorder. He agreed the secondary condition related to the silicosis and was said to have commenced on 2 March 2020. Counsel suggested that he was absent from 14 January 2020 due to an anxiety or mood disorder created by his silicosis and not due to an alleged injury or psychological injury due to Duncan’s conduct towards him. He denied that.

- 92 He agreed that when silicosis “*hit the stone benchtop industry it had a significant and very disruptive effect on the industry and significant impact on the Willis Group.*” He accepted that changes in the production processes were implemented with a move towards wet putting and the purchase of new equipment and a number of workers were directed to stop work. He agreed that a code of practice was implemented in relation to managing silica in the workplace. He was unsure whether that required the implementation and further monitoring of safe systems of work. He agreed that around this time there were a number of labour shortages as a result and many employees were unable to attend work.
- 93 He was asked about the financial structure of Group Manufacturing. He accepted that the company pays expenses in relation to the manufacturing and the installation work for the group of companies. He was aware for the year 2018/2019 financial year that Group Manufacturing experienced a loss and denied a figure of \$780,000. He said the losses were due silicosis within the industry. He agreed there were redundancies but unaware how many. He agreed that assets such as company vehicle may need to be disposed of due to the financial pressure but disagreed that the removal of his car and fuel was a “cost cutting” measure.
- 94 He denied that he was advised about his QBCC allowance being stopped or being temporarily paused. He did not receive the email dated 21 February 2020 until 27 February 2020. The email stated “*Due to your extended sick leave, you will be unable to meet the conditions of the company’s QBCC licence. For the duration of his absence he will be removed from the licence, and the payment of the QBCC licence allowance will be paused.*” He agreed that as holder of the QBCC licence he was required to be able to supervise employees in the workplace. He accepted that the email indicated that once he returned to work the licence allowance would again be paid to him. In response he said “*when Justin Willis was the QBCC licence holder, Justin was absent from the workplace for more than two years. So I don’t believe it has any effect.*”
- 95 He agreed he had received money from Q Leave a scheme within the building industry that pays long service leave entitlements.
- 96 Regarding his leave entitlements Timothy said he took two weeks of holiday at the Christmas period when the factory closed and two weeks off for his honeymoon. He agreed he was involved in pig hunting and did that with his brother Luke as a recreational activity. He was required to go away from Brisbane to engage in that activity and had travelled to regional

areas in Queensland and New South Wales. He denied he went for a week at a time but just went on weekends. He agreed he sometimes took time off work to do that activity and would coordinate that with work. He agreed he took a week off as a “one off” to go pig hunting, denied he was off work due to a bad back and denied he would simply take leave when he felt like it in response to a question about a text message exchange in October 2019 between the applicant and Duncan which read from Duncan at 9.06 a.m. “Are you coming in?” The remaining text was illegible. I accept the applicant’s evidence that he had accrued leave entitlements and was utilising those leave entitlements when he was dismissed from employment. Given the absence of any records I am unable to quantify his accrued leave with any precision suffice to say he had not exhausted his leave entitlements when he was dismissed. I find that the applicant suffered hurt, humiliation and distress as a result of Duncan’s conduct over the preceding months prior to 14 February 2020. I find that the applicant was discriminated against by Duncan because he had a physical disability and was treated less favourably than other employees. The medical certificate provided on 14 February 2020 indicated he was “suffering from workplace stress and will be unfit for duty up to and including 14 February 2020.” The certificate was extended to 30 May 2020 and covered the period during which the applicant was dismissed.

97 Counsel suggested that there was a disagreement between Timothy and Duncan, in relation to shareholder loans. He agreed and said Duncan alleged that shareholder loans were owing which he denied. He agreed that issue was the subject of other legal proceedings with Duncan seeking to enforce the loans against both himself and Simon. He confirmed that Duncan demanded that he wanted his shares back on 14 January 2020 when he entered his office.

98 He agreed that there were a series of emails that he sent from the company to his home, or to his wife’s email account and it was suggested he did not have authority to send those emails. He said he was a director at the time and sent them to his wife’s account so “Duncan and Renee wouldn’t delete them. Because that’s what they were doing. They were deleting my emails.” It was alleged that 34 emails were sent by the applicant to his wife’s email account and Duncan alleged this was a breach of confidentiality. The subject matter of the emails was not revealed in evidence.

99 Timothy denied that he had directed staff members to clean up dog poo.

100 He agreed that Duncan had told him that on his return to the company he was told the company intended to investigate him over the alleged incident with Mr Miltoni. Counsel

suggested that Timothy had asked to speak to Miltoni at the Christmas party on 21 December 2019 and that during a discussion with Mr Miltoni Timothy said that Duncan was screwing with his brother and making his brother look like a “*fucking idiot*.” Counsel suggested that Timothy told Mr Miltoni he was not happy and that he wanted something to be done about Duncan and asked “*do you know anyone that could fuck him up*.” Timothy denied he made the alleged threat. He agreed he attended the Christmas party on 21 December 2019 and spoke to Mr Miltoni in a group setting. He denied any one on one conversation. He later lent Mr Miltoni money at his request.

101 He agreed that he obtained alternative employment on 26 August 2020 but did not apply for or seek employment anywhere other than with his brother. He started commencing discussions about employment at Dream Benchtops three or four weeks before he started on 26 August 2020. He denied he started before that date. He borrowed money from Simon to pay bills before commencing work with Dream Benchtops. He earned \$2500 a week at Dream Benchtops and was working in the office assisting with scheduling jobs.

102 He was cross examined about signing an employment contract with Dream Benchtops Manufacturing in August of 2020 in response to the question “*Do you have any disabilities, medical or physical conditions or pre-existing injuries that may affect your work ability?*” he had answered “*No*.” The document indicated that his wage was \$73.89 per hour for the job of production foreman reporting directly to the production manager. There was a second contract signed with Dream Benchtops Manufacturing where his wage was \$52.63 an hour in the role of production foreman. He said he could not explain the reduction in the hourly rate given the offer was for the same position of “*production foreman*.” He said he needed work and was prepared to accept any offer. He had never applied for Centrelink benefits and needed money to support his children. He said he received gross pay of \$2809 a week for the first contract and that he provided payslips for the period 27 August 2020 to 18 November 2020. (Exhibit R3)

103 Counsel asked whether Timothy had any involvement with C & C Saw Wet Polishing and Shaping. He agreed he did and performed some work on the tools on that job despite Dr Deller’s warning. He said he took the job for his family due to financial hardship.

104 He agreed that he had not lodged a tax return for the 2019/2020 financial year or the 20/21 financial year evidencing his wages between 11 May 2019 and 30 June 2020 nor for the period 1 July 2020 to 30 June 2021 however he had provided payslips.

105 He agreed after he went on leave on 14 January 2020, he had some initial discussion or email communication with Duncan and then had no contact until April 2020 nor did he have any contact with Renee or Justin in relation to his return to the workplace. He said “*I think I sent an email to Justin and Duncan.*” He said he received the letter regarding that after his employment was terminated from Willis Bros on 11 May 2020.

106 He ceased employment with Dream Benchtops on 25 May 2021.

107 I accept Timothy’s evidence and find that he was doing his best to provide a truthful and accurate account of what had occurred prior to his termination from employment. Until he was diagnosed with lymph node silicosis he had worked with Duncan in the stone bench top business for about 20 years. Neither he nor Duncan suggested there had been any animosity between them prior to November 2018. I accept that after Simon left in July 2019 Timothy made a request for assistance upon taking on Simon’s workload and no assistance was provided. I accept his evidence that he was bullied by Duncan and told to “*get back on the tools*” and finish jobs which involved being exposed to silica dust. I accept he received no notice that his QBCC allowance had been suspended or removed and he was not given advanced warning that his wages would cease. I accept he received no response to his inquiry about his wages and allowances and no response regarding his request for information including records of his leave entitlements. I accept his version of the incident on 14 January 2020 and that over a six month period he suffered significant workplace stress. I accept Timothy’s evidence that he had accrued leave entitlements prior to receiving notice that he had “*exhausted his leave entitlements*” on 6 April 2020 and was entitled to rely on that leave which was supported by medical evidence at least until 30 May 2020. I find that the applicant suffered distress, hurt and humiliation as a result of Duncan’s conduct towards him during the period following Simon’s termination in July 2019 until his employment was terminated.

Simon Ruttley

108 Simon gave evidence which largely corroborated the applicant’s evidence. In 2003 after Simon finished his apprenticeship Simon and Timothy discussed opening their own business. They agreed that Duncan found out about their intention to open their own business and encouraged them not to leave Willis Bros. Duncan offered each of them a 10% interest in Willis Bros which they accepted. When Justin left Willis Bros in 2008 Simon and Timothy acquired Justin’s shareholding interest in Willis Bros giving them 17% each.

- 109 He said in 2013 Duncan, Timothy and Simon agreed that they would all be paid the same annual salary by Willis Bros. The salary package comprised a weekly wage, allowances for a vehicle for personal and work use, a vehicle for their spouse and allowance for fuel, registration and telephone expenses. In 2013 it was agreed that Simon would receive an additional 13% interest in Willis Bros as he was assisting in managing the company giving Simon a 30% interest in Willis Bros with the applicant retaining a 17% interest. Duncan held the remaining interest and was the majority shareholder.
- 110 Simon was a director of Group Manufacturing Victoria from 25 October 2016 to 18 July 2019. Group Manufacturing held accounts for the entity's creditors for the Willis Group and all financial accounts being moneys in and moneys out in relation to the manufacturing and installation work occurred through Group Manufacturing. He denied that Duncan was involved in the financial management of Willis Bros and said he was the one that paid the bills for Willis Bros or they were paid by the staff employed to manage the finances for the company. Counsel for the respondent suggested that *"regarding the financial management of the company as Duncan was managing director of Group Manufacturing the buck stopped with him."* He agreed.
- 111 He accepted that his and Timothy's salaries were verbally agreed between the directors and there were no written documents or contracts indicating what salary each of them would receive. He denied that from year to year those salaries were based on the financial performance of the business. He agreed that in July of 2019 he earned \$130,000 but said *"that's not what we got paid. That's not what we agreed to with part of our wage structure."* He said while working with Willis Bros he had a company vehicle that was owned Willis Bros Holdings. He disagreed that the vehicle was not part of his employment package however accepted there was no salary sacrifice arrangement and no arrangement for him to purchase the vehicle. He agreed the vehicle was a company asset.
- 112 Regarding leave entitlements he denied there was a longstanding agreement between the directors in terms of leave and denied that leave would be taken at the director's discretion. He said *"we would sit down with the three of us and let everyone know when we were going to go on leave."* He was unaware of any records being kept and said no one at Willis Bros applied for leave in writing. Leave would be written in the diary, *"so that we knew when the guys were off. So if the guys were off on those days, it would be written at the top of the diary. For example, Barry worked in the shed, and there would be an entry 'Barry off' on*

each given day so that when the girls would organise pays and leave they would check the diary regarding who was off and who was on annual leave, who got paid sick pay.” He was responsible for organising workers to be paid and it was his job to know “who was on and who was off.” Counsel suggested that if he had that involvement he would have seen in the system whether leave was in fact accruing. He said he had no access to those files but only organised each persons’ pay and never sought to check how much leave he had accrued. Simon said he never took leave but was aware he was entitled to it. He worked six days a week every year throughout the year and said “We worked public holidays. So I didn’t need to check, because I already knew I had enough. Because I had been there for 20 years and never took leave other than Christmas Timothy, or applied for leave, which we would sit down and discuss to make sure that – you know, that the business could afford us not to be there.”

113 In June 2019 he was engaged in a conversation with both Duncan and Timothy regarding a dispute about a shareholders loan agreement now subject to separate legal proceedings. They were given a written shareholder’s agreement and told to sign it. He denied there had ever been any previous discussion or agreement regarding any shareholder’s loans. He and Timothy obtained legal advice about the shareholders agreement and told Duncan the changes they wanted to make and Duncan dismissed those changes and they did not sign the agreement.

114 He agreed they took time off during the Christmas shutdown period and were not required to be present at work during this period. Counsel suggested that the shaping work did not need to start in the business until after the shutdown, because installation work was delayed after coming back after the Christmas break. He disagreed and said

...every year at Christmas time, we worked right up until the end – until the last final day, which would be, like, 21/22 December, to make sure that we had – people had kitchens handed over. There was no work ready for the – the – for the coming year or our first day of January. So we always started back with a skeleton staff in the first week of January. So were up to date with cutting, installing, so – we had 100 and something staff in Queensland alone, and Melbourne and Sydney also. But we had 100 staff in Queensland alone, so if you have no kitchens ready to go, we’ve got 100 – 100 people, so you add up the value of that for that one day or two days or three days, is enormous. So we always come back with skeleton staff, so that all the people came back to work, to do work, not to start work. Otherwise, the business loses too much money.

115 After his employment was terminated on 19 July 2019 he was not physically present in the Willis Bros work environment. He agreed he had a phone call with Timothy on 14 January

2020 in the morning and overheard a conversation between Timothy and Renee and said Renee's voice was raised.

116 When Timothy's employment ceased with Willis Brothers in May of 2020 he loaned him money but was unable to recall the amount and said it had not been repaid.

117 Simon obtained work as the production manager at Dream Benchtops when he left Willis Bros. Dream Benchtops was not his company but agreed he was the QBCC licence holder. He denied he was secretary for the company. He was shown an ASIC record that indicated he was a former secretary and said he "*never signed anything so he could not answer why the document recorded him as secretary.*" He denied he took a number of employees with him when he left Willis Bros. He was asked about his involvement in Dream Custodian Pty Ltd. He said this was a superannuation company and he was a director of the company from 1 July 2020. It was not related to Dream Benchtops at all.

118 He agreed he was involved with Timothy's employment at Dream Benchtops and said Timothy started there in August 2020. He was shown Timothy's contracts of employment with Dream Benchtops and said he did not produce those contracts.

119 Regarding his termination from Willis Bros he said he and Timothy met with Duncan in June 2019 to discuss the business and the employees who were unable to work because of their silicosis diagnoses. At that meeting, Duncan said he was concerned about both Simon and Timothy becoming symptomatic with silicosis and told them he was "*at a cross- road the other week and I don't know mate, I think now Luke's gone, I think that fucking rattled me. You guys are sick. What are you'se going to do?... the ball's in your court. I'll tell you, I will be honest with you, what worries me is fucking you guys with silicosis. I'm the only one here without it. Everyone is pointing their fucking finger at me. Fucking poor Luke's got it. You guys have got it.*" Around this time Simon's credit cards had been cut. Duncan told Simon he wanted to "*buy him out*" because he was not happy with the way the company was going. He said "*...it's nothing personal. If you are fucking sick and can't be here, what do I do, mate? I've got the shits. I've got to get organised.*" Simon's employment was terminated on 19 July 2019. I found Simon to be a credible witness and accept his evidence.

Alanah Baluch

120 Alanah Baluch gave evidence that she worked for Willis Bros from April 2013 until October 2019 and now works for KBHI. She agreed she is in a relationship with Simon. She agreed

that between 2014 and 2019 she was required to attend work in the first week of January of each year and to sign in and out of a time system when they had one. She returned to work in the first week in January each year. She was asked about various payslips she relied on to support that contention. Overall the cross examination of this witness regarding the fact that the pay slips she relied on did not cover the period she said she was working did not assist. I accept her evidence that she returned to work in the first week of January each year but did not necessarily work the entire week.

RESPONDENT'S EVIDENCE

Duncan Willis

121 Duncan gave evidence that he and his brother Justin established Willis Brothers Installations (Queensland) on the Gold Coast in 1997. The business manufactures and installs stone benchtops. Willis Bros is the entity which holds the QBCC licence. Duncan is the managing director of the Willis Group and has been since its inception. Renee Coleman commenced working for Willis Bros in 2011 and was appointed by Duncan as chief financial officer in around 2017. She is currently the general manager of the Willis Group. She and Duncan are in a relationship and have been so since about 2017. Justin left the Willis Bros in about 2010 to work elsewhere. From July 1997 Timothy was employed by other associated companies of Willis Bros in various positions and was a director of entities within the Willis Group until September 2018. He was a director of the respondent in the proceedings from 12 January 2016 until 30 April 2020.

122 Duncan said he found out about Timothy's silicosis diagnosis when Timothy told him about it in November 2018. He agreed he was aware that Timothy was going to see Dr Deller to get the results from the silicosis screening test and on his return he asked him what happened and was told that he (Timothy) had silicosis. Duncan said Timothy was very vague about it however he agreed that he asked Timothy if he was going off work and he said he was not.

123 Counsel for the applicant asked Duncan about a statement in his affidavit that in June 2019 he was "*not aware that Timothy or Simon had been formally diagnosed with silicosis.*" When asked why he made that statement he said had not seen any doctors' reports or anything from WorkCover. He agreed that he had a right as the employer to access any medical reports and agreed he did not do so. He agreed that Timothy told him he had silicosis in November 2018 and did not doubt that diagnosis. It is apparent from the conversation between Simon, Timothy and Duncan in June 2019 that Duncan confirmed was accurate that he was well

aware both Simon and Timothy had been diagnosed with silicosis and was concerned that they may be unable to continue to work in the business. Duncan's statement in his affidavit that he was "*not aware*" is patently false.

124 Counsel suggested that when Duncan found out that Timothy had silicosis he formed the belief that Timothy would become symptomatically sick and would not be able to continue to manage his part of Willis Bros. In response Duncan said "*Well, that's why we had insurance and he has income protection ...*" He agreed he was concerned that if Timothy's illness progressed he might not be able to work the long hours he had done in the past and might not be able to be the QBCC nominee. He agreed that by the time Timothy had been diagnosed in November 2018 there had many other Willis Bros employees diagnosed with silicosis and a lot of them had gone off work throughout 2018. Those workers were instructed by WorkCover to leave the premises immediately and couldn't continue to perform any stone masonry work. He agreed they went off work because continuing to perform stone masonry work exposed them to silica dust. He agreed when Timothy and Simon were diagnosed with silicosis that posed a liability for Willis Bros and they had several conversations about that. He claimed at that point he didn't want to cut ties with either Simon or Timothy and denied he wanted to exit them from the business. He said changes needed to be made as the "*silicosis issue*" was a discussion across the whole group. He accepted that the conversation between Simon, Timothy and Duncan in June 2019 was accurately recorded and agreed he was "*rattled*" about their silicosis diagnoses and told them "*The older you get, the both of yours – I don't know, mate what do we do.*" He agreed he thought their condition would get worse.

125 Duncan was asked what he meant when he said during the conversation in June 2019 he "*wanted to buy Simon out.*" He said that was a business decision. He agreed when Simon asked him if that was because he had silicosis he replied "*I'm not going to lie to you; it is what it is. And you've been – you've got silicosis up your arse and you're fucking worried and you're scared.*" He said he was scared for the whole group not just for the boys and was worried that Simon and Timothy may not be able to continue to work "*because everybody else got told to march straight away.*" He agreed that the business decision he needed to make was to cut ties with Simon and Timothy but then added "*not Timothy at that point.*" He denied that he decided that they would both cease to work in the business in June 2019.

126 Regarding whether he believed their silicosis diagnosis was likely to get worse he agreed. He accepted he told them in reference to his father's emphysema "*In my mind it's all the same as*

my dad, like, it's going to get worse". Regarding his comment "I'm over it. I'm ready to go on my own, you know? I'm lined up. I'm ready to fucking go...I'm fucking done, mate, because you know what? My life won't fucking change. It won't; yours will." He said he was "in a rage" when he made that comment. Counsel suggested that when this conversation occurred he had decided to cut ties with Timothy as well. He denied that and said "*I hadn't formally decided. No.*" He said "*Well, that's where it was heading, but no, I hadn't decided.*" Duncan said he had not put anything to Timothy in writing "*but they had many discussions.*" Counsel suggested "*so in your head at that time, you're done, because Timothy's life is going to change because he has got silicosis, correct?*" He said "*it wasn't about silicosis it was about the money that they were taking out of the business... they had already lined up to go on their own and this was just a rage.*" He agreed there was no evidence that they had anything lined up. He said Simon's redundancy was a "*different issue.*" He agreed as far as Simon was concerned, part of cutting business ties with Simon included ending his employment. He did not recall whether he ended Simon's employment at the same time he had the conversation with Timothy.

127 Simon's employment was terminated on 19 July 2019. Duncan agreed that when Simon left Timothy took over the production side of the business that Simon and Timothy had run together and took on work that Simon had previously managed. He agreed it was a two man job and said he still needed Timothy to help him keep the Queensland business running in Simon's absence.

128 Duncan was asked about alleged shareholders loans that existed. Counsel suggested that when Simon attempted to find out more information about the shareholder loans from Renee he became angry with Simon and Timothy for speaking with Renee about the issue and told Timothy he "*should never have asked her*" and "*keep that fucking thing out of it*" because "*she is only acting on my authority*" and told Timothy that he should have "*come straight to the horse's head.*" He agreed he was the majority shareholder of Willis Bros, the managing director of the Willis Group and the director of six associated companies. He could not recall making the comment but said the discussion was extremely heated. Regarding Renee's involvement he said "*I do take some influence, but we – every time we have a major decision, if it was with the boys or Renee or my brother now, we have a group discussion and the director will have the final decision.*" He agreed when there was any disagreement that his decision would stick but denied there had been any disagreements.

129 Duncan initially denied in cross examination that he made a demand for Timothy to “*get back on the tools*” or tell Timothy to perform stonemasonry work. He agreed that he encouraged Timothy to have more presence on the factory floor. Regarding the statement “*get back on the tools*” he said Timothy never left his office and the comment was a way of telling him to “*get off his butt and get out in the yard because we had that many remakes and we were losing money. Paying someone to sit in their office for God knows how long doesn’t help anybody.*” Counsel asked “...and you said that to him more than once, didn’t you ‘get back on the tools.’” He said his brother also said that and “*all three of us have used that expression*” and it meant “Get out there. Get out of the office.” He accepted at this point Timothy had silicosis but said “*Well, he wasn’t told to leave the premises, so yes, he told me he had silicosis, but he could have drove the forklift; he could have just stood there and inspected the stone. He could have done anything but look at his YouTube videos*” Duncan ultimately agreed that he told Timothy to “*get back on the tools*” but indicated they were only “words.” He agreed that other workers who had silicosis were unable to perform any stonemasonry work and were told to leave the premises effective immediately. He accepted that people with silicosis could not do the actual stonemasonry work. He was asked by Counsel in telling Timothy to “*Get back on the tools*” on numerous occasions “*that was designed to put pressure on Timothy to do something that Duncan knew that he couldn’t do.*” In response he said “*Well, there’s that much pressure on the company.*” I accept Timothy’s evidence that Duncan demanded that he perform stone masonry work and have a presence on the factory floor in full knowledge that he had been diagnosed with lymph node silicosis and should exposure to silica dust.

130 Duncan was asked whether he told the office staff “*If Simon or Timothy asks for any information, can you please direct them to me.*” He agreed he said that and had a right to because he believed “*they may use the information against him*” and “*our lawyers were working against it, so all information – all staff – we needed to control what was coming out because we had other matters.*” He was asked about his affidavit where he denied he “*directed office staff not to provide company information to Timothy*” and said “*...this did not occur.*” Counsel suggested that statement was a lie. Duncan said it depends on what we’re talking about. Though he denied he gave a direction to Lisa Wilson that no information be provided to Simon and Timothy I am satisfied that he did tell Lisa Wilson that Timothy was not to be provided with any information.

- 131 Duncan denied that he would go around Timothy's side of the desk and stand so close to him such that his legs were touching his office chair and denied he attempted to bully and intimidate Timothy. I accept Timothy's evidence regarding the conduct he said Duncan engaged in and accept Duncan was attempting to harass and intimidate Timothy on those occasions.
- 132 Regarding the assertion that Timothy had agreed to be paid \$130,000 plus a QBCC licence in the amount of \$1243 gross per week Duncan was asked where the amount of \$1243 gross per week came from. He could not say and could not recall any conversation about a QBCC licence allowance. He said "*our pay always fluctuated over the last 10 years.*" Counsel suggested there was never an agreement nor any discussion about pay. He denied that. Counsel suggested that after Simon left Timothy told Duncan he wanted to be paid \$2500 in the hand each week. Duncan said he did not recall any discussion. He was shown a payroll advice for the applicant for the first week in January 2020 indicating Timothy's gross pay was \$3743 and net pay \$2500. Counsel suggested that the \$1243 (QBCC allowance) was the exact amount of tax payable on \$3743. Duncan said he did not know whether there was a tax benefit for the company in organising Timothy's pay in that manner.
- 133 Duncan was asked whether in the financial year ending 30 June 2019 he paid his family trust from the Willis Bros Group a dividend of \$76,850. He did not recall. When shown financial records he agreed with that proposition and that franking credits of \$29,150 were recorded. His ex - wife at the time also received the same amount of \$76,850 in dividends and \$29,150 in franking credits. That same year Duncan received \$154,408. He accepted that in the financial year ending June 2019 the sum attributable to the three entities amounted to approximately \$330,000. He agreed that Timothy received a dividend of \$24,650 and \$9350 for the same financial year. Counsel suggested to Duncan that Timothy's request that the cost of the outdoor setting be deducted from his drawings was a reasonable one. He said it was not reasonable at the time.
- 134 Duncan denied that in September 2019 he put in an application with the New South Wales Fair Trading body requesting that Timothy be removed as the QBCC nominated supervisor and that he be the nominated replacement. He said the NSW licence is similar but different from the QBCC licence and he appointed himself as the licence holder for New South Wales because of the Sydney operation. He was shown a document which was a consent declaration form nominating himself as the QBCC supervisor nominee for Willis Bros in

September 2019. He agreed he did so and said his application was rejected. Counsel suggested that by September 2019 he had decided to replace Timothy as QBCC supervisor nominee for Willis Bros. He denied that but said he had wanted to be the QBCC nominee for many years and Timothy was aware of that. Counsel suggested that's what prompted him to bring Justin on as director in December 2019. He said *"I wasn't sure about Timothy's exit because I knew our relationship was deteriorating."* He denied that in seeking to nominate himself as the QBCC supervisor that was a step towards exiting Timothy from the business whether Timothy wanted to leave or not. I am satisfied that this was a step by Duncan towards exiting Timothy from the business. I am satisfied that between September and December 2019 he needed Timothy to continue to work as production and installation manager. He was no longer needed once Justin was appointed as director and filled that position.

135 Duncan was asked whether two weeks before the Christmas break commenced in 2019 he and Timothy had a discussion about other employees who were seeking to cash out their holiday leave entitlements and commented *"How are these dogs sitting at home, nothing wrong with them."* He denied the conversation. He agreed he spoke to Timothy in late 2019 about Timothy phoning Simon and agreed he was told that he had been calling Simon a lot because he had to take over all of Simon's jobs when Simon left. He agreed he was told the calls to Simon were made to follow up on jobs. He denied there was any need for Timothy to phone Simon after Simon left.

136 In late November 2019 Duncan requested Justin return to work for Willis Bros when he not worked for that entity since about 2010. I am satisfied that this was yet another step by Duncan towards exiting Timothy from the business.

137 It was suggested that Duncan had a conversation with Timothy on 12 December 2019 at the factory at about 7 pm where the shareholder loans were discussed. Timothy alleged Duncan told him he needed to get his house in order. Duncan denied that but agreed they had many discussions about the shareholder loans. It was suggested Timothy told Duncan that he didn't have any shareholder loans and Duncan said *"On paper you do"*. He denied he told Timothy he could make the loans stick. I accept Timothy's evidence and am satisfied that in raising this issue Duncan was attempting to intimidate Timothy.

138 Duncan agreed that on 20 December 2019 he offered to buy Timothy's shares for \$130,699.80. He was asked why he had stated in his affidavit *"I had no desire to buy*

Timothy's shares when it was such a small percentage." He denied that he made any offer to buy Timothy's shares and said "No. *It was in the accountant's report and it went to both of the guys.* He was asked about a letter from his lawyers to Timothy as follows "We write to you as legal representative of the above entities to invite you to consider an offer proposed by your fellow shareholder, Duncan Robert Willis." He then agreed that he had offered to buy Timothy's shares. He was asked whether Timothy had requested an extension of time to consider the share offer. He could not recall. An email sent to Timothy included the statement "You have asked my lawyers for an extension of time for my request which I have granted." He said he could not recall sending that email. I find that Duncan's statement in his affidavit was deliberately misleading. During cross examination he agreed that he had lied in his affidavit about not offering to buy Timothy's shares. It was suggested he lied to support a narrative that he was not trying to force Timothy out of the business. He denied that. It is clear that in offering to purchase his interest in the business Duncan was intent on removing Timothy from Willis Bros. Justin had been appointed a director of Willis Bros on 16 December 2019 Timothy refusing to consent to the appointment.

139 Counsel suggested that Duncan was angry and frustrated regarding Timothy not agreeing to sell his interest in Willis Bros to Duncan and as a consequence on the morning of 14 January 2020 he came into Timothy's office uninvited, banged his fist on the chair and said "*I want my shares back.*" He denied that. I accept Timothy's evidence on that issue. Following the incident early in the morning of 14 January 2020 Duncan sent Timothy an email requesting the surrender of the BMW to be returned by 28 November 2019. When asked whether he had decided to recall the Range Rover given those monthly payments were the most expensive he said he had not decided to do that at the time but maintained that recalling the BMW was a "*cost cutting*" exercise. Counsel suggested it was untrue that the business could not afford the repayments on the BMW. He denied that and denied he singled out Timothy in demanding the return of the BMW whilst not demanding the return of the Range Rover. Counsel suggested he did this as he had determined to exit Timothy from the business. He said "*I would have to refer to the paperwork and the letters that were to and fro from Timothy and the current lawyers at the time.*" He denied he was trying to force him from the business. He accepted that it was possible that in his mind Timothy would no longer work in the business.

140 He was asked about the alleged incident that occurred on 14 January 2020 with Renee where he said in his affidavit that there was CCTV and he could see the dispute between the applicant and Renee and "*Timothy's body language appeared confrontational and aggressive*

towards Ms Coleman.” He agreed he did not keep the CCTV footage but accepted he could have kept it. He claimed that the interaction between Timothy and Renee concerned him so much that he intended to further address the matter with Timothy upon his return to work and wrote an email as follows “*as you are director of that company, I am seeking legal advice and will let you know the outcome.*” He agreed that he didn’t give the CCTV to his lawyers. Counsel suggested that this was because it would show that Timothy had not behaved in any way aggressively or confrontationally. He denied that. He said there was no camera in Timothy’s office. He denied that he deleted the footage. He agreed he spoke to Timothy on the afternoon of 14 January 2020 but denied that Timothy told him he was struggling after the events of that day and was going to take some time off work. He said he recalled him coming back and speeding up the driveway, collecting personal items and then leaving. I suspect the applicant was distressed over the events of the day. I reject the evidence about the CCTV. I did not find Duncan a credible witness.

141 An email sent by Duncan on 14 January 2020 raised an issue about Timothy purchasing an outdoor setting on the Bunnings account for \$1124.85. Duncan was asked whether Timothy requested the amount be deducted from his drawings. He said “*Timothy was not a director of Group Manufacturing but just an employee who misused the Bunnings card.*” He denied buying items for himself when using the Bunnings account. He agreed that he had bought stuff for his dad on that account but said “*my dad fixes all our tools for free, and the boys occasionally would buy him an orchid.*” He denied that he bought himself a \$15,000 Rolex watch on the company credit card. He agreed he purchased a Louis Vuitton handbag in the sum of \$4000 paid for by Group Manufacturing Proprietary Limited. He said we would quite often buy gifts for staff using that facility and said the amount was intended to “*go under my drawings.*” As he was the sole director of the six companies he had a discretion whether to use the card for personal items and then record the entries as drawings. He agreed he was not a director Willis Bros and was asked whether he used the Willis Bros line of credit to buy something personal. He said “*it would be discussed if anything needed to be purchased as a group but no.*”

142 Duncan agreed that he instructed O’Reilly Workplace Law on 21 February 2020 and raised various issues including a direction for the surrender of the Landcruiser and an allegation about what was said to have happened at the Christmas party with Mr Miltoni. He agreed there was nothing in that letter to suggest that Timothy behaved in a bullying manner towards Renee on 14 January 2020.

143 Duncan agreed that he received a medical certificate from Timothy on 15 January 2020. He denied that the previous day must have been stressful for Timothy. Regarding the recall of the BMW used to transport Timothy's wife and children he claimed that as Timothy was going to be absent for 4 weeks the BMW and Landcruiser needed to be sold. He accepted that Timothy wrote back and said he needed the car to get to his doctor's appointments and was stressed as a result of the request. Counsel suggested that as the repayments on the vehicle were \$903.13 per month there was no need to recall the vehicle. Duncan said it was recalled "for cost saving just one part of many things." He agreed that in relation to cost cutting measures other than the applicant's vehicles, phone and fuel card no "other things" were identified with respect to cost cuts. He agreed he did not give him a replacement vehicle but said he would have he had asked for one. He accepted that issuing a demand for the return of both vehicles for that household was likely to cause Timothy stress. He agreed in his email he had stated "Also, I do not want to put any more stress on you, so I've organised for your work phone to be diverted to the office." He did not agree that diverting his phone was likely to cause Timothy stress knowing full well that he used the phone for personal matters. I am satisfied that this was yet another step by Duncan to exit Timothy from Willis Bros and to ensure he did not return.

144 Duncan agreed he made all the decisions by said Justin made the decision to stop paying Timothy the \$1243 a week QBCC allowance. When cross examined Justin said he had no involvement in any decision to stop paying Timothy the QBCC allowance and in fact was not aware of how Timothy was paid. Renee said Duncan directed her to stop the QBCC allowance. I am satisfied that Duncan lied when he said Justin made the decision to stop paying Timothy his QBCC allowance. I am satisfied that Duncan made that decision and this was yet another step towards exiting Timothy from Willis Bros. The correspondence about "suspending" the allowance acknowledged that the allowance would be reinstated upon Timothy's return from sick leave. Duncan agreed that following 14 January 2020 he did not seek any further medical evidence from Timothy nor require him to be independently assessed. Nor did he ask Timothy whether there was any support he could provide to assist his return to work.

145 Duncan agreed that he called a meeting on 6 April 2020 in his capacity as majority shareholder to remove Timothy as a director of the respondent. He said he could not recall whether at that time whether he had decided to terminate Timothy's employment. He said there was a group discussion in the office and "As a result of the view formed that it was

unlikely Timothy would return to the workplace, and we also formed the view that it was unlikely he would be returning to the business, on 30 April 2020.”

146 He was asked “*so that resolution on 30 April 2020 that you removed Timothy as a director of the respondent, you must accept, don’t you, that the decision to terminate Timothy’s employment must have been made some time prior to 30 April 2020.*” He said “*I wouldn’t think so.*” He denied that Timothy’s removal as director went hand in hand with the decision to terminate his employment. He was asked “*When did you decide to terminate his employment?*” He said “*I don’t have the dates in front of me, but it was a group decision and Justin as director, made the final decision to terminate his employment.*” He continued to deny it was his decision to terminate Timothy’s employment claiming this was Justin’s decision. He agreed that when the decision was made to terminate Timothy’s employment the company didn’t prepare a written resolution and there were no documents that recorded the reason for that decision nor any record of any discussion between Duncan, Renee and Justin about the decision to terminate Timothy’s employment.

I reject Duncan’s evidence. I am satisfied that after September 2019 Duncan formed the intention to remove Timothy from Willis Bros because he had been diagnosed and suffered from a physical disability. He acted upon this intention as discussed above which included requesting Justin’s involvement, removing Timothy’s employment benefits, cancelling his QBCC allowance, ceasing to pay his wages or leave entitlements and removing him as director.

Renee Coleman

147 Renee gave evidence that she was the general manager of the Willis group of companies. Before working with Willis Bros she worked in debt collection with the ATO. She holds a TAFE qualification in bookkeeping and was appointed chief financial officer of Willis Bros in 2017 by Duncan. She had not been a chief financial officer before that. She commenced a relationship with Duncan in about 2016 or 2017 and that relationship continued at the time of the hearing.

148 Renee denied that she acted on Duncan’s authority in relation to any decision within the business. She said “*a lot of the decisions were made with all the boys. Duncan was a majority shareholder but a lot of the decisions were made with Simon and Timothy.*” There were seven companies and Duncan was managing director of six of those companies but she acted on Justin’s authority as he was a director of Willis Bros rather than Duncan’s authority.

149 She agreed she had nothing to do with the recall of the BMW or the fuel card. She said “*I gathered all the information and the company was in a financially bad situation..... We looked at what was costing us the most money. We looked at what we could cut off.*” She said Duncan made the decision about the Landcruiser. He had asked her what their overheads were and whether there were any unnecessary overheads and as the Landcruiser was worth quite a bit of money and the repayments were quite high she gave Duncan advice where to cut back expenses. She agreed she was not aware what the Landcruiser was worth in January 2020 and did not know what the repayments were. She was told that the repayments for the Landcruiser were \$900 per month and asked “*so are you saying that the business just – as CFO of this business you’re saying the business could not afford \$900 to make a single repayment on the Landcruiser for the month that you believed that Timothy was going to be off sick.*” She said “*when you add things together it was a matter of being profitable and not about \$900 per month.*” Regarding the company restructuring she said this took place in March 2019 and the company had disposed of 12 vehicles and made a number of redundancies. She agreed that she did not send Duncan any cash flow projections but “*they discussed those*” and agreed there were no documents to support the “*cost cutting*” exercise. She agreed that Duncan’s wife’s car was not subject to a recall in 2019 but said the loans went on hold in early March 2020 and there were no repayments. She agreed that when the request for Timothy to surrender the Landcruiser was made he was off work for a month supported by a medical certificate and had not been made redundant. She was unaware of the repayments for the Landcruiser which it was suggested was \$900 per month. I accept Duncan made the decision to recall the vehicle’s used by Timothy. I am satisfied that Renee acted with Duncan’s authority regarding any involvement on her part.

150 Renee said she could not recall whether she was informed by WorkCover in early 2019 that Timothy had made a WorkCover claim for silicosis and could not say when she became aware that Timothy had been diagnosed with silicosis “*it was all a bit confusing.*” They had over 30 employees probably more having to go back three times for a health scan. It wasn’t until after she found out that she had an obligation to Work Safe Queensland to report anybody with silicosis that she sent through a diagnosis to WorkCover. She said it may have been February 2019 but was unsure because many employees started to leave in 2018. She claimed that WorkCover advised her that as Timothy was a director they wouldn’t allow her any information. WorkCover contacted Timothy and later on she received a report from Dr David Deller. She said Willis Bros was issued with stop work orders and many employees

had to leave the premises immediately but Dr Deller had stated that Timothy was still fit to work.

151 She said she saw Dr Deller's report but didn't read "*the bit of Dr Deller's report that referred to a diagnosis of silicosis.*" She denied she discussed the report with Duncan in 2019 and denied Duncan told her Timothy had silicosis. She agreed she was told by WorkCover in November 2019 that Timothy's WorkCover claim had been accepted. She said "*that was only for health monitoring reasons.*" She said at that time "*she still did not know that he had silicosis.*" She was asked about a letter which read:

"*Dear Renee Coleman, WorkCover Queensland has accepted Timothy Ruttley's claim for the application for lymph node silicosis.*" She could not recall receiving that letter and said she didn't report Timothy's diagnosis to WorkCover. She agreed she had an obligation to pass on that information to Work Safe Queensland but she didn't pass it on "*because she didn't recall seeing the document.*" She denied she had any conversation with Duncan about whether Timothy had silicosis and claimed that she didn't know Timothy had been diagnosed with silicosis prior to 22 May 2019. She said "*I know that he had respiratory because I remember him talking in my office.....breathing. He had to go to a special respiratory doctor for – to breathe – what they do in the health monitoring, and I remember Timothy coming upstairs to tell me that.*" She agreed that she was aware prior to 22 May 2019 that Timothy had put in a Worker's Compensation claim with respect to silicosis. She said she didn't recall seeing Dr Deller's report (though she had previously said the report did not suggest Timothy had to stop work).

152 Counsel suggested her evidence was contrary to her affidavit where she stated that "*she was notified by Simon that WorkCover had opened health monitoring claims for himself and Timothy in or around November 2018 and Timothy and Simon had informed me that they had been diagnosed with silicosis.*" I am satisfied that Renee deliberately lied when giving evidence about her knowledge of Timothy's silicosis diagnosis. I find she was well aware in November 2018 that Timothy had been diagnosed with silicosis. I suspect she lied in a misguided attempt to assist Duncan.

153 She was asked about an incident with Timothy on 14 January 2020. She said Duncan had told her that Timothy "*had bad mouthed her*" and Timothy told Duncan he needed to take "*his nuts out of her handbag.*" Duncan told her Timothy had called her the "C" word so she went downstairs and Timothy was in his office on the phone. She could hear him but couldn't hear

who he was talking to and she moved to the door. She waited until he came out and didn't have his phone to his ear and she said "*Timothy, can I speak to you for a moment?*" and he turned around and pointed at her and said "*This is fucked up, or something. You're nothing but a cunt.*" When cross examined about the incident Counsel suggested that she overheard Timothy on the phone saying "*I don't know what Renee has got over him.*" She denied that and said when he saw her he pointed at her and started screaming. She claimed Timothy said to her "*this is fucked up. This is all your fucking fault; you're nothing but a cunt, or something.*" It was suggested she stepped closer to Timothy and pointed her finger at him, and said, "*How dare you*". She denied that. She denied that Timothy said, "*How dare you come down here....go back upstairs where you belong*" She agreed Timothy left straight away. She saw the cameras and noticed he reversed out of the driveway really fast. She agreed she spoke to Duncan about what happened and said she was upset and shaking. Duncan told her what he had seen on the CCTV but she did not watch it. She accepted that they could have retained that footage. She denied she would have taken the incident further and denied that she had asked Duncan to address the issue with Timothy. She said she did not ask Duncan to investigate the incident when Timothy returned to work. I do not regard Renee as a credible witness and prefer Timothy's version of this incident.

154 Renee was asked about a statement in her affidavit that "*It was my understanding from previous conversations I had had with Duncan that the payment of the QBCC licence allowance formed part of a remuneration agreement as part of broader expense reduction measures.*" She agreed that Timothy had held the QBCC licence since about 2015 and prior to 2019 had never been paid any allowance for holding that licence and had received exactly the same pay before he became the QBCC licence holder in 2015 as he did afterward. She qualified this by saying that his wage fluctuated between 2017 and 2018. She said she played no part in the decision to commence paying Timothy an allowance in 2019 for the QBCC licence.

155 She was asked whether in mid - 2019 Duncan told her that he and Timothy had agreed Timothy would receive a salary of "*\$2500 in the hand.*" She said she thought that was including the QBCC licence allowance. She agreed she had seen payslips for the applicant with his net pay of \$2500 and gross pay of \$3743. She said Duncan was the person responsible for determining Timothy's rate of pay and agreed she had no discussion with Timothy about a base hourly of pay or any allowance for the QBCC licence even though she was the Chief Financial Officer in 2019. She accepted that part of her duties was to

understand the allocation of pay. She said *“my portion of it would have only been to ask the girls to include into the payroll accounting system.”* She had no recollection of what the terms of the payment for any QBCC licence allowance were and accepted that in January and February 2020 she had no knowledge of any agreement between Duncan and Timothy as to the circumstances in which that licence amount would cease to be paid.

156 It was suggested to Renee that Justin was, in fact, a nominee QBCC supervisor in January 2020. She denied that and said it would have been either late January or early February. She was asked whether Justin was the QBCC nominee at the time she ceased paying Timothy the QBCC licence amount. She said *“I knew, because I did all the QBCC stuff, so I knew he wasn’t unless I’m getting my dates mixed up.”* She said *“I think it was just after I got Timothy’s second sick leave for that long extension that I called the QBCC because I was concerned that we didn’t have a nominee supervisor there.”* She said there was no need for Justin to hold the QBCC licence because Timothy was supposed to be returning to work so *“she wouldn’t have put Justin on it.”* It was suggested that she didn’t even check to see whether or not Justin was also a QBCC nominee supervisor for Willis Bros. She claimed she was called up by QBCC and they advised her that they needed somebody who would be able to overlook all the jobs at installation. I reject her evidence about contacting QBCC and regard it as a recent invention on her part.

157 She was shown a licence search from the QBCC for Willis Brothers Installations Proprietary Limited indicating Justin was the QBCC nominee supervisor on 17 January 2020. She did not accept the document was correct *“because Timothy has been our QBCC holder, so I think this might be incorrect”* She was shown an email from Justin to QBCC which read: *“As I am also the nominated supervisor and director, I will not have to nominate anyone in replacement of Timothy.”* She said she had no knowledge of that and *“Timothy had only been removed on the 20th of the 2nd, that’s when I made the calls.”* Counsel suggested that at the time she ceased paying Timothy the QBCC licence amount she knew that Justin was already a QBCC licence nominee for Willis Bros. She denied that but agreed she did not do a QBCC licence search prior to ceasing to pay Timothy his QBCC allowance. She claimed that QBCC backdated their records from the time Timothy left. Counsel suggested that she knew *“full well at the time she ceased paying Timothy the QBCC licence allowance, that Justin was already a QBCC licence holder.”* She said *“we wouldn’t have ceased paying Timothy until Timothy was removed, and Justin was on there.”* Her evidence demonstrated that she was prepared to say anything in an attempt to justifying the action taken by Willis Bros.

158 She agreed she ceased paying Timothy the \$1243 per week allowance when he had been off work for about six weeks. She said it was not her idea to cease paying Timothy the \$1243 per week in February 2020 and she would not have done so without Justin’s approval. At one point she agreed that Timothy was still a director of Willis Bros at the time his QBCC allowance was stopped. She contradicted her evidence and said she believed he was not a director at that time. Counsel suggested that Timothy was removed as a director on 30 April 2020. She agreed she did not raise the matter with Timothy before ceasing his QBCC allowance. She was not in contact with him and the matter was decided by the other director and it was not her job to pick up the phone and call him. She could not recall any conversation about changing the QBCC licence allowance but agreed that she would have been the one to tell the staff not to pay Timothy the allowance. She said Duncan would tell her when to change payments to employees but claimed that Justin made the decision to cease paying Timothy the QBCC allowance. I am satisfied that Renee acted on Duncan’s authority to cease paying Timothy the QBCC allowance otherwise I place no weight on her evidence on this issue.

159 Renee agreed that prior to Timothy’s employment being terminated, Willis Bros appointed O’Reilly Workplace Law to act in relation to Timothy’s employment. She was asked about a letter from O’Reilly Workplace Law, dated 21 February 2020 which said *“Timothy Ruttley’s employment with Willis Brothers Installations. We’ve been recently instructed to act for Willis Brothers Installations in relation to Timothy Ruttley’s employment.”* She denied she gave those lawyers instructions and said *“Justin would have done that”* and Duncan. Justin denied any involvement with lawyers and said this was Renee’s responsibility. Duncan agreed he instructed O’Reilly Lawyers on behalf of the respondent.

160 Renee denied that O’Reilly Workplace Law were engaged to advise Willis Bros how Timothy’s employment could be lawfully terminated. She claimed they were retained to advise on the recall of the motor vehicles, the QBCC licence holder and Timothy’s conduct “in downloading emails onto a third-party device, to his wife, which were company emails.” She denied there was any discussion about sacking Timothy with those lawyers. She agreed that the lawyers *“did the final termination letter but she was the one who drafted it.”* She claimed she *“rang Fair Work and got advice and wrote it and Justin signed off on it.”* I reject her evidence and am satisfied that the Workplace Lawyers were engaged to provide advice regarding how to lawfully terminate Timothy’s employment.

161 Renee was asked about the respondent's amended response and whether it was Duncan or Justin, or all three (including Renee) that gave instructions for the drafting of the amended response. She said it was discussed. Counsel suggested that the amended response was filed by the company's lawyers and Renee was asked whether she was one of the people who gave instructions to the lawyers as follows:

The respondent ceased paying the applicant paid leave on or around 16 March 2020, as the respondent, after making the necessary inquiries, had formed the view that the applicant had exhausted his paid leave entitlement.

162 She did not respond to the question but said that statement was correct and was based on inquiries "... since the second medical certificate.... we were all on the belief that Timothy probably would not be returning, so when that second one came, it was at a point where, for Timothy's sake, and for Willis Brothers', you know, financial sake, we need to have a look and – since there was no – it's the rarest case, where no one's – no entitlements are accrued or taken on the accounting system, so it was up to – so what – we sat together." She said she, Justin and Duncan needed to "recollect the days that Timothy had off, and they all agreed that Timothy had a lot of the days off, because he had told Renee when he went gold mining with his Dad, and he would show her all the rocks and they had lots of conversations about it. It was the same with the pigging and all the rest." Renee said she "got the girls to go to all the diaries to see as much as they could find and the emails." That evidence was improbable given that Duncan and Renee both said that no entitlements of leave accrued "or were taken" on the accounting system or records kept.

163 Counsel asked whether prior to ceasing paying Timothy's wage, she calculated the days Timothy had off from 1997. She agreed she did and said "*that's why we needed Duncan there, because he had worked with Timothy from the start.*" She said she made no notes but "*gathered information that we had in front of us.*" She was asked how long the exercise took and responded "*Timothy has done the same thing every year.*" She said he was paid 10 weeks sick leave which is equivalent to five years sick leave. She was asked whether she made any notes. She claimed the notes were in her affidavit as attachments.

164 Renee said there was a meeting in February 2020, and they all went to the trouble of sitting down together around a table to work out what leave Timothy had taken and then again in April 2020. It was suggested to her "*so in April, you just suddenly felt the need to communicate to Justin that you thought Timothy had exhausted his paid leave entitlements.*" She said "*no but if he had entitlements there, we wouldn't be able to, so we would have had*

to pay him out on termination.” She couldn’t recall what the conversation was about in April 2020. In her affidavit Renee said she had a conversation with Justin in April 2020 and shared her view with Justin that Timothy had exhausted his paid leave entitlements. She accepted that was about two or three weeks after she had already cut off Timothy’s wage. She agreed that Timothy’s wages were ceased on 16 March 2020 and they had received a second medical certificate by then. She claimed she was satisfied that he had used all his leave entitlements in March 2020. Counsel suggested that there was never any meeting with Duncan and Justin in February 2020 to discuss Timothy’s leave entitlements but once the proceedings commenced they got together and attempted to reconstruct how many days leave Timothy may or may not have taken. She denied that. I regard Renee’s evidence about Timothy’s discussing leave and holding meetings as blatantly false. I am satisfied that when the applicant’s wages were ceased on 16 March 2020 there had been no investigation regarding his accrued leave entitlements. No records were kept and no notes made of any meeting in February 2020. Nor would any investigation have been necessary given that Duncan claimed that directors took leave at their discretion and as such no records were kept nor was there any need according to Duncan to keep any records of any leave. I am satisfied when Timothy’s employment was terminated on 11 May 2020 he had not exhausted his leave entitlements.

165 I accept Timothy’s evidence that having worked for Willis Bros for twenty years and taken very little time off he had accrued at least 12 months in leave entitlements when he commenced taking leave on 14 January 2020. I accept that Renee as Chief Financial Officer were responsible for ensuring employment records were kept.

166 Renee claimed it was Justin’s decision to terminate Timothy’s employment. She said they all discussed the matter but it was Justin’s final decision. They were of the understanding that Timothy would not *“more than likely be returning to work.”* She believed that the final decision to terminate Timothy’s employment was made in around late April 2020. She was asked when she actually formed the view that Timothy’s employment should be terminated. She said it was *“gradually over time after the medical certificates started to come in and there was an incident at Christmas with Siasaia from work.”* She agreed there was no documented evidence with respect to the termination and no emails between Renee, Justin and Duncan about whether or not to terminate Timothy’s employment and no company resolution to terminate Timothy. She agreed there were no notes of any meeting where the matter was discussed and said she could not recall the date the particular meeting occurred. Counsel suggested that it was highly unlikely that she communicated to Justin two weeks or

three weeks after she had already ceased paying Timothy his wage, that Timothy had exhausted his leave entitlements. She said “*no we would have been at that belief prior to doing that.*” Counsel suggested that there was nothing in her affidavit about any such discussion or inquiries at any time prior to ceasing paying Timothy’s wage. I find there was no round table discussion about the leave Timothy had taken and no inquiries nor investigation into his leave prior to ceasing to pay Timothy his wage and prior to terminating his employment.

167 Renee denied that the leave being paid to Timothy prior ceasing his wage on 16 March 2020 was paid as personal leave. She said “*It was paid normal, like it always has for the boys Just the base rate, so as if he’s at work...So that’s how it has always been, for as long as I’ve been there. That’s how they wanted it.*” She agreed that leave could be characterised as paid personal leave or sick leave. She accepted that an employee is entitled to 10 days paid personal leave each year for things such as sickness and also four weeks per year annual leave. Counsel suggested that Timothy had been on paid personal leave, as in sick leave, for the period he was off work from 14 January 2020 until the date she ceased paying his wage on 16 March 2020. She denied that and said “*it was just normal.*” She was asked “*what does that mean, normal? Was it annual leave or sick leave?*” She said “*he would have used up a lot of or the majority of his sick leave and that is something that we can’t prove. There were text messages to Duncan when he said I’m not coming in. He had the flu twice a year. He only receives 10 days a year.*” She was asked “*was it annual leave or sick leave? You don’t know.*” She said “*Well, no. We couldn’t prove anything.*” Renee was asked if she rang Fair Work to clarify her obligations in relation to the payment of sick leave or annual leave. She said she did. Counsel suggested she did not include that in her affidavit. Counsel suggested that she had no idea regarding the breakdown for employees or directors between personal leave and annual leave in terms of the leave that Timothy had taken over the course of his employment. Counsel suggested that she had no idea what leave Timothy had been paid during the period that he was off work sick from 14 January 2020 until she stopped paying his wage. She said “*I did have an idea. It was just, he was just paid a normal gross wage like he had always been ...when he took a sick day or an annual leave day...she said if it was accrued, and if he had sick leave entitlements, it would have been put as sick leave on our accounting system.*” She denied that when they were sitting around working out how much leave Timothy had taken, she did not perform any analysis of which part, if any, was properly characterised as paid personal leave, and which part, if any, was properly characterised as

annual leave. She said “*we definitely separated it.*” She was asked whether she recorded any of the information she obtained about the applicant’s leave. She said they were in Singapore and “*we wrote everything down and our discussions would have been first what we could recollect and then back to the diaries...the girls went through all the diaries over that period. There was a lot of diaries to go through, a lot of emails to go through, email trails to try and find.*” She was asked where the document was evidencing the inquiries she made in February 2020. She said she did not have it. She agreed that no records were kept of Timothy’s personal leave or his annual leave accruals during the course of his employment. She was asked whether she kept financial records or ensured financial records were kept in her role as a chief financial officer. She said “*Not of the boys’ leaves. No. Not any of the directors.*” The cross examination of Renee indicated her evidence was deliberately abstruse or demonstrated a complete lack of knowledge and understanding of employee wages, rights and entitlement notwithstanding that she held the position of chief financial officer for the respondent. There was not a scintilla of evidence to justify terminating Timothy’s employment on the basis that he had exhausted his accrued leave entitlements.

168 She agreed that Timothy provided a medical certificate certifying that he was unfit for duty from 15 January 2020 through to 13 February 2020 as a result of workplace stress. She agreed she received it a bit later than 15 January 2020 and there had been stressful events in the workplace in the months prior to Timothy going on leave. She accepted the doctor’s view that Timothy was, in fact, unfit for work due to workplace stress. She said “*I wasn’t quite sure of whether that had something to do with Timothy and I the day before.*” She was asked whether she believed that Timothy was, in fact, mentally unwell. She said “*Stressed. Yes.*” She was asked about a second medical certificate dated 13 February 2020 stating Timothy is suffering from a medical condition and would be unfit for duty up until and including 30 April 2020. She did not doubt the medical certificate but was unsure what his medical condition was.

169 She said there was no further communication from Timothy after 14 January 2020 and she did not ask Timothy for further information nor make contact with him nor did she request he undergo an independent medical examination. She agreed she did not make any inquiry as to whether there was any support that could be provided to Timothy to help him become fit for work. She was not sure if Duncan reached out to Timothy.

170 She was asked what date the decision to terminate Timothy's employment was made. She said "*I don't remember.*" She said she called Fair Work and was told he could be terminated "*three months consecutive within one year.*" Counsel asked how she could be certain that Timothy would not return to work when she didn't make a single inquiry of Timothy regarding his medical condition. She said she was certain from the events that had previously occurred and we all believed he wasn't going to return.

171 She denied that she and Duncan formed an intention to sack Timothy at the time she stopped paying him the QBCC allowance in February which was later confirmed when she stopped paying his wage in March 2020. She said "*No. It was when we gathered more evidence, and rang Fair Work, so it was after that.*" She denied that she did not want Timothy to return to work she said "*Timothy and I have had a really good relationship, along with Simon and I.*" She said "*what happened on that Monday – we would have got over it. I was upset but we would have got over it.*"

172 She denied that in early April 2020 when Duncan moved a shareholder's resolution to remove Timothy as director she and Duncan intended to sack Timothy. Counsel suggested that she knew full well that by the time Timothy was removed as director he was also going to be sacked. She denied that and said Duncan was worried Timothy was going to leave the business in December 2019 and was concerned about the relationship breaking down and the events over Christmas. She agreed that she knew Duncan was in talks with "*Katrina*" from Nautilus Law at the time and that all other workers that had been diagnosed with silicosis had left the business by that time with Timothy the only one left. Counsel suggested that having Timothy back in the workplace with silicosis posed a risk to the business. She denied that and said Dr Deller gave him a clearance and they were not worried at all as Timothy was fit to return to work.

173 Counsel suggested that Timothy emailed Renee on 3 April 2020 asking why his pay had not been deposited. She replied on 4 April 2020 "*Hi Timothy. You will need to contact the office. I have been absent on personal leave.*" She was asked whether she intended to convey to him that she did not know why his pay had been stopped. She denied that. It was suggested that she knew exactly why his pay had been stopped, which was because she had decided to stop it. She denied that and said it was a group decision.

She was asked about emails from Timothy to Justin on 6 and 9 April 2020. She claimed that she was not aware of those emails. She was asked whether Duncan informed her on or about

21 April 2020 that Timothy had also requested Duncan provide a reconciliation of his leave entitlements during a face-to-face meeting at the Willis Bros office. She was aware that Timothy came to the office to collect some financials but she was not there and did not know what they spoke about. Duncan did not inform her that Timothy had asked him for a reconciliation of his personal and annual and long-service leave entitlements. I reject her evidence.

174 She was asked whether by 3 April 2020 when Timothy emailed her asking why his pay hadn't been deposited whether the decision to terminate Timothy's employment had been made. She said "*I don't think a decision had been made by then. We were under the impression he wasn't coming back.*" She was unsure whether the decision had been made by 6 or 9 April 2020. She said "*I first called WorkCover and they told me it was a Fair Work matter.*" She denied she called Fair Work before she instructed O'Reilly Workplace Lawyers. She said O'Reilly Workplace Lawyers were engaged for total different matter. Counsel suggested "*So your evidence is that you had lawyers engaged – O'Reilly Workplace Lawyers – but rather than engaging with your lawyers to ask the terms on which you could terminate Timothy's employment, you say you called Fair Work; is that your evidence*" She said "*Yes. O'Reilly's was for those totally separate matters, and (sacking Timothy) wasn't considered then, so no.*" She did not consider extending the engagement of O'Reilly Workplace Lawyers to include providing advice about Timothy's employment termination as they were engaged to give advice on matters raised in the letter of 21 February 2020 "*cost-cutting measures that was all that we were thinking about*" not necessarily the termination of Timothy's employment. She denied she called Fair Work some time prior to 21 February 2020 and was told that Timothy couldn't be sacked within three months of being absent from the workplace. I found her evidence on this issue disingenuous and scornful quite frankly.

175 Renee agreed she had not produced the group tax position statement in relation to the 2020 financial year for Willis Bros. She said she had not been able to get it. She agreed she hadn't provided any financials for 2020 to demonstrate the precarious financial position that Willis Bros was in such that the business needed to recall the applicant's vehicles and terminate his employment.

176 Overall Renee presented as a staunch ally of Duncan prepared to lie to assist Duncan in his decision to terminate the applicant's employment.

Justin Willis

- 177 Justin gave evidence that he had not worked for Willis Bros since he left in 2010 to work as a firefighter and worked in the mines until 2019. In 2012 he worked as a stonemason in Tamworth for his own company for a period making headstones.
- 178 Justin was shown a document dated 18 November 2019 which indicated that he was registered with QBCC as a nominee supervisor with the entry “*active.*” He said “*I never thought that I really suspended my licence ...I thought I would keep it going....so as far as I was concerned it was still getting paid, because it’s a really hard licence to get.*” He was asked about the entry stonemasonry licence class commencement date 30 August 2003 being the first approved date. He said he thought he held that licence the whole way through under QBCC’s old name as in the building construction industry a person needed to hold a licence. He said there was no significance in the date 18 November 2019. Counsel asked whether it was possible that he made an application in November 2019 to be put on as the Willis Bros nominee supervisor. He said he may have done so. He was shown a QBCC licence search, in the name of Willis Bros Installations Queensland Proprietary Limited and confirmed he was a director of that entity. (Exhibit A3). He was asked about the entry “*Nominee details current*” with a start date of 17 January 2020. He agreed that the application to QBCC would have been made some time prior to that 17 January 2020. He said he actually had to go in and fill out the documentation in person and the application took longer than a week to process probably about a month. He agreed he came on as nominee supervisor for Willis Bros at Duncan’s request.
- 179 He said when Duncan asked him to come on as QBCC nominee supervisor Simon had left Willis Bros. When he was appointed nominee supervisor he knew Timothy was also the QBCC nominee supervisor. He was not aware that Duncan had tried to get himself put on as the QBCC nominee supervisor but wasn’t able to do it because Timothy was a director and had not consented. He was asked when Duncan asked him to come on as the QBCC nominee supervisor, whether he told him he was planning to go out into business on his own. He said no and said Duncan did not tell him he was planning on buying Timothy out of the business.
- 180 He said it was his decision to sack Timothy from his employment. He said they discussed it “*two or three days before Timothy was terminated*” but he had the final say. Renee wrote the termination letter. He did not know if the workplace lawyers engaged by Willis Bros were involved as he did not personally consult those lawyers nor did he seek advice whether to

terminate Timothy's employment. Regarding the reason for sacking Timothy he said "*he needed to move the company forward*". He asked Renee for advice on how to move forward within the company and he was told she had advice from the lawyers as far as he was aware. He didn't speak to any lawyers at the time. He was asked whether he checked with Duncan prior to sacking Timothy. He said "*I mentioned it to him, as we do, in a group discussion, so he knows what's actually going on. Because he's actually the director of a lot of companies.*" He said even though he was the director and boss of Willis Bros, they still spoke to each other on a daily basis. He agreed that Duncan was the majority shareholder for the whole business. He was aware Timothy was a shareholder and the most senior employee left in the organisation, apart from Renee. He denied he sought Duncan's agreement to sack Timothy. He said "*I told Duncan what I wanted to do to move forward and he said 'Well, you're the director of that company. You make that call'*". He denied that he would not have sacked Timothy if Duncan opposed that. He said he had a group discussion with Renee and Duncan regarding the progress of the business at the time and "*they needed to move forward to keep the company going.*" He was responsible for hiring and firing and he would have sacked Timothy even if Duncan opposed that.

181 He denied Duncan was the primary decision maker though he accepted he had not been part of the business since 2010 and had returned at Duncan's request in mid - January 2020. He said he had been on board for three or four months and "*had a look at the financials but his main concern was installations, making sure that the work was getting completed and going out, being installed.*" At no time did Justin explain what he meant by the company "*needing to move forward.*" I reject his evidence and find that Justin simply carried out Duncan's decision to terminate Timothy's employment.

182 He was asked if he recalled giving instructions to K&L Gates to prepare a defence to Timothy's claim in these proceedings. He said he did not recall. He was asked whether he was involved in the decision to cease paying Timothy his wage on about 16 March 2020. He said he spoke with Renee about finances and what Timothy's entitlements were and she looked into that and told him that "*they had all been exhausted so that's why it was stopped.*" He sent an email to Timothy saying his entitlements had been exhausted. Justin made no mention of any conference in February 2020 as alleged by Renee where all three investigated whether Timothy had exhausted his leave entitlements.

- 183 Justin was asked whether he made any enquiries of Renee after receiving the emails from Timothy on 3 April 2020 requesting information about his entitlements. He said Renee did not raise that with him. On 6 April 2020 Justin agreed he sent Timothy an email. He was asked why he did so and said that on 3 April Timothy asked Renee about his pay. He said “*I asked Renee what his entitlements were prior to that, so I never seen that other email before.*” He said the dates were just a coincidence.
- 184 He said he spoke with Renee the week before 6 April 2020 because he wanted to find out what was going on so Willis Bros could move forward. He was asked what he meant when he wrote in an email “*As a current director of Willis Bros Installations, I’ve had a look into this.*” He said it meant he had “*asked Renee*” and agreed that was the extent of the inquiries he made at that time. Counsel asked whether the email was sent by him after Timothy had already ceased receiving his wage. He said he sent the email “*when he found out what was going on to let Timothy know what was going on.*” Counsel suggested the email was sent after Timothy’s pay had already been stopped. He said he was not aware of that as he was not involved in the decision to stop paying Timothy because “*I don’t do the pays.*”
- 185 He was asked whether on 21 April 2020 Duncan told him that Timothy had asked him for a reconciliation of his leave entitlements. He did not recall that. He was shown an email from Timothy, 6 April 2020, “*Hello, Justin. Given my length of service, that cannot be correct. Would you please provide me with details of the inquiries you made. As a current director – and a reconciliation.*” He agreed he did not respond to that email and did not ask Renee for a reconciliation. He spoke “*to upstairs and just left it with Renee who was in charge of finances.*”
- 186 Counsel suggested that Timothy sent an email on 9 April 2020 “*Would you please provide me with the details I have asked.*” He said he simply referred that to Renee and agreed he did not respond to that request.
- 187 Justin said he did not receive copies of the medical certificates that Timothy submitted when he was off sick from 14 January 2020. He knew they had been submitted, but didn’t look at them. He believed they indicated Timothy was suffering from stress. He was aware that both Timothy’s vehicles had been recalled and said he was not involved in that decision. He had no knowledge of Timothy’s pay or the components of it or how much he was getting paid. He did not know that Timothy had been diagnosed with silicosis. He said he found out when Duncan told him later on. I accept he was not involved in any decision to cease paying

Timothy his allowance or wages and accept he was not involved in the recall of the vehicles or engaged in any meeting or investigative process where an analysis of Timothy's leave entitlements was undertaken. It is unclear when he was advised Timothy had been diagnosed with silicosis.

188 When he came to the business in January 2020, his primary involvement was getting on the factory floor and supervising the guys and the site more like a production manager. He was concerned with the operations side of the business and had no interaction with Timothy other than through emails. He agreed that Timothy had been certified unfit for work and accepted the validity of the doctor's certificate. He made no inquiries of Timothy and sought no further medical information from him. He agreed he didn't ask Timothy whether there was any support that Willis Bros could provide to assist him to return to work and as far as he was aware Timothy would return to work at the conclusion of the period of incapacity on the medical certificate.

189 Justin said he formed a view to terminate Timothy's employment when he found out he had exhausted all his leave and made that decision in April 2020. He did not accept 6 April 2020 as the date of termination. He was asked "*so knowing that he had a medical certificate that said that he would be unfit for work until the 30th, you nevertheless decided to sack him on about the 6th is that right*". He agreed. Counsel suggested that he knew that Duncan had on the same day 6 April 2020 moved a shareholder's resolution to remove Timothy as a director. He agreed they had a meeting but he did not know the date. He said they had multiple meetings. He was asked why he didn't move the resolution to remove Timothy as director given he was director of Willis Bros. He said it was a joint decision. He denied it was at Duncan's instigation to remove Timothy as a director. He said "*we needed to move forward within the company, so we had to come up with something to move forward. That's why we had meetings.*" He could not recall whether Duncan came up with the idea first.

190 He was asked whether the decision to sack Timothy and the decision to call the meeting to remove Timothy as director were part of the same decision. He could not recall but agreed both decisions were made around the same time being 6 April 2020 when Justin advised Timothy that he had exhausted his leave. He remembered sending the email but could not remember what else was done. He was not aware whether he was not permitted to sack an employee who had been absent from work for less than three consecutive months. He said Renee "*would have done her homework on that, and then presented it to me.*" He was not

aware when Timothy's wages were ceased. Counsel suggested this was done on 16 March 2020. He said all he knew was that Timothy had exhausted all of his leave and that's when they moved forward with the decision to terminate Timothy's employment. Justin claimed the decision to terminate Timothy was his decision alone.

191 Counsel asked Justin when he came on as director of the company part of his job would have been to become aware of which employees had WorkCover silicosis claims and who did not. He said the ones that had silicosis weren't at the factory they had all gone. He did not know if Timothy had a WorkCover claim for silicosis and he made no inquiries and did not consider that to be part of his job as director to find that out. Timothy wasn't there when he was working there in mid to late January.

192 He said he knew nothing about Duncan making any offer to buy Timothy's shares. He did not recall whether Duncan told him that he had been brought back because he was cutting all ties with Timothy. He said Duncan told him he needed someone to run the factory and the sites and make sure the stone was getting manufactured and installed. He came back as director prior to Christmas 2019 and Timothy had not left the business then. Counsel suggested it was untrue that the reason he said he came back in his affidavit was because Timothy wasn't there. He said *"I don't recall it. I don't recall the conversation. I can't remember, sorry."* Counsel suggested *"You've got no idea"* and he responded no. I am satisfied Justin returned to the business at Duncan's request because Duncan had decided to exit Timothy from the business because he had been diagnosed with lymph node silicosis and he needed someone who was a stone mason who could hold the QBCC licence and replace Timothy as production and installation manager. In that respect Justin was involved in Duncan's decision to terminate Timothy's employment.

Additional witnesses

193 Alexander Di Russo was called by the respondent. He was a wet polisher with Willis Bros. He attended the Christmas party at the Varsity Tavern with work colleagues from Willis Bros and all persons were consuming alcohol both at the tavern and afterwards at a colleagues' home. He said the applicant told him this would be his last Christmas party. There were a few others present. He said in doing this the applicant was making a *"big announcement"*. He gave evidence about the applicant whistling employees on the factory fall inferring that conduct was demeaning. He said the applicant directed staff to pick up dog poo. The

applicant denied all allegations. I am unable to make any finding and place no weight on Mr Di Russo's evidence.

194 Siasaia Miltoni was called by the respondent. He works as a factory labourer for Group Manufacturing. He attended the Christmas party at the Varsity Tavern and also went to a colleagues' home where he and his friends kept drinking alcohol. He said they were kicked out from the tavern as they were all drunk. When cross examined most of his responses were *"I can't recall or I have no idea."* He spoke in an aggressive and hostile manner to Counsel and volunteered that *"he was a criminal for half his life."* He refused to answer any questions about his past. Counsel suggested he had a violent past which left a victim of a home invasion by him with head injuries. He did not respond other than to advise that he left prison in 2018 and had tried to change his life. Counsel suggested he was before the Magistrates Court in Southport as recently as September 2021. He agreed but refused to provide any details regarding the reason he was there.

195 In his affidavit the witness deposed that *"I was speaking to a number of fellow employees when Mr Ruttlely approached the group and asked if I could be excused so that he may speak to me."* He said there were people at the party and he did not know their names as he had only just started to work at Willis Bros in 2018 (he had been there for 18 months). He said the applicant asked him *"if he knew anyone that could fuck Duncan up."* He said he was shocked and stressed. He said *"first of all, my reaction is that he fucking recording me... Yes."* It was suggested he was lying which he denied.

196 193. Counsel asked him whether he rang Timothy up after the Christmas party and told him that he was a bit short and asked if he could borrow \$200 and met up with him at the 7-11 store in the first week of January 2020. He could not remember. He said *"I tried to talk to him, because I just wanted a normal job like everyone else. I wanted to speak to him. All I want is a normal job..... he's my boss. I want a job, and that's what I want. He said "When he told me to fuck someone up, it's wrong."* He said when he borrowed the money Phil Cole was present.

197 Counsel suggested that he did not mention the allegation to Phil Cole about Timothy wanting him to get someone *"to fuck Duncan up."* Counsel suggested that had Timothy said that he would not have gone anywhere near Timothy if you could help it. He said at the time he was my boss and I was looking for work. Counsel suggested that in his affidavit he had said *"I believe Timothy avoided contact with me on 13 and 14 January 2020."* He agreed he had

seen Timothy the week before and he said “*See you at work.*” Counsel suggested the witness was lying in giving evidence. Further his job was not new as he had worked for Willis Bros for 13 months. He disagreed. He said he had no idea why Timothy went off work on 14 January 2020. He had seen him at work and then became aware that there were all these conflicts were going on. He denied that he received a promotion with Willis Bros and said he was still a labourer working on a machine. I reject the witness’ evidence and accept the applicant’s denial and find that he did not make the statement as alleged.

198 Lisa Wilson is employed as a payroll and accounts officer for Willis Bros. She could not recall whether in June 2019 Duncan told her that if Timothy or Simon asked her for any information she had to direct them to Duncan. It was suggested that in June 2019 Timothy asked Lisa for a weekly pay schedule. She was asked whether she produced a preliminary schedule of the hours that people had worked and the pay that they would receive. She said “*you have to run a report.*” She did not recall Timothy coming and asked for a report. She said it was possible he did so.

199 She was asked whether in late November 2019 Timothy came and asked her if she could give him his leave entitlement balance. She agreed that he made that request. It was suggested that she said to Timothy that Duncan had told her that Timothy wasn’t allowed to have access to that information. She did not recall saying that. Counsel suggested that Timothy asked her a second time and she brought up leave schedule up on her screen and told Timothy not to tell anyone that she had shown him that information because you didn’t want to get in trouble. She could not recall. Most of the witness’ responses were “*I don’t recall.*” Her evidence was absent any probative value.

LEGAL PRINCIPLES

Fair Work Act 2009 (Cth)

200 The FW Act provides in Part 3-1, general protections to protect *inter alia* employees and employers with respect to action which may be taken against them on account of certain characteristics they have, activities they may take part in, or rights which they have.

s.340 Protection

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

- (ii) has, or has not, exercised a workplace right; or
- (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
- (b) to prevent the exercise of a workplace right by the other person.

s.341 Meaning of workplace right

(1) A person has a workplace right if the person:

- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
- (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
- (c) is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
 - (ii) if the person is an employee--in relation to his or her employment.

s.342 Meaning of adverse action

(1) The following table sets out circumstances in which a person takes adverse action against another person.

Meaning of <i>adverse action</i>		
Item	Column 1	Column 2
1	Adverse action is taken by ... an employer against an employee	if ... the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.

(2) Adverse action includes:

- (a) threatening to take action covered by the table in subsection (1); and
- (b) organising such action.

(3) Adverse action does not include action that is authorised by or under:

- (a) this Act or any other law of the Commonwealth; or
- (b) a law of a State or Territory prescribed by the regulations.

(4) Without limiting subsection (3), adverse action does not include an employer standing down an employee who is:

- (a) engaged in protected industrial action; and
- (b) employed under a contract of employment that provides for the

employer to stand down the employee in the circumstances.

s.351 Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(3) Each of the following is an anti-discrimination law :

...

(ab) the Disability Discrimination Act 1992 ;

...

(c) the Anti-Discrimination Act 1991 of Queensland;

201 Pursuant to the *Disability Discrimination Act 1992* (Cth):

s.5 (1) Direct disability discrimination

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.

(2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

(a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and

(b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

(3) For the purposes of this section, circumstances are not materially different because of the fact that, because of the disability, the aggrieved person requires adjustments.

s.6 Indirect disability discrimination

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and

(c) the requirement or condition has, or is likely to have, the effect of

disadvantaging persons with the disability.

(2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

202 Pursuant to the FW Act:

s.360 Multiple reasons for action

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

Statutory presumption

s.361 Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

203 The principles applicable to contraventions of the FW Act are well settled. The applicant must first prove that adverse action occurred. In *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83 at [100] the Court said:

[100] The orthodox approach to dealing with allegations of adverse action said to be engaged in “because” of a particular circumstance requires the party making such an allegation to establish the existence of the circumstance as an objective fact:

see *Tattsbet Ltd v Morrow* [2015] FCAFC 62 discussed at [16] above. If an applicant, on the whole of the evidence, establishes, to the *Briginshaw* standard, that the elements of a particular contravention (other than the reasons for the respondent taking action) exist and if the respondent wishes to avoid an adverse finding in respect of the alleged contravention the respondent will bear the onus to establish, on the balance of probabilities, that he or she had not acted for any proscribed reason: see *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No 1)* [2012] HCA 32; (2012) 248 CLR 500 at 512–513, 524; [2012] HCA 32 at [31]–[33] and [65] (French CJ and Crennan J); *RailPro Services Pty Ltd v Flavel* [2015] FCA 504; (2015) 242 FCR 424 at 447–450; [2015] FCA 504 at [80]–[93] (Perry J). As has already been noted above (at [14]), s 360 contemplates that there might be multiple reasons for a respondent taking action to the prejudice of the applicant. A reason will not be proscribed unless it is “a substantial and operative factor” in the respondents’ reasons for taking the adverse action: see *Barclay (No 1)* at 523 [62] (French CJ and Crennan J) and 535 [104] (Gummow and Hayne JJ).

204 Under section 361 (1) of the FW Act Kerr J said in *Roohizadegan v Technology One Limited* (No 2) [2020] FCA 1407 (2 October 2020):

[64] In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; 248 CLR 500 (Barclay) at [50] French CJ and Crennan J - while acknowledging that Mason J’s remarks had been directed to an earlier expression of the statutory presumption - adopted as applicable to its current expression his Honour’s observation in *General Motors-Holden’s Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 (Bowling) at 617 that:

the plain purpose of the provision [is to throw] on to the defendant the onus of proving that which lies peculiarly within his own knowledge.

...

[69] If “adverse action” is taken as a result of a decision that has been made by an individual within a corporation, the identification of the reasons for the corporation taking the adverse action requires an inquiry focussed on the actual mental processes of the relevant individual who made that decision: *Barclay* at [140] (Heydon J); *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; 253 CLR 243 (*BHP Coal*) at [7] (French CJ and Kiefel J), [85] (Gageler J).

205 Further in *Roohizadegan v Technology One Limited* (No 2) (*supra*) the Court said:

[71] Section 361 however requires the Court to conclude that the reason the employee has alleged was his or her employer’s reason for taking adverse action against him or her was in fact the reason for that action, unless the employer can establish that the adverse action was not taken for that alleged prohibited reason. Proof in that regard is on the balance of probabilities: *Barclay* at [56] per French CJ and Crennan J, citing Gibbs J in *Bowling* at 239.

206 The key principles relevant to the determination of the reason for taking adverse action were set out succinctly by Wigney J in *Construction Forestry Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 2)*¹ as follows:

¹ [2017] FCA 1046 at [296] – [303] cited in *Salama v Sydney Trains* [2021] FCA 251 [88]

[297] First the question is one of fact: *Barclay* at [41], [45], [101]; *BHP Coal* at [7];

[298] Second the question is why the adverse action was taken: *Barclay* at [5], [44]. The focus of the inquiry is the reason or reasons of the relevant decision – maker: *Barclay* at [101], [127], [140], [146]; *BHP Coal* at [7], [19], [85]. More particularly the question is whether the alleged prohibition reason was a substantial and operative reason for taking adverse action: *Barclay* at [56] – [59], [104], [127] or an operative or immediate reason: *Barclay* at [140];

[299] Third the test does not involve any objective element: *Barclay* at [107], [121], [129]; *BHP Coal* at [9]. To speak of objectively obtained reasons risks the substitution by the Court of its view rather than making a finding of fact as to the true reasons of the decision – maker: *Barclay* at [121]; *BHP Coal* at [9];

[300] Fourth, the inquiry is not concerned with mere causation in the sense that it is not sufficient that there is factual or temporal connection between the relevant protected workplace rights and the adverse action: *BHP Coal* at [18] – [20]. Any such connection however may necessitate some consideration as to the true motivation or reasons of the decision – maker: *BHP Coal* at [22];

[301] Fifth the question must be answered having regard to all the relevant facts and circumstances and the inferences available from them: *Barclay* at [45], [127]; *BHP Coal* at [7];

[302] Sixth direct testimony from the decision – maker as to why the adverse action was taken is capable of discharging the burden imposed by section 361: *Barclay* at [45], [71]; *BHP Coal* at [38]. However declarations that the action was taken for an innocent reason may not discharge the onus if contrary inferences are available on the facts: *Barclay* at [54], [79], [141]. The reliability and weight to be given to such evidence must be assessed having regard to the overall facts and circumstances: *Barclay* at [127];

[303] Seventh it is not necessary for the decision – maker to establish that the reason for adverse action was entirely dissociated from the relevant protected workplace right: *Barclay* at [62].

207 The reverse onus aims to assist employees overcome the difficult task of proving what is in the mind of the person alleged to have taken adverse action.² Further evidence that the decision maker acted for a non - prohibited reason may be rendered unreliable by the quality of their own evidence.³

Consideration

208 The adverse action about which the applicant seeks relief in these proceedings includes:

- (a) Treating the applicant less favourably than other employees of the respondent due to his physical and mental disability despite the applicant’s diagnosis not inherently preventing him from performing his duties as an employee of the respondent there

² *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99 at 449

³ *State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184 at [32]

being no medical concerns to substantiate the respondent's concerns about the applicant's alleged incapacity;

- (b) Unilaterally reducing the applicant's wage, cancelling the applicant's fuel card, re-directing the applicant's mobile phone all of which formed part of the applicant's salary package;
- (c) Failing to pay the applicant his wage whilst on personal leave from 26 March 2020;
- (d) Failing to pay the applicant's accrued leave entitlements on termination of employment; and
- (e) Terminating his employment by letter dated 11 May 2020, which (notwithstanding the applicant's medical certificate stating he was suffering from workplace stress) the reason given for termination was "*the excessive period of leave and your absence is not based on Workers Compensation and Rehabilitation Act 2003 as it is not a work-related incident.*"

Who was the decision maker for the respondent?

209 I am satisfied that Duncan Willis as majority shareholder of Willis Bros and director of six of the companies that comprised the Willis Group, Willis Bros also being part of the Willis Group was the controlling mind of the respondent. He requested Justin Willis return to work for Willis Bros and prepared a company resolution as majority shareholder appointing Justin a director of Willis Bros on 16 December 2019 in circumstances where Timothy (who remained a director) refused to provide his consent. I am satisfied that Duncan made all the decisions for Willis Bros including recalling the vehicles, mobile phone and fuel card, reducing his wages, ceasing to pay Timothy any entitlements from March 2020 and terminating his employment on 11 May 2020. Each of those decisions impacted adversely on Timothy. I am satisfied that Renee had full knowledge of those decisions and acted under Duncan's authority. I find that Justin who had recently returned to work with Willis Bros after a 10 year absence acted with Duncan's authority in terminating Timothy's employment contrary to his assertion that he alone made that decision.

Events leading to termination

210 The events leading to termination are discussed at length above and may be summarised as follows:

- (a) On 20 November 2018 Timothy was diagnosed with lymph node silicosis. Duncan formed a view that he would not be able to continue as production and installation manager for Willis Bros due to his physical disability. Persons diagnosed with silicosis were unable to complete stone masonry work and were not to be exposed to silica dust. Simon who was also diagnosed with silicosis had his employment terminated in July 2019. He had refused to transfer his interest in Willis Bros to Duncan.
- (b) In January 2019 Timothy made a workers compensation claim and WorkCover accepted the claim for compensation in relation to his silicosis diagnosis.
- (c) In September 2019 Duncan attempted to obtain the QBCC nominee supervisor licence which was rejected. He became increasingly aggressive and intimidating towards Timothy but at that stage needed Timothy to continue to operate the production and installation side of the business.
- (d) Sometime in November 2019 Duncan requested Justin return to work for Willis Bros. He had the requisite stone masonry qualifications and he obtained a QBCC nominee supervisor licence. At that point Timothy was no longer needed to continue to operate the production and installation side of the business. Justin was appointed a director of Willis Bros on 16 December 2019.
- (e) In December 2019 Duncan made an offer to buy out Timothy's interest in Willis Bros which was not accepted. Duncan acted on his intention to terminate Timothy's employment on the basis that he remained a liability to the business because he was diagnosed with silicosis.
- (f) On 14 January 2020 Duncan recalled Timothy's two vehicles, diverted his phone and cancelled his fuel card leaving Timothy, his wife and children without a vehicle.
- (g) Timothy forwarded the respondent a medical certificate which stated he was suffering from workplace stress from 14 January 2020 to 14 February 2020 and would be unfit for work.
- (h) On 13 February 2020 Timothy forwarded the respondent a medical certificate which stated he was suffering from a medical condition between 13 February 2020 and 28 April 2020 and would be unfit for work.

- (i) Whilst Timothy was on personal (sick) leave on 21 February 2020 Duncan ceased paying Timothy his QBCC allowance reducing the amount Timothy received in wages.
- (j) On 16 March 2020 Duncan ceased paying Timothy his wages (or personal leave entitlements) notwithstanding Timothy had provided a medical certificate indicating he was unfit to work until 20 May 2020.
- (k) On 6 and 9 April and 21 April 2020 Duncan ignored Timothy's request when he made an inquiry about his personal and annual leave entitlements.
- (l) On 6 April 2020 Duncan moved a resolution to remove Timothy as director of Willis Bros.
- (m) On 28 April 2020 Timothy forwarded the respondent a medical certificate which stated he was suffering from a medical condition between 28 April 2020 and 30 May 2020 and would be unfit for work.
- (n) On 30 April 2020 Timothy was removed as a director of Willis Bros.
- (o) On 11 May 2020 Duncan terminated Timothy's employment on the basis that he had exhausted his leave entitlements.

Was Timothy dismissed for a prohibited reason

211 The respondent's reason for terminating the applicant's employment is set out in the letter dated 11 May 2020 which states

“Due to the excessive period of leave and your absence is not based on Worker's Compensation and Rehabilitation Act 2003 as it is not a work related incident we will unfortunately have to terminate your employment with Willis Bros Installations (Qld) Pty Ltd. We terminate under the FW Regulations 2009 3.01 which states if an employee's total length of absence due to illness or injury is more than 3 consecutive months or a total of more than 3 months over a twelve month period and no paid entitlements it is fair and reasonable to terminate their employment. We regret your injury or illness we need to make arrangements to operate the business in your absence....”

212 Section 352 of the FW Act provides that an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the FW Regulations (3.01)

213 The regulations prescribe as follows:

Temporary absence--illness or injury

REG 3.01 (1) For section 352 of the Act, this regulation prescribes kinds of

illness or injury.

(2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within

- (a) 24 hours after the commencement of the absence; or
- (b) such longer period as is reasonable in the circumstances.

Note: The Act defines **medical certificate** in section 12.

(3) A prescribed kind of illness or injury exists if the employ

- (a) is required by the terms of a workplace instrument:
 - (i) to notify the employer of an absence from work; and
 - (ii) to substantiate the reason for the absence; and
- (b) complies with those terms.

(4) A prescribed kind of illness or injury exists if the employee has provided the employer with evidence, in accordance with paragraph 107(3)(a) of the Act, for taking paid personal/carer's leave for a personal illness or personal injury, as mentioned in paragraph 97(a) of the Act.

Note: Paragraph 97(a) of the Act provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.

- (5) An illness or injury is not a prescribed kind of illness or injury if:
 - (a) either:
 - (i) the employee's absence extends for more than 3 months
 - (ii) the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and
 - (b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.
- (6) In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation.

214 To satisfy this ground it is essential that the absence be one that is prescribed by the Regulations. All absences must be a lawful use of the employee's relevant leave entitlements, absences must provide the required notice and the employee provide the relevant medical certificates for those absences. Timothy provided relevant medical certificates. He claimed

and I accept that he had accrued leave entitlements over the twenty plus years of his employment with Willis Bros and was entitled to use that leave. No leave records were kept by the respondent and no investigation of Timothy's leave entitlements occurred to ascertain what leave entitlements he had accrued. Further Timothy's requests for a reconciliation of his leave entitlements prior to his termination were ignored. I draw the inference that no evidence was or could have been adduced to contradict the applicant's claim that he had accrued personal and annual leave entitlements and was entitled to and did use those leave entitlements during his period of absence. I find that the applicant was on personal (sick) leave supported by medical evidence up to and including 11 May 2020 when his employment was terminated. I find that the applicant had accrued leave entitlements over the 20 years he was employed by Willis Bros for at least 12 months. I am unable to be more precise. I reject the reason stated for Timothy's termination in the letter dated 11 May 2020 as contended for by the respondent and find that was not the real reason his employment was terminated.

215 In *Ingersole v Castle Hill Country Club Limited* [2014] FCCA 450 (11 March 2014) Judge Barnes discussed the approach to claims of adverse action at [127] - [129] and said as follows:

[127] Section 340 is in Part 3.1 of the Act. It proscribes taking action against a person "because" that person has or had a workplace right or for one of the other specified reasons associated with the exercise or proposed exercise of a workplace right by that person. An object of this Part of the Act is to protect workplace rights and to provide "effective" relief to those adversely affected by reason of holding or exercising such rights (see s.336). The Applicant must establish objectively that she had the asserted workplace right and that adverse action was taken against her (see *Wolfe v Australia and New Zealand Banking Group Limited* [2013] FMCA 65 at [72]). It is then presumed, unless the Respondent proves otherwise, that the alleged adverse action was taken for the asserted prohibited reason (see ss.360 and 361).

[128] The requirement that the applicant establish matters objectively means that she must first:

...prove the existence of objective facts which are said to provide a basis for the alleged adverse action, before the onus shifts to the employer in respect of the prohibited reason...It is not sufficient for [the Applicant] to simply allege that she had a workplace right and that she was the subject of adverse action – rather on the assumption that [the Applicant] is able to prove these allegations, the burden is then cast on to [the Respondent] to prove that adverse action was not taken against [the Applicant] because of her workplace right for the purposes of s340 and s361 of the Act: *Jones v Queensland Tertiary Admissions Centre Ltd* (No.2) (2010) 186 FCR 22; [2010] FCA 399 at [10] per Collier J).

[129] While the contraventions alleged are civil contraventions, the proceedings are penal in nature (see *Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuit Ltd* (2010) 188 FCR 221; (2010) 198 IR 143; [2010] FCA 770). As Logan J pointed

out in *Arnotts* at [13], subject to the operation of ss.360 and 361, the Applicant carries the burden of proving the alleged contraventions on the balance of probabilities with due regard being given to the matters in s.140(2) of the *Evidence Act 1995* (Cth).

216 219. In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 which was confirmed by the majority in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; 253 CLR 243 (BHP Coal) at [7] (French CJ and Kiefel J), [85] (Gageler J) the Court held that a proscribed reason for the adverse action must be a “substantial or operative factor” influencing the adverse action or alternatively the “operative or immediate” reason for acting in order for a contravention of the FW Act to be made out.

Adverse action

217 Subsection 351 (1) of the FW Act provides that an employer must not take adverse action against a person because of the person’s “*physical or mental disability*.” I am satisfied that the respondent took adverse action against the applicant in terminating his employment for a prohibited reason because of his “*physical or mental disability*.” In *Hodkinson v The Commonwealth* [2011] FMCA 171 at [140] – [141] the Court discussed the meaning of “*disability*” under section 351 of the FW Act as follows:

[140] Although s.351 is headed “Discrimination” this heading is not to be taken as part of the Act: s.13(3), Acts Interpretation Act 1901. The section does not prohibit “discrimination” as such but, rather, identifies conduct which is generally considered to be discriminatory. It is by demonstrating the occurrence of adverse action and the fact that it was motivated for a reason prohibited by s.351(1), such as a person’s disability, that a contravention is proved. The criteria found in s.351(1) rely in no way on the Disability Discrimination Act.

[141] Further, s.351 does not employ the word “discrimination” other than as a term by which to identify other Acts which provide exceptions to the operation of s.351(1). The absence of that word from the list of prohibited reasons for adverse action found in s.351(1) means that there is no grammatical link between that subsection and ss.5 and 6 of the Disability Discrimination Act. There is, therefore, no term in s. 351(1) whose proper construction may be understood by reference to what is contained in ss.5 and 6 of the Disability Discrimination Act.

218 His Honour in *Hodkinson* (*supra*) observed at [143] that “*conduct which contravenes the Disability Discrimination Act does not, by reason of that contravention, also contravene the FWA*.” Having analysed the meaning of “*disability*” His Honour said at [146]:

[146] Where it is used in s.351(1), I conclude that the word “disability” should be understood to refer to a particular physical or mental weakness or incapacity and to include a condition which limits a person’s movements, activities or senses. Examples can be found in the definition of disability in the Disability Discrimination

Act. Importantly, however, while physical or mental limitations may be a disability or an aspect of a disability, their practical consequences, such as absence from work, are not. This distinction is significant when a party is required to identify the disability said to be the reason of adverse action alleged to have been taken against them.

219 The Court in *Hodkinson (supra)* observed that allegations that adverse action has been taken because of a person's disability should be clearly particularised. At [147] the Court said:

[147] In proceedings under the Disability Discrimination Act, it has been held that the precise identification of the alleged disability is critical to an allegation of disability discrimination: *Qantas Airways Ltd v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 at 567 [89] per French and Jacobson JJ; *Stevenson v Murdoch Community Services Inc* [2010] FCA 648 at [87]. The same requirement should apply to allegations under the FWA that adverse action has been taken because of an employee's disability.

220 The applicant's disability was a physical disability in the form of lymph node silicosis diagnosed and confirmed by Dr Deller in his report, accepted by WorkCover and not disputed by the respondent. I rely on my reasons set out above. Once Duncan became aware that Timothy had been diagnosed with silicosis he formed a view that he would be unable to continue to work for Willis Bros as production and installation manager. He formed an intention to exit or remove Timothy from the business and acted upon that intention between September 2019 and 11 May 2020. No evidence was adduced that the applicant was unable to perform the inherent requirements of the position of production and installation manager for Willis Bros. I find that the respondent contravened subsection 351 (1) of the FW Act.

221 I am satisfied that pursuant to subsection 340 (1) of the FW Act the applicant had a workplace right and was entitled to the benefit of a workplace law, was able to initiate or participate in a process of proceedings under a workplace law and was able to make a complaint or inquiry in relation to his employment. I am satisfied that the respondent contravened section 340 of the FW Act and took adverse action against the applicant in terminating his employment because the applicant exercised the following workplace rights:

- (a) The applicant exercised his workplace right by making a worker's compensation claim under the *Worker's Compensation and Rehabilitation Act* 2003 (Cth) for an injury sustained in the course of his employment which was accepted by WorkCover. I am satisfied that the respondent took adverse action against the applicant following the lodgement of that claim and acceptance by WorkCover in January 2019 by injuring him in his employment by removing his work vehicle, mobile phone and fuel card, suspending his QBCC allowance and failing to pay his entitlements from 16

March 2020 whilst he was on personal leave. In *Construction, Forestry, Mining & Energy Union v Endeavour Coal Pty Ltd* [2013] FCCA 473 Cameron J at [133] discussed the relevant authorities on this issue which I respectfully adopt. He said at [133]:

In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30; (1998) 195 CLR 1 at 17-18 it was held that the phrase “injure an employee in his or her employment” covers injury of any compensable kind and that “alter the position of an employee to the employee’s prejudice” is a broad additional category which covers not only legal injury but also any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question. In *Australian Workers’ Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3; (2000) 106 FCR 482 Kenny J said at 499 [54] that before a provision such as item 1 of s.342(1) can apply, it must be possible to say of an employee that he or she is, individually speaking, in a worse situation after the employer’s acts than before them, that the deterioration has been caused by those acts and that the acts were intentional in the sense that the employer intended the deterioration to occur.

- (b) The applicant was entitled to the benefit of a workplace law namely the right to make a complaint or inquiry about the failure to pay his leave entitlements under Part 2 – 2 of the FW Act. In late November 2019 the applicant requested information regarding his accrued leave entitlements from Lisa Wilson. On 3 April 2020 the applicant made an inquiry regarding non - payment of his accrued leave entitlements. On 6 April 2020 the applicant made an inquiry requesting details of his accrued leave entitlements. On 9 April 2020 the applicant made an inquiry requesting details of his accrued leave entitlements and on 21 April 2020 the applicant requested the respondent provide details of his leave entitlements. At no time was the applicant provided with any information in relation to his inquiry. I am satisfied that a reason the respondent took adverse action against the applicant was because he exercised a workplace right in making those inquiries. I find that the respondent contravened section 340 (1) of the FW Act.

Compensation

- 222 Pursuant to sections 545(1) of the FW Act the Court may make any order the court considers appropriate if the court is satisfied that a person has contravened a civil remedy provision. Subsection 545 (2) (b) provides that the Court may make an order awarding compensation for loss that a person has suffered because of the contravention.

223 Section 545 of the FW Act provides the Court with a broad discretion. In *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; (2011) 193 FCR 526; (2011) 205 IR 392 the Court said:

[441] The question arises, however, whether the Court may order compensation, that is to say the payment of a pecuniary sum on account of hurt and humiliation found to be a direct consequence of contravention of s 340 and s 346 of the FW Act. There is no direct authority under the FW Act concerning this question. However, approaching the question as a matter of first principle, it is plain that s 545(1) is intended to provide the Court with a very broad power to make appropriate orders where contravention is established. In this s 545(2) provides confirmation that certain types of orders – for example, an order awarding compensation for the loss a person has suffered because of a contravention – may be made. But s 545(2), in this regard, expressly states that it has effect “without limiting subs (1)”.

[442] As a matter of principle it is difficult to see why a compensatory financial order cannot be made in respect of hurt and humiliation (or “shock, distress and humiliation” as s 329(4) of the FW Act describes this head of loss) shown to be a direct consequence of a contravention. At common law, courts have been reluctant to provide damages for a breach of a contract which results in hurt and humiliation, unless the parties to the contract can be taken to have contemplated such damages for breach: *Baltic Shipping Co v Dillon* [1993] HCA 4; (1992) 176 CLR 344 (Baltic Shipping), for example at 365, Mason CJ. There are special reasons usually cited by courts as to why this common law position in respect of breach of contract should obtain. For example, in *Baltic Shipping*, at 369, Brennan J suggested that if a promisor in a usual commercial setting were exposed to such an indefinite liability in the event of breach of contract, the making of commercial contracts would be inhibited.

[443] However, the power of the Court under s 545(1) and (2) to make appropriate orders following contravention including an order for compensation is quite divorced from this type of contractual consideration. As a matter of broad public policy, the Parliament of Australia has provided that the Court may give appropriate relief where contravention is proved. Relief in these circumstances helps to uphold the policy indicated in the FW Act that, amongst other things, contraventions of the freedom of association provisions should not occur and that appropriate orders should be made to remedy the contravention of such provisions. There is, therefore, in my view, no obvious policy consideration that militates against the making of a compensation order under s 545(1) or a compensation order under s 545(2), for the sorts of reasons that have inhibited the award of damages at common law for a breach of contract which is attended by shock, distress or humiliation.

[444] Indeed, there are other indications in the FW Act itself that suggest that s 545(1) and (2) should properly be construed to this effect. For example, s 392(4) of the FW Act expressly provides that compensation should not include compensation for shock, distress or humiliation in respect of a proceeding for unlawful dismissal. That provision does not apply in this case, but is in clear contrast to s 545 which contains no such limitation.

224 In *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd* [2015] FCA 275 at [73] per Gilmour J observed:

[73] Both under the FW Act and the WR Act, the making of a compensation order

is confined by the express purposes of such orders: compensation for loss suffered because of the contravention” (FW Act, s 545(2)(b)) and “*compensation for damage suffered as a result of the contravention*” (WR Act, s 807(1)(b)). In both cases, the statutory precondition to a compensation order is that there has been loss or damage suffered because, or as a result of, the contravention. There must be “*an appropriate causal connection between the contravention and the loss claimed*”: *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; (2011) 193 FCR 526 at [423].

Assessment

225 The applicant seeks compensation as per the amended claim as follows:

- (a) Lost opportunity to continue with employment;
- (b) Past economic loss for the period 11 May 2020 to 25 August 2020 the total loss being a total of \$56,710;
- (c) Past economic loss from 26 August 2020 to 5 May 2021 being the difference between the salary he earned at Dream Benchtops of \$2500 per week and his previous salary of \$3743 per week (36 weeks) being a total of \$44,748;
- (d) Past economic loss in the form of unpaid accrued leave entitlements owing to him on termination comprising:
 - (i) Unpaid personal leave between 26 March 2020 and 11 May 2020 for 7 weeks being a total of \$26,201; and
 - (ii) Unpaid annual leave between 20 July 1997 and 11 May 2020 a period of 22 years, 9 months and 21 days less leave taken being a total of \$170,900.88
 - (iii) Unpaid long service leave in the amount of \$64,018.
- (e) Future economic loss being one year out of the workforce in the sum of \$194,636.
- (f) The applicant suffered distress, hurt and humiliation and claims damages in the sum of \$50,000.

Determination

226 Having regard to the evidence and my reasons discussed above I am satisfied that the applicant is entitled to be compensated for past economic loss as follows:

- (a) For unpaid personal leave between 26 March 2020 and 11 May 2020 for 7 weeks in the amount of \$26,201.
- (b) For unpaid accrued personal and annual leave in the amount of \$14,972;

(c) For loss of income for the period 11 May 2020 to 25 August 2020 in the amount of \$56,710;

(d) For loss of income from 26 August 2020 to 5 May 2021 being the difference between the salary he earned at Dream Benchtops of \$2500 per week and his previous salary of \$3743 per week (36 weeks) in the amount of \$44,748.

Total loss: \$142,631

227 As set out in my reasons I am satisfied that the applicant suffered distress, hurt and humiliation and I award damages in the sum of \$20,000.

228 The respondent is required to pay to the applicant total compensation in the amount of \$162,631 within 28 days. I will hear the parties with respect to any pecuniary penalty to be imposed with respect to the contraventions by the respondent.

I certify that the preceding two hundred and twenty-eight (228) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Tonkin.

Associate:

Dated: 9 June 2022