



DECISION

Fair Work Act 2009
s.604—Appeal of decision

NBN Co Limited

V

Adam Camilleri

(C2025/5178)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT CROSS
DEPUTY PRESIDENT SLEVIN

BRISBANE, 10 OCTOBER 2025

Appeal against decision [2025] FWC 1349 of Commissioner Crawford at Sydney on 15 May 2025 in matter number AB2024/896 - Application for orders to stop bullying – Commissioner was satisfied there was a risk that worker would continue to be bullied at work for the purposes of s 789FF(1)(b)(ii) – Whether arguable case of appealable error – Permission to appeal refused.

Introduction

[1] NBN Co Limited (NBN) has lodged an appeal, for which permission is required, against a decision of Commissioner Crawford at Sydney on 15 May 2025 in *Re Camilleri* [2025] FWC 1349 (the Decision). The Decision relates to an application for an order to stop bullying (the Application) under s 789FC of the *Fair Work Act 2009* (Cth)(the Act).

[2] The Application had named NBN and a number of NBN employees as Respondents to the proceeding, however only Mr Camilleri's claims that he had been bullied at work by his Field Area Manager, Mr Paul Fitzpatrick, and so by NBN, were pressed.

[3] The present matter was listed to deal with the question of permission to appeal and the merits of the appeal. For the reasons that follow, we have determined that permission to appeal should be refused.

Decision under appeal

[4] After setting out the statutory context in which the Application was to be determined, the Commissioner recorded the factual background to the Application and the respective positions advanced by the parties.

[5] It is unnecessary to traverse the full facts in the matter because, while Mr Camilleri ultimately advanced nine instances of alleged bullying by Mr Fitzpatrick at first instance, the Commissioner only found there was substance to two of the nine alleged instances of bullying. Further limiting the enquiry on appeal was the scope of the alleged errors asserted, being that NBN only challenged the second of the two alleged instances of bullying.

[6] The first alleged instance of bullying found to exist, titled by the Commissioner as “#3 – Mr Fitzpatrick took disciplinary action taken against Mr Camilleri concerning an RDO taken on 18 October 2024” (the First Finding), related to facts and findings of the Commissioner expressed as follows:

[30] On 17 September 2024, Mr Fitzpatrick sent Mr Camilleri a follow-up email after their meeting earlier in the day. The email relevantly stated:

“As mentioned in the meeting, you will be removed from the RDO roster as of 4 weeks from today. This means your last RDO will be on or before 17/10/2024 depending on where it falls, and you will return to a 7:00am to 3:06pm roster or a 8:00am to 4:06pm roster.”

[31] Mr Camilleri took a day of personal leave on 17 October 2024. Mr Camilleri was absent from work on 18 October 2024 on what he claims was an RDO. Mr Fitzpatrick determined that Mr Camilleri had failed to comply with the Flex Day Guidelines and directions from management in relation to taking 18 October 2024 as an RDO.

[32] There was clearly some confusion between Mr Camilleri and Mr Fitzpatrick about the removal of Mr Camilleri’s RDO. Mr Fitzpatrick’s letter to Mr Camilleri dated 20 February 2025 stated “NBN ended the flex day arrangement in September 2024 because you were not completing sufficient hours to receive a Flex Day in accordance with the Flex Day Guidelines.” That was not entirely correct. NBN Co gave four weeks of notice on 17 September 2024 that Mr Camilleri’s RDO roster was ending. That means Mr Camilleri should have remained on the RDO roster for the four-week notice period, or until around 17 October 2024. Mr Camilleri should have continued working from 7:00am to 3:56pm during the four-week notice period and should have continued accruing RDOs. If Mr Camilleri was not working the required hours during the notice period, NBN Co could have taken disciplinary action against Mr Camilleri.

[33] It appears therefore that Mr Camilleri may have been entitled to the RDO on 18 October 2024 because of additional hours he worked during the four-week notice period. That would be consistent with the UKG and SMAX records Mr Camilleri provided to Mr Fitzpatrick in response to his 20 February 2025 letter.

[34] The warning letter issued by Mr Fitzpatrick to Mr Camilleri on 5 March 2025 also states:

“I confirm that there was an error in UKG and SMAX where the Flex Day was showing up. However, this issue has since been rectified. In addition, as you know, you had been provided verbal and written notice that your Flex Day arrangement was ending, therefore you should not have made the assumption it was continuing.

Accordingly, I consider that you have failed to comply with the Flex Day Guidelines and management direction by failing to work sufficient hours to

receive Flex Day and continuing to take the Flex Day despite being notified that the arrangement had ended.”

[35] Mr Fitzpatrick was unable to conclusively answer whether Mr Camilleri had worked the hours necessary to take an RDO on 18 October 2024 during cross-examination.

[36] I find Mr Fitzpatrick’s conduct in relation to the 18 October 2024 RDO to be problematic. Although Mr Fitzpatrick clearly communicated that Mr Camilleri was being given four weeks’ notice of his removal from the RDO roster, there was a distinct lack of clarity about the working arrangements and RDOs during the notice period. Mr Fitzpatrick was made aware that NBN Co’s own systems showed Mr Camilleri was on an RDO on 18 October 2024 prior to making the decision that Mr Camilleri had breached the Flex Day Guidelines and management direction. I do not consider these findings were open on the evidence before Mr Fitzpatrick.

[37] I find Mr Fitzpatrick behaved unreasonably towards Mr Camilleri in relation to the issue of the RDO Mr Camilleri took on 18 October 2024. While it was reasonable for Mr Fitzpatrick to seek information from Mr Camilleri about what had occurred, it was not reasonable to make any finding against Mr Camilleri once he had identified the issue with NBN Co’s internal systems.

[38] I find Mr Fitzpatrick’s conduct in making findings against Mr Camilleri in relation to the RDO he took on 18 October 2024 was not reasonable management action carried out in a reasonable manner. I consider Mr Fitzpatrick’s frustration about ongoing issues with Mr Camilleri clouded his assessment of Mr Camilleri’s conduct in relation to the RDO he took on 18 October 2024. Mr Fitzpatrick acted unreasonably in finding that Mr Camilleri had breached a policy or direction concerning the 18 October 2024 RDO.

[39] There was no challenge to Mr Camilleri’s evidence about the health issues he has experienced because of his interactions with Mr Fitzpatrick.

[40] I find Mr Fitzpatrick’s behaviour towards Mr Camilleri in finding that Mr Camilleri had breached a policy and direction in relation to the 18 October 2024 RDO was unreasonable and the behaviour created a risk to Mr Camilleri’s health and safety.

[Footnotes omitted]

[7] The second alleged instance of bullying found to exist, titled by the Commissioner as “#8 – Mr Fitzpatrick unreasonably alleged that Mr Camilleri was not available to take a call when he was on standby for a callout on 7 October 2024” (the Second Finding/ the “missed call” issue), related to facts and findings of the Commissioner expressed as follows:

[57] Mr Fitzpatrick alleged in an email dated 20 February 2025 that Mr Camilleri was at a barbeque on the Labour Day public holiday on 7 October 2024 and did not respond to a call-out, despite being paid an allowance to be on standby.

[58] Mr Camilleri provided a response to this allegation in which he denied receiving the call-out and denied being at a barbeque. Mr Camilleri stated he was at home all day with his phone next to him and it did not ring. Mr Camilleri provided evidence that a technical issue may have arisen because the call to him was made via Microsoft Teams rather than the Control Tower number. Mr Camilleri provided evidence that Mr Fitzpatrick had also not responded to a call-out on the same date.

[59] Mr Fitzpatrick decided not to take any further action in relation to this issue in the outcome letter to Mr Camilleri dated 5 March 2025.

[60] Although Mr Fitzpatrick did not take any further action in relation to this issue, I consider the manner that it was raised by Mr Fitzpatrick constitutes unreasonable behaviour towards Mr Camilleri. Mr Fitzpatrick should have made more enquiries before alleging in writing that Mr Camilleri was at a barbeque and suggesting this was why he missed a call-out on 7 October 2024. I consider this was an example of Mr Fitzpatrick unreasonably making Mr Camilleri respond to an allegation in writing without having sufficient evidence to justify making the allegation. I do not accept the raising of this allegation in the overall context was reasonable management action carried out in a reasonable manner. I consider Mr Fitzpatrick overreacted to the issue because of his ongoing frustration with Mr Camilleri.

[61] I consider in most cases raising an allegation against an employee and then taking no further action against the employee after receiving their response would constitute reasonable management action carried out in a reasonable manner. The point of difference in this case is the range of issues Mr Fitzpatrick had been raising with Mr Camilleri's conduct in mid-to-late 2024. I consider this is an example of Mr Fitzpatrick unreasonably deciding to raise an issue with Mr Camilleri that Mr Fitzpatrick would not have raised with other employees in comparable circumstances. I consider Mr Fitzpatrick was actively looking for issues to raise with Mr Camilleri's conduct because of his ongoing frustration.

[62] There was no challenge to Mr Camilleri's evidence about the health issues he has experienced because of his interactions with Mr Fitzpatrick.

[63] I find Mr Fitzpatrick's behaviour towards Mr Camilleri in raising the allegation that he was at a barbeque and missed a call-out on 7 October 2024 was unreasonable and the behaviour created a risk to Mr Camilleri's health and safety.

[Footnotes omitted]

[8] While NBN only challenged the Second Finding, it was accepted by the parties that success in that challenge would defeat the Application for an order to stop bullying under s.789FC because the necessary requirement of repeated unreasonable behaviour¹ would cease to exist.

¹ S. 789FD(1)(a).

Grounds of Appeal and Public Interest

[9] Noting that only the Second Finding was challenged, NBN submitted that there were four grounds of appeal, being:

Ground 1: The Commissioner made a significant error of law in finding that Mr Fitzpatrick acted unreasonably towards Mr Camilleri by raising an allegation with Mr Camilleri that he was not available to take a call when he was on standby for a callout on 7 October 2024.

Ground 2: The Commissioner made a significant error of fact in finding that Mr Fitzpatrick should have made more enquiries before putting the allegation in writing to Mr Camilleri for response.

Ground 3: The Commissioner made a significant error of fact in finding that raising the matter with Mr Camilleri was an example of Mr Fitzpatrick unreasonably deciding to raise an issue with Mr Camilleri that Mr Fitzpatrick would not have raised with other employees in comparable circumstances.

Ground 4: The Commissioner made a significant error of fact in having regard to an irrelevant consideration in dealing with the allegation by placing reliance on Mr Camilleri's evidence that Mr Fitzpatrick had also not responded to a call-out on the same date. The error arises because Mr Fitzpatrick was not on-call and not under the same obligations as Mr Camilleri.

[10] In support of the proposition that it was in the public interest to grant permission to appeal, NBN submitted that while this matter is one where the Commission's discretion may apply, the Commission must still grant permission if it is satisfied that it is in the public interest to do so. The Appellant submitted that there existed an appealable error going to the Commissioner's jurisdiction in determining whether Mr Fitzpatrick acted unreasonably, and the public interest is attracted as the decision at first instance manifests an injustice. The breaches of procedural fairness in this matter were submitted to give rise to a "*practical injustice*" in that they have resulted in a denial of an opportunity to make submissions and that denial was material to the Commission's decision.

Principles on appeal

[11] Section 604(1) of the Act permits a person who is aggrieved by a decision of the Commission to appeal the decision. However, there is no right to appeal. An appeal may only be brought with the permission of the Commission. Section 604(2) requires the Commission to grant permission to appeal if it is satisfied that it is in the public interest to do so. In addition, the Commission has a general discretion as to whether to grant permission to appeal even if it is not satisfied that the public interest requirement has been met.

[12] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.² The public interest might be attracted, for example, where a matter raises issues of importance and general application, where there is a diversity of decisions at first instance so that guidance from an appellate court is required, where the decision at first instance manifests an injustice or the result is counter intuitive, or because the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.³

[13] Aside from the special circumstance in s 604(2) in which permission to appeal must be granted, grounds which have been traditionally considered in granting leave include whether the decision is attended with sufficient doubt to warrant its reconsideration and whether substantial injustice may result if leave is refused. It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of an appealable error.⁴ However, the fact that the member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.⁵

[14] If permission to appeal is granted, an appeal under s 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.⁶ In conducting an appeal by way of rehearing, the Full Bench is bound to conduct a "*real review*" of the evidence given at first instance and of the reasons of the member of the Commission at first instance to determine whether the member has erred in fact or law.⁷ However, an appeal exists for the correction of error. It is not a hearing *de novo*. There are natural limitations that apply to the hearing of an appeal by a Full Bench and the member at first instance is usually in a better position than the appeal bench to make findings of fact.⁸

Submissions on Appeal

[15] We have considered all the written submissions of the parties. It is unnecessary to set those submissions out in full, and those submissions are set out in summary form below.

² *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44] -[46].

³ *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWA FB 5343; (2010) 197 IR 266 at [27].

⁴ *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30]; *Ferryman Pty Ltd v Maritime Union of Australia* [2013] FWC FB 8025; (2013) 238 IR 258 at [11]-[12].

⁵ *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWA FB 5343, at [26]-[27]; (2010) 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWA FB 10089 at [28], 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe*; *Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWC FB 1663 at [28].

⁶ This is so because on appeal the FWC has the power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

⁷ *Robinson Helicopter v McDermott* [2016] HCA 22; (2016) 90 ALJR 679 at [43] (French CJ, Bell, Keane, Nettle and Gordon JJ).

⁸ *Australian Education Union v Bendigo Kangan Institute of TAFE* [2021] FWC FB 3649 at [38].

(a) First Ground

[16] In support of the first appeal ground, NBN submitted that the Commissioner made the Second Finding on a matter in respect of which Mr Fitzpatrick and NBN Co Limited had no notice, the result being a denial of procedural fairness and therefore an error of law. NBN submitted members of the Commission are obliged to observe procedural fairness in carrying out their functions under the Act. Procedural fairness is a component of natural justice, and it requires that the Commission ensure that each party is given a reasonable opportunity to present its case.

[17] NBN referred to the judgment of the Full Court of the Federal Court in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd*⁹, wherein Justices Katzmann and Rangiah referred to the passage from the decision of the English Court of Appeal in *R v Thames Magistrates' Court Ex Parte Polemis*:¹⁰

But of the versions of breach of the rules of natural justice with which in this court we are dealing constantly, perhaps the most common today is the allegation that the defence were prejudiced because they were not given a fair and reasonable opportunity to present their case to the court, and of course, the opportunity to present a case to the court is not confined to being given an opportunity to stand up and say what you want to say; it necessarily extends to a reasonable opportunity to prepare your case before you are called on to present it. A mere allocation of court time is of no value if the party in question is deprived of the opportunity of getting his tackle in order and being able to present his case in the fullest sense.

[18] NBN submitted that Mr Fitzpatrick was denied the opportunity to prepare and present his case before the Commission, as Mr Fitzpatrick and NBN were not on notice that the Second Finding could have been made against Mr Fitzpatrick as it did not form part of the Applicant's case.

[19] NBN submitted that if the matters regarding the Second Finding had formed part of the Applicant's case, then Mr Fitzpatrick could have led evidence that addressed:

- a. the evidence relied upon by Mr Fitzpatrick to justify making the allegation;
- b. the decision-making process in determining to make enquiries of Mr Camilleri with respect to the issue;
- c. any instructions he may have received from Ms Suzanne Sheppard, Regional Area Manager (who was originally contacted with respect to Mr Camilleri failing to answer his phone) when asked to investigate the matter; and
- d. how NBN, and Mr Fitzpatrick, ordinarily deal with failures to respond during an on-call engagement and their usual steps to investigate these matters.

⁹ [2013] FCAFC 148, Katzmann and Rangiah JJ at [118] and [119] ("*Abigroup*").

¹⁰ [1974] 2 ALL ER 1219.

[20] In addition to the denial of an opportunity to lead evidence on the matters raised above, NBN submitted that those matters were not put to Mr Fitzpatrick in cross-examination by the Applicant's representative or the Commissioner for comment, consistent with the principle in *Browne v Dunn*.¹¹

[21] Mr Camilleri submitted that while it was correct that the missed call incident may have occurred on the 7 October 2024 and was not set out in the Application dated 21 November 2024, Mr Fitzpatrick did not raise any concerns with Mr Camilleri until Mr Fitzpatrick sent Mr Camilleri his "*Letter Outlining Concerns*" on 20 February 2025, three months after the Application had been filed.

[22] Mr Camilleri referred to his extensive response to Mr Fitzpatrick's "*Letter Outlining Concerns*", that referenced details of conversations with others, the call missed by Mr Fitzpatrick and the BBQ issue. Mr Camilleri also stated:

I note that Mr Fitzpatrick himself (as well as Mr Bogoevski) missed Mr Khan's calls from the WOC on the exact same day regarding the very same incident, and that Mr Gill also missed a call from the WOC in similar circumstances on the 7/12/24.

I remain concerned that I am being subjected to a level of scrutiny that is not being imposed upon any of these individuals, and will be referencing this in my Fair Work submission.

[23] Thereafter, Mr Camilleri referenced the "*missed call*" matter in his first statement and Submissions of 10 March 2025, and closing submissions on 6 May 2025. The matter was clearly before the Commission and ventilated.

(b) Second Ground

[24] NBN submitted that Mr Fitzpatrick did in fact make several verbal enquiries of Mr Camilleri prior to putting the allegation in writing at the request of Mr Camilleri. Given the nature of the allegations, this was a reasonable approach, as only Mr Camilleri would have been able to answer the question as to whether he missed the call due to attending a barbeque. It was only upon the insistence of the Applicant, with the support of the CEPU, that the matter was then put in writing.

[25] NBN submitted that, in making this finding, the Commissioner failed to consider the relevant evidence of both parties with respect to:

- a. the numerous verbal enquiries made by Mr Fitzpatrick of Mr Camilleri;
- b. the refusal of Mr Camilleri to respond to those enquiries;
- c. the nature of the allegation and the fact that the knowledge of Mr Camilleri's whereabouts were solely his own knowledge; and, most significantly,

¹¹ (1893) 6 ER 67.

d. the Applicant's insistence that any enquiry be put to him in writing.

[26] Mr Camilleri relied on his submissions on the First Ground, and further submitted that the Commissioner heard extensive evidence of the methodology used by Mr Fitzpatrick when dealing with issues generally, and, in particular, the spreadsheet matter (the First Issue in the Decision in which failures by Mr Fitzpatrick were noted at [17]).

[27] Mr Camilleri submitted that it was clearly open to the Commissioner to find Mr Fitzpatrick to be a person who needs to make more inquiries before raising allegations.

(c) Third Ground

[28] NBN admitted that evidence on this issue was limited as a result of the factors identified in the First Ground of this appeal, however it was still not open to the Commissioner to make the finding in light of the uncontested evidence of Ms Sheppard that the Workflow Regional Delivery Manager, Ms Galati, had asked Mr Fitzpatrick's manager, Ms Sheppard, to look into Mr Camilleri's failure to answer his phone while on-call and advise what occurred.

[29] Mr Camilleri again relied on his submissions on the First Ground.

(d) Fourth Ground

[30] NBN submitted that while it is unclear what weight the Commissioner gave to the evidence regarding Mr Fitzpatrick not answering his telephone, any weight given would be inappropriate because there was no obligation on Mr Fitzpatrick to answer his phone while not working. Mr Fitzpatrick was not an on-call Field Engineer on 7 October 2024.

[31] Mr Camilleri submitted that the issue was that Mr Fitzpatrick also missed a call, for the same reason that Mr Camilleri missed the call. Mr Fitzpatrick became aware of the technical problem, yet Mr Fitzpatrick chose to reprimand Mr Camilleri. Given the uncontested evidence in the matter, it was reasonable for the Commissioner to find that Mr Fitzpatrick had an obligation to answer his phone.

Consideration

[32] We are not persuaded that it is appropriate to grant permission to appeal in this matter. The appeal grounds advanced by NBN do not, in our opinion, disclose any arguable basis on which it can be said that there was an appealable error in the decision of the Commissioner.

[33] While NBN's reliance upon *Abigroup* and *R v Thames Magistrates' Court Ex Parte Polemis* are uncontroversial, this was not a matter where NBN was deprived of the opportunity of getting its case in order or having the opportunity to present its case in the fullest sense. The facts supporting the Second Finding were the subject of allegation and consideration, and Mr Fitzpatrick and NBN were on notice that the Second Finding could be made.

[34] While it is correct to observe that the "missed call" issue was not outlined in the Application (filed on 21 November 2024), that issue did not gain relevance until 20 February

2025, when it was raised by Mr Fitzpatrick in his “*letter outlining concerns*”, which itself referenced a meeting on 13 February 2025. Regarding this issue, that letter (reciting a previous email), stated:

On call requirements

Incident on 7 October 2024

On 7 October 2024, you were on call during the Labour Day public holiday in New South Wales, and received a call out but did not respond to it. In conversation with the NOC, you advised that you were attending a barbecue at the time, and did not receive any missed calls or messages from the NOC. Incident notes in Remedy show the NOC called you and left a voicemail once you did not answer.

As you are aware, you are paid an allowance to be on stand by. The expectation is that you are available and contactable while you are on stand by, and will respond to your phone, regardless of your attendance at a barbecue.

In this instance, I am concerned that you failed to respond to a call out within a reasonable timeframe and without reasonable excuse.

- 1. Can you explain why you did not answer the call on 7 October 2024?*
- 2. What do you normally do when you are on call to ensure you do not miss any calls?*

[35] Mr Camilleri’s response to Mr Fitzpatrick on 26 February 2025 was extensive and, in conclusion, Mr Camilleri stated:

I note that Mr Fitzpatrick himself (as well as Mr Bogoevski) missed Mr Khan’s calls from the WOC on the exact same day regarding the very same incident, and that Mr Gill also missed a call from the WOC in similar circumstances on the 7/12/24.

I remain concerned that I am being subjected to a level of scrutiny that is not being imposed upon any of these individuals, and will be referencing this in my Fair Work submission.

[Emphasis added]

[36] On 5 March 2025, Mr Camilleri received a formal written warning regarding a number of issues including the “*missed call*” issue, that included:

On Call Requirements Incident on 7 October 2024

In your response, you advised that you checked your phone records and saw there were missed calls from Microsoft Teams, but the phone had not rung. You said that your phone volume was turned up and not on silent. You said that you logged an incident with IT Central the following day and that IT Central said it must have been a one-off glitch and closed the case.

You also stated that you were not attending a barbecue on 7 October 2024. With respect to the above, although you stated that IT Support were unable to find any issue with your Teams, I accept that there may have been a technical issue on this occasion. As such, I will no longer pursue this concern with you. However, I remind you of the expectation that you are available and contactable while you are on stand by.

[37] Five days later, in Mr Camilleri's submissions filed 10 March 2025, he outlined (at [13]):

The allegations are dealt with in the order outlined in the witness statement of Mr Camilleri:

...

(j) Formal Written Warning - Incident on 7 October 2024 (On Call Problem)

[38] Mr Camilleri's submission on that allegation was:

(j) Formal Written Warning Incident on 7 October 2024 (On Call Problem)

34. Mr Camilleri has attached to his witness statement a response to each of the issues. Formal Written Warning Incident on 7 October 2024 (On Call Problem)

Formal Written Warning Incident on 7 October 2024 (On Call Problem)

35. In relation to the "On-Call" missed call, it should have been clear to Mr Fitzpatrick that there is a glitch in the system when not called from a particular number in the Control Tower. Mr Fitzpatrick also had a missed call at the same time. The policy states that calls will be from a particular number at the Control Tower. The problem occurred when calls were made from the Teams number.

36. Mr Camilleri had never missed a call before. Having found no fault, there was no need for this reprimand from Mr Fitzpatrick:

However, I remind you of the expectation that you are available and contactable while you are on stand by.

[39] Mr Camilleri dealt with the "missed call" issue in his statement, as did Mr Fitzpatrick, who outlined in his statement:

147. I note that in Mr Camilleri's Outline of Submissions he has raised that he ought not have been subjected to a reprimand with respect to the On Call Requirements. The Outcome Letter does not reprimand Mr Camilleri for this issue. While no evidence was provided to confirm a glitch occurred, and specifically, IT stated that they were unable to find any issue with Mr Camilleri's Teams, I provided that:

... I accept that there may have been a technical issue on this occasion. As such, I will no longer pursue this concern with you. However, I remind you of the expectation that you are available and contactable while you are on stand by.

148. On this issue, I accepted that I was unable to make a finding either way as to whether a technical issue occurred or not, and on that basis, I accepted his version of events and chose not to pursue the issue further with Mr Camilleri. I then provided a reiteration of nbn's expectations that an employee is contactable while they are being paid to be on stand by. I believe it is part of my role as a manager to ensure that employees are aware of, and are meeting, the expectations of the employer. I do not believe that I reprimanded Mr Camilleri on this issue.

[40] In the cross-examination of both Mr Camilleri and Mr Fitzpatrick, each witness was questioned without hinderance about the making of the allegation that Mr Camilleri was not available to take a call when he was on standby for a callout. Mr Fitzpatrick and his representative were clearly alive to the “missed call” issue and the allegation that Mr Fitzpatrick unreasonably alleged that Mr Camilleri was not available to take a call when he was on standby for a callout on 7 October 2024.

[41] It is not the role of an Appeal Bench to approach a decision under appeal by applying a fine tooth comb to the words used in the decision. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,¹² Kirby J stated:

The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law.

[42] Read as a whole, which in this matter involves the totality of the decision, and not simply the two instance of bullying found to exist, NBN and Mr Fitzpatrick were on notice of the case they had to meet.

[43] The Commissioner heard extensive evidence of the methodology used by Mr Fitzpatrick when dealing with issues generally, and in particular the spreadsheet matter (the First Issue in the Decision in which failures by Mr Fitzpatrick were noted at [17]). Based on those findings, and the conclusions regarding the “missed call” issue, it was clearly open to the Commissioner to judge Mr Fitzpatrick as a person who needs to make more inquiries before raising allegations.

[44] It was unremarkable that the Commissioner found Mr Fitzpatrick raised an issue with Mr Camilleri that he would not have raised with other employees in comparable circumstances when that was a specific complaint of Mr Camilleri in his response to Mr Fitzpatrick on 26 February 2025.

Conclusion

[45] For these reasons, we are not persuaded that permission to appeal should be granted. We do not consider that an arguable case has been advanced that the decision of the Commissioner was attended by appealable error. We are not satisfied it is in the public interest

¹² (1996)185 CLR259 at [24].

that permission to appeal be granted for the purposes of s 604(2) of the Act or that there is any other basis upon which permission to appeal should be granted.

[46] Permission to appeal is refused.



VICE PRESIDENT

Appearances:

*Mr Diger representing NBN Co
Mr Dwyer from the CEPU representing Mr Camilleri.*

Hearing details:

2025.

Sydney.

17 July.

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