Federal Court of Australia

Parry v University of South Australia [2022] FCAFC 168

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| Appeal from: | *Parry v University of South Australia* [2022] FCA 49 |
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| File number(s): | SAD 52 of 2022 |
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| Judgment of: | **BANKS-SMITH, O'SULLIVAN AND FEUTRILL JJ** |
|  |  |
| Date of judgment: | 29 September 2022 |
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| Catchwords: | **EMPLOYMENT LAW** – appeal from orders dismissing an application alleging contravention of s 340 of the Fair Work Act 2009 (Cth) (FWA) – where primary judge found that the respondent terminated the applicant’s employment for reasons that did not include his possession or exercise of a workplace right to protect his health and safety in the workplace – where primary judge found that the respondent terminated the applicant’s employment because of his failure to perform his duties – where primary judge found the applicant’s failure to perform his duties did not constitute the exercise of a workplace right – whether primary judge erred in concluding that the reason for the employee’s dismissal was his failure to attend his duties and did not include any reason sanctioned by s 340 of the FWA – whether the primary judge had a conflict of interest or displayed actual or apprehended bias – whether the primary judge misused her advantage when making findings of fact based on the credibility of the applicant – no conflict of interest established – no actual or apprehended bias established – the primary judge did not misuse her advantage when making findings of fact based on the credibility of the applicant – appeal dismissed |
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| Legislation: | *Fair Work Act 2009* (Cth), ss 340, 342(1), 361 |
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| Cases cited: | *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* [2012] HCA 32; (2012) 248 CLR 500  *Charisteas v Charisteas* [2021] HCA 29; (2021) 393 ALR 389  *Devries v Australian National Railways Commission* [1993] HCA 78; (1993) 177 CLR 472  *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337  *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118  *General Motors-Holden Pty Ltd v Bowling* (1976) 12 ALR 605  *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507  *Parry v University of South Australia* [2022] FCA 49  *R v Australian Stevedoring Industry Board; Ex Parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22; (1953) 88 CLR 100  *R v Rich (Ruling No. 21)* [2009] VSC 32  *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In liq)* [1999] HCA 3; (1999) 160 ALR 588  *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71; (1997) 151 ALR 505  *Zaltni v Minister for Immigration and Multicultural Affairs* [2000] FCA 399 |
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| Division: | Fair Work Division |
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| Registry: | South Australia |
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| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 135 |
|  |  |
| Date of hearing: | 5 August 2022 |
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| Counsel for the Applicant: | The Applicant appeared in person |
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| Solicitor for the Respondent: | Mr A Short of Minter Ellison |

ORDERS

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|  | | SAD 52 of 2022 |
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| BETWEEN: | CHRISTOPHER PARRY  Applicant | |
| AND: | UNIVERSITY OF SOUTH AUSTRALIA  Respondent | |

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| order made by: | BANKS-SMITH, O'SULLIVAN AND FEUTRILL JJ |
| DATE OF ORDER: | 29 September 2022 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.

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

REASONS FOR JUDGMENT

THE COURT:

# introduction

1. The appellant was employed as a “Technical Officer” by the respondent on a series of short term casual employment contracts during the period 7 May 2019 to 8 October 2019. On 8 October 2019, his employment was terminated. But for that termination, the latest of the appellant’s casual contracts would have expired on 3 March 2020.
2. The appellant brought a claim pursuant to s 340 of the *Fair Work Act 2009* (Cth) (**FWA**) alleging he was dismissed because he had, or had exercised, a workplace right. That right was described in his originating application as “a workplace right (an OH & S right) to take reasonable care to protect [his] own health and safety at work”.
3. Before the primary judge, there was no issue that the termination of the appellant’s employment was an “adverse action” as defined in s 342(1), Item 1 of the FWA. The issue before her Honour was whether the appellant’s termination was because he had, or had exercised, a workplace right.
4. The primary judge dismissed the appellant’s claim, finding that the reason for his dismissal was his failure to attend to his duties and did not include any reason sanctioned by s 340 of the FWA: *Parry v University of South Australia* [2022] FCA 49 at [234] (**Reasons**).
5. The appellant now appeals against that judgment.
6. The appellant was self-represented at the first instance and on appeal.

## The notice of appeal and the conduct of the appeal

1. On 3 March 2022, the appellant had applied for an extension of time within which to file his notice of appeal. An order extending time was made on 4 May 2022.
2. The notice of appeal is in the form of the draft notice of appeal annexed to the appellant’s application for an extension of time and in a more detailed form annexed to his affidavit sworn 28 February 2022 and filed 3 March 2022 in support of his application for an extension of time.
3. The notice of appeal contains a number of grounds which fall into the following categories:
   1. (the primary judge) had a conflict of interest (ground 1);
   2. (the primary judge) was biased [The appellant did not make clear whether he alleges actual bias or apprehended bias or both] (grounds 2-14); and
   3. (the primary judge) failed to give due consideration to all the evidence (ground 15).
4. At the hearing of the appeal, the appellant was content to rely on his written submissions. He was informed of his right to make oral submissions and was encouraged to do so, however he reiterated that he relied upon his written submissions.
5. The respondent had filed written submissions and made brief oral submissions.

## The primary judge’s reasons

1. The primary judge started by identifying the claim brought by the appellant under s 340 of the FWA. Her Honour set out the relevant principles at Reasons [4]-[15], specifically noting the provisions of s 361 of the FWA which provides:

**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.

1. Her Honour identified that the effect of s 361 is that the respondent employer has the onus of establishing that on the balance of probabilities the adverse action taken against the appellant was not taken for a prescribed reason: Reasons [10]. In so doing, her Honour referred to the observations of Mason J (as his Honour then was) in relation to the predecessor to s 361 in *General Motors-Holden Pty Ltd v Bowling* (1976) 12 ALR 605, 617 and of French CJ and Crennan J in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* [2012] HCA 32; (2012) 248 CLR 500, 517 at [44], [45]. In the latter case, their Honours said:

44. There is no warrant to be derived from the text of the relevant provisions of the *Fair Work Act* for treating the statutory expression “because” in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer’s reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains “why was the adverse action taken?”

45. This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker’s evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity.

(Citations omitted)

1. Having referred to those decisions, her Honour stated, correctly with respect, that the Court must have regard to the circumstances advanced by the appellant as being the reason (or at least a reason amongst others) for his termination such that the case to be proved by the respondent is that the adverse action taken by it against the appellant was not for a proscribed reason. No ground of appeal asserted any error of law. We accept that the primary judge’s statement of the applicable legal principles was correct.

## Uncontroversial matters

1. Her Honour dealt with a number of facts, which she described as uncontroversial: Reasons [17]-[28]. There is no appeal against her Honour’s findings that those matters were uncontroversial.
2. Relevantly for the purposes of this appeal, her Honour found the following:

17. The **School** of Health Sciences within the University provides education and training at a tertiary level to students in allied health and related fields of study. For teaching purposes, it keeps human cadavers and body parts principally for the demonstration of anatomy. They may be referred to as “Specimens”.

18. There are two “wet laboratories” on separate floors within the anatomy division of the School for the demonstration of anatomy to students. The wet laboratories are closed hygienic spaces kept at a temperature of 16 degrees or lower and are conducted pursuant to a licence issued by the government agency SA Health. The School obtains advice from the School of Microbiology in relation to the care and maintenance of the Specimens. The temperature in the laboratory and associated spaces is externally monitored, usually resulting in a security alert if the temperature rises.

19. The Specimens were stored in rooms adjacent to each wet laboratory known as “wet rooms”. To avoid confusion, I will refer each wet room as a specimen storage room. Access to each specimen storage room was limited to personnel who carried an electronic access card. Such access was monitored by facilities personnel situated elsewhere within the University.

20. In January 2019, the air conditioning in a specimen storage room failed during a heatwave. Temperatures rose to 21 degrees for a day, resulting in a yeast infection affecting the Specimens then in the University’s possession and the destruction of the entire collection. Replacement Specimens were acquired in April 2019 from the University of Adelaide, where they had been embalmed.

21. Following that incident, changes were made to a Procedural Manual which specified the tasks to be undertaken by staff in the laboratories and the manner and frequency of their performance. Among the newly introduced procedures was a requirement of monthly swabbing of the Specimens to check for bacteria or other infection. At the time of Mr Parry’s employment, that monthly task was allocated to his colleague Ms Candice Grubb.

22. Mr Parry was employed by the University under a series of short-term casual employment contracts from 7 May 2019. Were it not for his dismissal, the latest of Mr Parry’s casual employment contracts would have expired on 3 March 2020. He was employed in the position of “Technical Officer” to provide laboratory support within the School at a rate of $41.97 per hour. The employment agreement provided that either party may terminate the contract by giving not less than twenty-four hours’ notice to the other or, in the case of the University, payment in lieu of such notice.

23. Mr Parry’s position was not advertised. Prior to his employment, Dr Nicola Massy-Westropp had met him on two occasions and had become aware of work he had done at Flinders University preparing and preserving animal bones. Mr Parry underwent training specific to the wet laboratories, delivered partly by Ms Grubb.

24. Mr Parry’s duties included the handling of the Specimens, particularly to ensure that they were properly maintained so as to remain useful for the University’s teaching purposes.

25. Upon the commencement of his employment, Mr Parry was provided with the Procedure Manual. It contained a table specifying the tasks to be performed by him, the frequency of the task and to some extent the manner in which the task was to be performed. Mr Parry was one of two Technical Officers undertaking the same duties in caring for Specimens stored in two different parts of the workplace. The other Technical Officer was Ms Grubb.

26. By the time that Mr Parry commenced his employment, a concern had arisen that the Specimens were omitting unsafe levels of formaldehyde. As explained below, during the course of his employment, Mr Parry expressed his concern about the issue, as well as his dissatisfaction with the University’s response to it.

27. Mr Parry’s employment was terminated by his manager, Dr Massy-Westropp, on 8 October 2019.

28. For two weeks prior to that time, Mr Parry had not entered the room in which the Specimens under his care were stored and had not undertaken tasks for their hydration and care as specified in the Procedure Manual. The reasons for his failure to do so are critical to the resolution of his claims.

1. Next, her Honour dealt with the appellant’s originating application and concise statement. Her Honour referred to the appellant’s originating application in which he claims he “… was dismissed for exercising a workplace right (an OH & S right) to take reasonable care to protect my own health and safety at work”.
2. Her Honour made the observation, amongst other things, that in the appellant’s originating application, the claim is confined to an allegation of a contravention of s 340 of the FWA: Reasons [31].
3. The primary judge also set out that in the concise statement, which accompanied the originating application, the appellant alleged the respondent had taken inadequate steps to ensure the appellant’s health and safety at work, specifically in relation to levels of formaldehyde to which he was exposed. In the concise statement, the appellant alleged he told Dr Massy-Westropp, the person responsible for managing him, and others in the laboratory team (Reasons [32]):

20.1: Just after 2:30pm Dr Nicola Massy-Westrop [sic] came into my office and said that the logs had been checked and that no-one had entered the specimen storage room for the last two weeks - then asked me to confirm.

20.2: I told her that was correct.

20.3: She then asked why the specimens were not being sprayed daily with hydration fluid.

20.4: I told her that since all dissection had been stopped for safety reasons I thought it wise to minimize my exposure, at least until the test results were in - and as the last two weeks were student free and no dissection was being done the specimens remained in a sealed cabinet in a very small sealed and un-ventilated room and not in need of hydration.

20.5: Nicola Massy-Westrop [sic] said she would have to think about it and left.

20.6: Ten minutes later she returned and said she would have to let me go because I hadn’t followed the hydration protocol.

20.7: I said ‘I feel this is all a little too convenient’ – ‘you mean the formaldehyde’ she reflexively answered, then claimed it wasn’t related.

20.8: This is a very unusual way for a uni to deal with performance issues and fire people.

1. In its concise response, the respondent alleged the appellant was obliged to undertake tasks prescribed in the Procedure Manual, obligations which had been made known to him, and that in the two weeks leading up to his dismissal, he had not entered into the specimen storage room to attend to the care of the Specimens (as defined at [17] of the Reasons, extracted at [16] above). That fact was not disputed.
2. The respondent denied that the appellant ever stated to it that his failure to attend to the Specimens was due to concerns that the performance of his duties would expose him to a serious risk to his health or safety, and that the appellant had not at any time notified it that he had ceased work due to any such concerns. It alleged further that the appellant’s failure to attend to the Specimens amounted to a serious dereliction of his duties, with the potential to cause serious and irreversible damage to the Specimens, and that his employment was terminated for that reason alone. It denied that the existence or exercise of the workplace rights referred to by the appellant were a reason or part of the reason for the decision to dismiss him.
3. A further ground advanced by the respondent was that following the appellant’s dismissal, it became aware that the appellant had also failed to enter the specimen storage room to attend to the Specimens in accordance with the Procedure Manual on a number of occasions in June and July 2019.
4. As to this last point, in view of the primary judge’s finding that the appellant’s employment was not terminated for a proscribed reason, it was unnecessary for her Honour to decide the issue. However, for completeness, her Honour considered this issue and found that the written record upon which the respondent relied to establish this allegation did not establish that the appellant was rostered to work on the days on which he is recorded as having failed to attend the specimen storage room in June and July 2019. Accordingly, her Honour did not consider that the written record disclosed a failure by the appellant to perform his duties: Reasons [235]-[237].

## The conduct of the trial

1. As the Court has noted, the appellant represented himself both at trial and before the Full Court. The primary judge described the conduct of the trial, and having regard to the nature of the appeal grounds, it is appropriate to record this aspect of the Reasons in some detail. It is apparent that her Honour provided the appellant with some guidance about what he was required to do in conducting the trial but that evidence adduced in cross-examination by him was not helpful to his case and the respondent’s witnesses were not challenged as robustly as they might otherwise have been: Reasons [42]. Her Honour alluded to anomalies in the evidence of the respondent’s witnesses which she addressed later in the Reasons at [221]–[224], [228].

### The appellant’s evidence

1. The appellant’s evidence-in-chief was set out in an affidavit sworn 21 July 2020. The primary judge noted the affidavit had documents annexed to it but no depositions of fact. Her Honour gave the appellant an opportunity to elaborate on his evidence, however he was content to rely upon the documents. The primary judge noted the documents annexed to the appellant’s affidavit included a bundle of documents relied upon by the parties at the Fair Work Commission hearing. That bundle included a statement by the appellant comprising 37 paragraphs of asserted facts, as well as a response by the respondent; the appellant’s reply to that response which contained further alleged facts; and the submissions of both the appellant and the respondent. The appellant’s submissions also contained alleged facts.
2. Her Honour explained to the appellant that it may not be sufficient to simply point to the documents upon which he relied, in response to which the appellant confirmed he wished to rely on the facts asserted by him in the Fair Work Commission documents for the purposes of their truth. The respondent did not object to this course and the documents were received into evidence. Her Honour observed that the documents were out of court statements by the appellant, the truth of which had been adopted by him in the course of his oral testimony and that although admitted into evidence, the weight to be attributed to the factual assertions contained within the documents was another question: Reasons [52]-[56].
3. Her Honour summarised the appellant’s evidence given both orally and as contained in the documents in a careful and detailed fashion.
4. The primary judge referred to the appellant’s Fair Work Commission documents for his account of what occurred on 8 October 2019: Reasons [71].

71. Mr Parry returned to the workplace for his afternoon shift at 2:30pm. In the FWC documents, he gives the following account of what occurred upon his return:

At just after 2:30pm Nicola Massy-Westrop [sic] came into my office and said that the logs had been checked and that no-one had entered the specimen storage room for the last two weeks - then asked me to confirm.

I told her that was correct.

She then asked why the specimens were not being sprayed daily with hydration fluid.

I told her that since all dissection had been stopped for safety reasons I thought it wise to minimise my exposure, at least until the test results were in - and as the last two weeks were student free and no dissection was being done the specimens remained in a sealed cabinet in a very small sealed and un-ventilated room and not in need of hydration.

Nicola Massy-Westrop [sic] said she would have to think about it and left.

Ten minutes later she returned and said she would have to let me go because I hadn’t followed the hydration protocol.

I said ‘I feel this is all a little too convenient’ – ‘you mean the formaldehyde’ she reflexively answered, then claimed it wasn’t related.

I packed up and left.

1. The primary judge also referred to the appellant’s oral evidence-in-chief dealing with the conversation on 8 October 2019 between the appellant and Dr Massy-Westropp: Reasons [72].

72. Mr Parry also dealt with this critical conversation in his oral evidence-in-chief, although not in wholly consistent terms. He said that at 2.30pm Dr Massy-Westropp had come to him and said that the electronic access records had been checked and that it appeared that he hadn’t been hydrating the Specimens on a daily basis as required by the Procedure Manual. He said that he had explained to Dr Massy-Westropp that there was “no need for them to be hydrated” and that she had said she would take some time to think about it and left. In that part of his evidence, Mr Parry did not state that he told Dr Massy-Westropp he had not attended to the Specimens because of concerns about his exposure to formaldehyde. He said that just under ten minutes later, Dr Massy-Westropp returned and said that she had to “let me go because I hadn’t been following the procedure manual”. He said that he had “suggested that it was all a bit too convenient” and that Dr Massy-Westropp had said “oh no, it’s not the formaldehyde”. When given the opportunity to elaborate on his oral evidence in respect of this conversation, Mr Parry declined. He repeated that he relied on the material he had lodged in the FWC.

1. In cross-examination, the appellant admitted that he did not comply with his obligation to hydrate the Specimens daily because he knew better: Reasons [94], [109], [112].
2. The primary judge noted the appellant’s acknowledgement that the requirements to hydrate the Specimens daily was specified in the original version of the Procedure Manual as well as in a later version. He did not dispute that prior to 8 October 2019, he had last accessed the specimen storage room on 20 September 2019: Reasons [96].
3. On the question of the reasons for his dismissal, the appellant repeated before the primary judge his assertion that the real reason he was dismissed was because he had raised concerns about his health and safety, particularly by requiring better personal protective equipment and raising concerns about the levels of formaldehyde in the Specimens: Reasons [110].
4. The primary judge assessed the appellant as a witness under cross-examination at Reasons [87]. Her Honour’s assessment was not favourable, describing the appellant as a defensive and prevaricating witness, who at times resorted to sarcasm and other times denied the occurrence of events that he later acknowledged had occurred. The primary judge formed the view that the appellant believed the respondent had formed a conspiracy against him and whilst her Honour gave him some latitude for the fact he was a self-represented litigant, her Honour nonetheless concluded that the appellant’s case was undermined by the content of the evidence given by him, particularly considering his reasons for not attending to hydration and care of the Specimens on a daily basis.
5. The primary judge concluded that the appellant’s unguarded responses in his oral evidence were to be preferred to his written versions of certain events as set out in the Fair Work Commission documents, particularly regarding the content of his conversations with Dr Massy-Westropp on 8 October 2019. Her Honour observed that it was the content of the appellant’s responses in cross-examination that undermined his case, rather than his demeanour in cross-examination, which did not generally weigh against him in the resolution of disputed facts: Reasons [87].
6. The primary judge observed that the appellant presented as a person convinced of the superiority of his own opinions over those with whom he had dealings in the workplace concerning the care of the Specimens. Her Honour considered that feature of his evidence supported the findings her Honour made about his reasons for not hydrating the Specimens and reinforced her view that his unguarded responses in oral testimony should be preferred over any inconsistent factual assertion in the written statement he prepared for the Fair Work Commission.

### Dr Massy-Westropp’s evidence

1. Dr Massy-Westropp was the respondent’s principal witness. The primary judge dealt with her evidence comprehensively at Reasons [115]–[166], dealing with topics of the Specimens at [118]-[121]; the appellant’s employment and his duties at [122]-[127]; formaldehyde at [128]-[132]; a meeting that was held on 3 October 2019 with the laboratory staff in relation to formaldehyde levels in the Specimens at [133]-[135]; an email sent by the appellant on 6 October 2019 to Dr Massy-Westropp and others, following on from the meeting held on 3 October 2019, in relation to personal protective equipment at [136]; the events of 8 October 2019 at [137]-[146]; the alleged behavioural issues with the appellant at [147]-[152]; and the alleged reasons for dismissal at [153]-[166].
2. The primary judge found that critical amongst the evidence given by Dr Massy-Westropp was that during the morning of 8 October 2019, she was approached by Ms Grubb, and informed that Ms Grubb had gone into the specimen storage room to attend to monthly swabbing of the Specimens and that she was concerned the room was warming up. Upon attending the specimen storage room, she noted the Specimens were dry, signifying to her that they had not been hydrated. It was following that discovery that she made contact with the appellant: Reasons [139]-[141].
3. The primary judge summarised the evidence given by Dr Massy-Westropp as to what occurred in the conversations with the appellant on 8 October 2019 in the following terms: Reasons [143]-[144].

143. Dr Massy-Westropp said that she found Mr Parry sitting at his computer and said to him that nobody had entered the wet laboratory for just over two weeks. She said that to her shock Mr Parry replied that he had not been in the room because the bodies hadn’t been needed for teaching and were sealed within the cabinets. Dr Massy-Westropp said that she would need to “go away and think about this”. She said that when she returned to her office, she decided that she could not trust Mr Parry and that she wanted him to leave immediately. She said that she telephoned Ms Todd and said that she wanted Mr Parry to leave and that Ms Todd had said to wait a moment while she spoke to somebody in Human Resources. Dr Massy-Westropp said that Ms Todd then called her back and confirmed that she could dismiss Mr Parry. Dr Massy-Westropp said that she asked Ms Todd to accompany her but Ms Todd was unable to do so because she had a meeting.

144. Dr Massy-Westropp said that when she returned to Mr Parry he started to talk to her about masks he had found. She said that she interrupted him and said “I’m sorry Chris, we can’t have you working here”, and that Mr Parry had said something to the effect that the timing was a little too convenient. Dr Massy-Westropp said that she referred to the “gassing problem” and said words to the effect that the University was “getting to the bottom of it”. She said that at that point Mr Parry started to walk away and she thought it best not to follow him.

### Other witnesses

1. The other two witnesses called by the respondent were Ms Raewyn Todd, Manager of the School of Health Sciences at the University of South Australia, whose evidence was considered by the primary judge at Reasons [167]-[176], and Ms Candice Grubb whose evidence was considered at Reasons [177]-[190].
2. No complaint is made by the appellant as to the primary judge’s summary of the evidence of Ms Todd.
3. The primary judge assessed Ms Grubb as an impressive witness whose evidence she preferred over that of the appellant where that evidence was in conflict. On this appeal, the appellant makes a number of submissions about Ms Grubb’s evidence, which the Court considers when addressing the appellant’s grounds of appeal.

### Documents

1. During the course of the trial, the appellant called for production of the respondent’s Human Resources file that related to him. In response, the respondent produced three emails. The appellant did not tender any of them: Reasons [175].
2. The primary judge noted that the appellant’s case was that the discovery of temperature problems in the specimen storage room was a concoction by the respondent to conceal the real reason for his dismissal which, he submitted to the primary judge, was a conspiracy amongst a number of individuals within the University who wanted him gone because he had agitated issues concerning health and safety in the workplace. As a part of that, the primary judge noted that the appellant took issue with the authenticity of a number of records and alleged that oral evidence had been concocted. Her Honour considered that complaint, finding that none of the appellant’s challenges to the authenticity of documents had merit or significance: Reasons [191]-[198].

## The primary judge's consideration and findings

1. The primary judge found that the appellant had a right in the nature of a workplace right to raise a complaint or enquiry about formaldehyde levels in Specimens and that he had, in fact, exercised that right: Reasons [200].
2. The primary judge was also satisfied that the appellant possessed a right to take steps to protect his health and safety at work, including a right to decline to perform his duties for safety reasons, and that he had taken steps to safeguard his health by wearing what he considered to be more suitable personal protective equipment: Reasons [202], [203].
3. However, the primary judge found that on his own admission, the appellant had not attended to the daily hydration of Specimens between 20 September 2019 and the date of his termination on 8 October 2019: Reasons [207].
4. Her Honour then set out her Reasons at [208]-[234] as to why she concluded that the appellant’s failure to attend to the Specimens did not constitute the exercise of a workplace right.
5. In summary, those reasons are that:
6. The appellant’s oral evidence, and the evidence he presented to the Fair Work Commission covering the same subject matter, differed. Specifically, in his oral testimony, the appellant did not state that his decision not to attend to the Specimens was related to his concerns about formaldehyde. Her Honour considered the appellant’s “unguarded responses” given in the course of trial were more reliable evidence: Reasons [208], [209];
7. There was no suggestion that the appellant failed to attend to the Specimens during semesters when teaching was occurring. Her Honour considered that the failure by the appellant to express safety concerns as a reason not to attend to the Specimens during teaching periods, further reinforced her view that his failure to carry out his obligations during the mid-semester break was a manifestation of his confidence in the correctness of his own opinions rather than apprehension about his safety: Reasons [210];
8. Her Honour found the appellant’s conduct in the workplace more generally reinforced her Honour’s finding that he failed to attend to the Specimens because he considered it unnecessary. Specifically, her Honour accepted Ms Grubb’s evidence that the appellant was not amenable to training by her and had closed the door on her so she could not provide him with instruction. Further, the primary judge found that not only had the appellant formed his own view that the respondent’s protocols for disinfecting the Specimens were wrong, but also that the method by which he made the calculations in his 6 October 2019 email to support his argument that the respondent’s personal protective equipment was inadequate, was a manifestation of his view that he knew better. That attitude also manifested itself in the appellant freely acknowledging that he thought he knew better than the respondent as to the proper procedures for care of the Specimens, such that her Honour was satisfied that was the reason why he failed to attend to them: Reasons [211], [212];
9. The appellant did not have a workplace right to refuse to attend to his duties because he believed it was not necessary: Reasons [213]; and
10. When asked by Dr Massy-Westropp about his non-attendance in the specimen storage room, the appellant did not respond in terms of the suggested connection between his non-attendance and his concerns for his health and safety, whether related to the levels of formaldehyde or otherwise. Her Honour was satisfied that the appellant responded to Dr Massy-Westropp’s query about his non-attendance in the specimen storage room with words to the effect that he did not consider it necessary to hydrate the Specimens during the mid-semester break: Reasons [214].
11. Having identified some discrepancies in the evidence of Dr Massy-Westropp concerning the reasons the appellant was dismissed, nonetheless her Honour concluded that her evidence should be accepted and that Dr Massy-Westropp subjectively considered the appellant’s non-attendance to the Specimens was significant such as to justify his dismissal.

# Consideration of the grounds of appeal

1. As we have noted, there are a number of grounds of appeal which may be characterised as follows:
2. Conflict of interest (ground 1);
3. Bias (grounds 2-14); and
4. Failure to give due consideration to all the evidence (ground 15).

## Conflict of interest and bias

1. The appellant’s first ground of appeal concerns an alleged conflict of interest on the part of the primary judge. In reality, this is a further ground of bias.
2. At a case management hearing held on 27 July 2022, 9 days prior to the appeal being heard, the appellant was informed by the Court that there was a distinction between allegations of actual and apprehended bias and that the tests were quite different. He was invited to make himself aware of that distinction, however he made no attempt to identify in his submissions whether he was alleging actual bias or apprehended bias or both.

## Principles - actual bias

1. A claim of actual bias requires cogent evidence: *R v Australian Stevedoring Industry Board; Ex Parte Melbourne Stevedoring Co Pty Ltd* [1953] HCA 22; (1953) 88 CLR 100, 116 (Dixon CJ, Williams, Webb and Fullagar JJ).
2. In *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71; (1997) 151 ALR 505 (Wilcox, Burchett and North JJ), North J described actual bias in these terms, at 134:

Actual bias exists where the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant:

(Citations omitted)

1. In *R v Rich (Ruling No. 21)* [2009] VSC 32, [7] Lasry J said at [7]:

A party asserting actual bias on the part of a decision-maker carries a heavy onus; the allegation must be “distinctly made and clearly proved”. It has been said, and I agree, that a finding of bias is a “grave matter”, and cannot be made lightly. Apart from corruption, it is hard to think of a more serious allegation that can be made against a judge.

(Citations omitted)

1. In *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507, 519 at [35]-[36], Gleeson CJ and Gummow J referred with approval to statements made by French J (as his Honour then was) at first instance in that matter in which his Honour had cited with approval judicial statements that actual bias involves a pre-judgement and an applicant must show that the decision maker “had a closed mind to the issues raised and was not open to persuasion by the applicant’s case” and that actual bias exists where “the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant”.
2. In *Zaltni v Minister for Immigration and Multicultural Affairs* [2000] FCA 399, the Full Court (Einfeld, Lindgren and Tamberlin JJ) said in relation to the evidentiary requirement for a finding of actual bias: at [59]

A finding of actual bias should not be made lightly and cogent evidence is required; cf *R v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd*(1953) 88 CLR 100 at 116 per Dixon CJ, Williams, Webb and Fullagar JJ; *Sun*(FC) at 123; *Jia Le Geng* at [104] per Cooper J and cases there cited.  On the other hand, too high an evidentiary requirement might make impossible the presentation and proof of a justifiable case.

1. As the authorities referred to above show, the appellant must demonstrate by reference to cogent evidence that the primary judge pre-judged the action such that as noted by Gleeson CJ and Gummow J in *Jia Legeng* referred to above, her Honour “had a closed mind to the issues raised and was not open to persuasion by [the appellant’s] case”; or “… had pre-judged the case against [the appellant] or acted with such partisanship or hostility as to show that [her Honour] had a mind made up against [the appellant] and was not open to persuasion in favour of [the appellant].” (brackets provided)

## Principles - apprehended bias

1. The position is different with apprehended bias. In *Charisteas v Charisteas* [2021] HCA 29; (2021) 393 ALR 389 the High Court said: at [11]-[13]

11. The apprehension of bias principle is that “a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide”. The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial - that it is conducted by an independent and impartial tribunal. Its application requires two steps: first, “it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits”; and, second, there must be articulated a “logical connection” between that matter and the feared departure from the judge deciding the case on its merit. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.

12. As five judges of this Court said in *Johnson v Johnson*, while the fair-minded lay observer “is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice”.

13. Ordinary judicial practice, or what might be described in this context as the most basic of judicial practice, was relevantly and clearly stated by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* in 1986 by adopting what was said by Mcinerney J in *R v Magistrates’ Court at Lilydale; Ex parte Ciccone* in 1972:

“The sound instinct of the legal profession - judges and practitioners alike - has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.”

(Citations omitted)

1. In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [6], (Gleeson CJ, McHugh Gummow and Hayne JJ) the Court said:

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

(Citations omitted)

1. Their Honours continued at [19]:

Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

## The parties’ submissions and consideration

### Ground 1 - conflict of interest

1. The appellant’s first ground is that the primary judge had a “conflict of interest”. As the Court has noted, this is a ground of actual or apprehended bias.
2. The appellant submits that the primary judge is, or was, on the “Board of Law of the institution (University of Adelaide)” that knowingly provided the Specimens to the respondent. The appellant submits that the Specimens exposed students and staff to dangerous levels of formaldehyde.
3. The respondent submits that there is no logical connection between the circumstances identified by the appellant, namely her Honour’s alleged position as a member of the “Board of Law at the University of Adelaide” and any feared deviation from her Honour deciding the case on its merits. Further, there was no dispute by either party that the Specimens were found to be emitting unsafe levels of formaldehyde, however that was not a matter for determination by her Honour.

#### Actual bias

1. The Court does not accept the appellant’s submissions.
2. There is no evidence before the Court of the primary judge’s position with the University of Adelaide, but in any event, even accepting that be the case, a consideration of her Honour’s reasons, and the way she conducted the trial, makes it perfectly clear that there is no basis for an allegation of actual bias such that her Honour prejudged the case against the appellant, or acted with such partisanship or hostility as to show that her Honour had her mind made up against the appellant, and was not open to persuasion in his favour. On the contrary, the primary judge’s reasons demonstrate that her Honour conducted the hearing in a fair and balanced fashion, providing appropriate guidance to the appellant when necessary.

#### Apprehended bias

1. In *Charisteas*, the High Court identified that the application of the apprehension of bias principle requires two steps: at [11]. Those two steps are:
2. “… the identification of what it is said might lead a judge … to decide a case other than on its “legal and factual merits”; and
3. “there must be articulated a ‘logical connection’ between that matter and the feared departure from the judge deciding the case on its merits.”

The Court continued that once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.

1. The appellant has identified what he contends might have led the primary judge to decide the case other than on its legal and factual merits, although, as the Court has noted, there is no evidence of that fact. Nonetheless, accepting for the moment that her Honour held a position with the University of Adelaide, there is no “logical connection” between that matter and the “feared departure from the judge deciding the case on its merits”.
2. In the absence of this “logical connection”, there is no occasion to assess the reasonableness of the asserted apprehension of bias. In those circumstances, the Court is not satisfied that it can be said that a fair-minded lay observer might reasonably apprehend that the primary judge might not bring an impartial mind to the resolution of the question the judge is required to decide.
3. The appellant's first ground of appeal fails.

### Grounds 2 – 14 – bias

1. The Court has identified the principles to establish bias or apprehended bias above. In the reasons that follow, those principles are applied although they are not set out in terms in each case.
2. In his written submissions, the appellant refers to numerous passages in the judgment that may apply to grounds 2-14 or ground 15, but does not direct them to any specific ground. In large part, the appellant’s submissions amount to disagreement with how the primary judge dealt with specific issues. In so doing, the appellant’s disagreement, or in some cases observations, do not impugn her Honour’s reasoning. In two instances, the submissions contend bias but they are not attributed to any particular grounds. The Court deals with those contentions separately.

#### Ground 2

1. Ground 2 refers to “Spurious reasons given at case management meeting [sic] for not accepting any of my evidence”. No particulars are given in the notice of appeal nor in the appellant’s written submissions. The appellant was given the opportunity to expand upon or speak to his written submissions at the appeal, an opportunity he did not accept. The Court is left with no detail and no submissions of any weight.
2. In the circumstances, the Court does not accept the primary judge displayed actual or apprehended bias. This ground of appeal fails.

#### Ground 3

1. Ground 3 relies upon a delay in pronouncing judgment with no communication or information in the interim which, the appellant submits, is contrary to the Court’s rules.
2. The trial was heard on 9 and 10 March 2021 with judgment delivered on 3 February 2022. The “rules” to which the appellant refers is Practice Note CPN-1, National Court Framework and Case Management, cl 16. That practice note provides:

**16. Judgment**

16.1 The Court aims to deliver judgment as soon as is reasonably practicable. In the ordinary course (and subject to the size and complexity of the matter) the Court will endeavour to deliver judgment resolving the substantive dispute within 3 months of the receipt of the final submissions. If a judgment is not forthcoming within 6 months, the Court will inform the parties of the anticipated time for delivery of judgment.

16.2 If a party wishes to make an enquiry about a reserved judgment, all parties should be told of the wish to make the enquiry. The enquiry is best directed through the Law Society or Bar Association in the relevant registry or to the Chief Justice directly. It is not appropriate for parties or their lawyers to contact a judge's chambers directly about such an enquiry.

1. Even accepting a delay between the hearing of this matter and judgment, and assuming that the Court gave no information as to the anticipated delivery time under cl 16.1, such matters do not constitute a basis for an allegation of actual or apprehended bias. This ground of appeal fails.

#### Ground 4

1. Ground 4 refers to Reasons at [87] and asserts that the primary judge “Made an unnecessary subjective assessment that has no place in a public document and is injurious to my already sullied reputation”.
2. The appellant’s written submissions refer to two passages in the Reasons. The first is where the primary judge assessed the appellant’s demeanour when giving evidence as “defensive and prevaricating”. The second is where her Honour observed “… it also reinforces my view that his unguarded responses in oral testimony should be preferred over any inconsistent factual assertions in the written statement he prepared for the FWC”.
3. As to the first matter, it was part of her Honour’s task to assess the appellant as a witness. There is nothing put forward by the appellant to suggest her Honour’s assessment of him was wrong. No legitimate complaint can be made about her Honour’s assessment of the appellant as a witness.
4. The second matter was a conclusion reached by the primary judge following an observation that the appellant presented as a person convinced of the superiority of his own opinions over those with whom he had dealings in the workplace concerning the care of the Specimens.
5. The limited submissions advanced by the appellant in relation to these two complaints are of little weight, amounting to no more than disagreement.
6. The Court is not satisfied the primary judge displayed actual or apprehended bias in making these observations about the appellant. This ground of appeal fails.

#### Ground 5

1. Ground 5 refers to Reasons at [98], [211] and [225]. The appellant contends he is quoted out of context and he had not expressed a view that “F10” (a cleaning chemical) should not be used.
2. The context in which the chemical, F10, was raised was dealt with by the primary judge in Reasons at [98]. Although denying he held an opinion about F10 being ineffective, the primary judge found at Reasons [100] that the appellant had held that opinion.
3. Later at Reasons [211] and [225] the primary judge stated she was satisfied that the appellant formed his own view about F10 and that in expressing that view he was not exercising or purporting to exercise a workplace right. Her Honour also noted that in any event, that aspect of the case did not feature in his pleaded allegations against the respondent.
4. The appellant has not taken the Court to any evidence that suggests her Honour’s findings were not open.
5. The Court is not satisfied that in making these findings, the primary judge displayed actual or apprehended bias. This ground of appeal fails.

#### Ground 6

1. Although no reference is made in this ground of appeal to the Reasons, this ground refers to Reasons at [116]. The contention is that the primary judge, “Excuses [Dr Massy-Westropp’s] apparently ‘long-winded and self-serving’ responses as a result of [the appellant’s] failure to interrupt her”.
2. When the primary judge made the observations at Reasons [116], her Honour noted that Dr Massy-Westropp’s evidence was not interrupted when she could and should have been, with the consequence that her evidence was at times overly earnest and the responses long-winded and apparently self-serving. The observation was not critical of the appellant. Indeed the primary judge notes specifically that the consequence of the appellant not being legally trained led to her Honour’s assessment of Dr Massy-Westropp in the terms described.
3. The Court is not satisfied that in making this assessment of Dr Massy-Westropp’s evidence, the primary judge displayed actual or apprehended bias. This ground of appeal fails.

#### Ground 7

1. Ground 7 comprises two parts, the first part relating to the production of the respondent’s Human Resources file regarding the appellant and refers to Reasons at [175]. The contention is that after the production of the file, the trial was adjourned for 30 minutes. The appellant submits that the 30 minute adjournment gave time for editing and that her Honour fails to refer to the appellant’s remark that the file contained three emails only. The appellant continues, without identifying any basis, that it should be presumed that the file contained evidence in his favour.
2. The nature of the appellant’s complaint appears to be, without actually stating it, that during the 30 minute adjournment, editing of his Human Resources file occurred. No material is advanced by the appellant to support that contention. Further, her Honour specifically referred to the appellant commenting on the paucity of the material produced but that the appellant took the matter no further.
3. The second part of ground 7 refers to her Honour’s reference to the paucity of material produced by the respondent in Reasons at [233] as “poor record-keeping”. No submission is made as to why that assessment was wrong, far less attended by bias or apprehended bias.
4. Neither of the grounds advanced in ground 7 reveal the primary judge displaying actual or apprehended bias. This ground of appeal fails.

#### Ground 8

1. Ground 8 relates to Reasons at [195] and contends that the primary judge failed to accept that documents supplied as evidence were clearly not what they purported to be. There is also a complaint that her Honour assigns no malign purpose to this.
2. This ground relates to the respondent’s Procedure Manual.
3. At Reasons [195] the primary judge considered the contents of a later version of the Procedure Manual which detailed the hydrating and cleaning tasks assigned to the appellant. At Reasons [193], her Honour accepted Dr Massy-Westropp’s evidence that she selected the most recent version of the Procedure Manual for provision to the Fair Work Commission because she thought it was the appropriate document. Her Honour noted that the fact that the latest version had been created shortly after the appellant’s dismissal was not concealed from the appellant nor from the Court.
4. At Reasons [195], the primary judge continued that the appellant, “… has not demonstrated that the provision of a later version of the Procedure Manual could have any bearing on the resolution of the objective question.” That question was whether the content of the Procedure Manual, as it applied to the appellant, specified the frequency of the cleaning and hydration tasks that he was required to carry out. It is in that context that her Honour recorded:

If Dr Massy-Westropp provided an incorrect version of the Procedure Manual, it has not been demonstrated that her decision to do so was accompanied by a malign purpose, nor that it should adversely affect her credit in this proceeding. No malign purpose is apparent from an examination of the differences between the documents referred to in the course of evidence.

1. There is no material which has been put before the Court which suggests the primary judge’s findings on this topic were not open to her Honour.
2. The Court is not satisfied that in making these findings, the primary judge displayed actual or apprehended bias. This ground of appeal fails.

#### Ground 9

1. Ground 9 refers to Reasons at [208] and contends that the primary judge disregarded evidence in to the Fair Work Commission document bundle that the appellant had concerns for his safety because he did not reiterate them in oral testimony.
2. In this paragraph of the primary judge’s reasons, her Honour considered the inconsistency between the written material provided to the Fair Work Commission and the oral evidence given by the appellant in the course of the trial. That inconsistency is an important consideration. It was open to her Honour to consider the more reliable evidence to be that which the appellant gave orally in the course of the trial and which her Honour described as “unguarded responses”.
3. Nothing is advanced by the appellant to support the assertion that the primary judge’s treatment and conclusion concerning the inconsistency in the versions put forward by the appellant was not open to her Honour.
4. In the circumstances, the Court is not satisfied that in making this finding the primary judge displayed actual or apprehended bias. This ground of appeal fails.

#### Ground 10

1. Ground 10 refers to Reasons at [231] and asserts that the primary judge disregarded Centrelink documentary evidence that several weeks after the event no reason had been given as to why the respondent had terminated the appellant’s employment.
2. At Reasons [231], the primary judge did not consider the absence of any reason for the appellant’s dismissal on Centrelink documentation to take the matter any further.
3. Clearly, the appellant disagrees, however mere disagreement does not mean the primary judge is wrong in reaching that conclusion nor does it demonstrate actual or apprehended bias on the part of the primary judge. This ground of appeal fails.

#### Ground 11

1. Ground 11 refers to where the primary judge noted at Reasons [232] that the appellant did not issue any subpoenas.
2. This passage of the Reasons is as follows:

232. In closing submissions, Mr Parry said that the paucity of documentary evidence adduced as part of the University’s case supported a finding of contravention. However, Mr Parry did not seek an order for discovery at the pre-trial stage, notwithstanding that he was encouraged prior to the trial to familiarise himself with the rules of the Court. A date was fixed by which such an application should be made and in that way the opportunity to have subpoenas issued was made known to him. No application for leave to issue a subpoena was made.

1. In his written submissions, the appellant submits that he “… wasn’t aware you could subpoena documents that don’t exist.”
2. With respect to the appellant, that submission does not assist the Court. The Court is satisfied that there is nothing in the primary judge’s observations at [232] which demonstrates that her Honour displayed actual or apprehended bias. This ground of appeal fails.

#### Ground 12

1. Ground 12 refers to “various misleading and unsupported claims throughout”. This ground is vague and the submissions in support of this assertion refer simply to “(See Above)”. To the extent that those words refer to the matters that precede them and are set out in the 7 pages of material leading up to those words, there is nothing in that material and the documents attached to the appellant’s written submissions which support the assertion that the Reasons contain “various misleading and unsupported claims throughout”.
2. The Court is not satisfied that the material to which the appellant refers demonstrates that the primary judge displayed actual or apprehended bias. This ground of appeal fails.

#### Ground 13

1. Ground 13 refers to Reasons at [230]. The contention is that the primary judge wrongly characterised the appellant’s complaints about other health and safety issues affecting the workplace or a culture of bad practices within the respondent’s laboratories as amounting to little more than bare allegations put in cross-examination which were met with bare denials.
2. The contention amounts to disagreement with the primary judge’s assessment of this topic.
3. Nothing is put before the Court that suggests the primary judge’s assessment on this topic was not open to her Honour and there is nothing in the material to which the appellant refers in this ground which demonstrates that the primary judge displayed actual or apprehended bias. This ground of appeal fails.

#### Ground 14

1. The final ground alleging bias was that the primary judge largely ignored the evidence tendered from the proceedings before the Fair Work Commission and that her Honour’s decision was not viewed in light of all the facts.
2. Her Honour described in the Reasons the manner in which the appellant gave his evidence in chief: Reasons [50]-[56], including that the Fair Work Commission documents upon which the appellant relied and which were adopted by the appellant in the course of his oral testimony were out-of-court statements. Importantly, the primary judge noted, correctly with respect, that the documents were admissible in circumstances where the respondent did not object to their admission into evidence but the weight to be attributed to the factual assertions contained in them was a different question.
3. As the Court has noted in these reasons, in the course of the primary judge’s Reasons, her Honour specifically addressed the inconsistency between the appellant’s written statements before the Fair Work Commission and his oral evidence in cross-examination.
4. In all the circumstances, the submission by the appellant is, in effect, that the primary judge’s decision was against the evidence and the weight of the evidence.
5. Nothing is put before the Court that supports that submission. In all the circumstances, there is nothing in the material to which the appellant refers which demonstrates that the primary judge displayed actual or apprehended bias. This ground of appeal fails.

#### Further allegations of bias

1. In the appellant’s written submissions, he identifies further passages in the primary judge’s Reasons, but does not refer to those paragraphs in the particulars to the grounds of appeal. He submits those paragraphs demonstrate bias on the part of the primary judge.
2. The passages in the Reasons are at [89] and [190]. In the case of [89], her Honour is setting out some of the appellant’s evidence in cross-examination. The appellant’s submissions amount to no more than disagreement with her Honour’s summary of his evidence on the topic of the status of his employment when he applied for the job with the respondent.
3. In the case of Reasons at [190], the appellant contends the primary judge’s assessment of Ms Grubb’s evidence is wrong, leading to his submission that her Honour’s preference of Ms Grubb’s evidence over that of the appellant (on the limited topics in which their accounts are in conflict) as demonstrating bias.
4. In neither case is the Court satisfied that the primary judge displayed actual or apprehended bias.

## Ground 15 - failure to give due consideration to the whole of the evidence

1. There are two parts to ground 15. The first part, ground 15(a), contends there were three different versions of the story of why the appellant’s employment was terminated, with the first two versions changing after the appellant noted inconsistencies, and the third version changing after the production of electronic records identifying when access to the specimen storage room occurred.
2. The second part, ground 15(b) asserts that, “… no coherent explanation had been devised for [the appellant’s] dismissal.”
3. Although the appellant has asserted “bias” in grounds 2 – 14 referred to above, the reference to “bias” in the appellant’s submissions under each of these grounds may also be taken as an assertion that the applicable finding, conclusion or observation of the primary judge was “wrong”. That is, these submissions amount to no more than disagreement about the manner in which the primary judge dealt with various issues and her Honour’s conclusions on those issues. As noted earlier in these reasons, the same may be said of the appellant’s general submissions made under the headings “JUDGEMENT”, “MR PARRY’S EVIDENCE” and “THE UNI’S EVIDENCE”. The grounds of appeal and appellant’s submissions do not identify any specific asserted error in the fact-finding process or reasoning of the primary judge.
4. The respondent submits that the primary judge has a significant advantage in comparison to an appellate court, referring to the well-known authorities of *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118, 126; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In liq)* [1999] HCA 3, (1999) 160 ALR 588, 619; and *Devries v Australian National Railways Commission* [1993] HCA 78; (1993) 177 CLR 472.
5. In particular, the respondent refers to the statement by the High Court in *Devries* (Brennan, Gaudron, McHugh JJ): at 479.

More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact. If the trial judge’s finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge “has failed to use or has palpably misused his advantage” or has acted on evidence which was “inconsistent with facts incontrovertibly established by the evidence” or which was “glaringly improbable”.

(Citations omitted)

1. The primary judge identified inconsistencies in the appellant’s evidence in reaching her decision and preferred his “unguarded responses in oral testimony” over any inconsistent factual assertion in the written material he prepared for the Fair Work Commission: Reasons [87].
2. The respondent submits there is nothing in the appellant’s submissions that suggests that in doing so the primary judge “misused” her advantage or that her findings were “glaringly improbable” or “contrary to compelling inferences”. That submission should be accepted.
3. In the circumstances, the appellant has not demonstrated that the primary judge erred in reaching her decision to dismiss the appellant’s claim. This ground of appeal fails.

# Conclusion

1. It is for the reasons set out above that the appeal should be dismissed.

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| --- |
| I certify that the preceding one hundred and thirty-five (135) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Banks-Smith, O'Sullivan and Feutrill. |

Associate:

Dated: 29 September 2022