

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER  
U 152/2018 GIVEN ON 10 OCTOBER 2019  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**FULL BENCH**

**CITATION** : 2020 WAIRC 00115

**CORAM** : CHIEF COMMISSIONER P E SCOTT  
COMMISSIONER T EMMANUEL  
COMMISSIONER D J MATTHEWS

**HEARD** : MONDAY, 10 FEBRUARY 2020

**DELIVERED** : MONDAY, 24 FEBRUARY 2020

**FILE NO.** : FBA 12 OF 2019

**BETWEEN** : ANNIE DERKACS  
Appellant

AND

TETYANA PODKAS TRADING AS PHOENIX PODIATRY  
Respondent

**ON APPEAL FROM:**

**Jurisdiction** : WESTERN AUSTRALIAN INDUSTRIAL RELATIONS  
COMMISSION

**Coram** : COMMISSIONER T WALKINGTON

**Citation** : 2019 WAIRC 00749

**File No** : U 152 OF 2018

**CatchWords** : Industrial law (WA) – Appeal against a decision of the Commission – Commission’s decision to dismiss claim of harsh, oppressive or unfair dismissal at first instance – Case management – Directions for witness statements to be filed – Witness summonsed – No statement of evidence filed for witness – Witness did not give evidence – Full Bench found witness ought to have been permitted to give evidence – Witness evidence may make different to findings of credibility and facts – Applicant alleged Commission erred in accepting witness evidence – Evidence in witness statement and under cross-examination compared – Appeal upheld – Operation of decision at

first instance suspended – Matter remitted to Commission for further hearing and determination

Legislation : *Industrial Relations Act 1979* (WA) – s 26(1)

Result : Operation of Decision suspended, Matter remitted to Commission

**Representation:**

Counsel:

Appellant : In person

Respondent : Mr J Nicholas (of counsel)

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**Case(s) referred to in reasons:**

*Director General of the Department of Education v Mr Patrick Guretti* [2014] WAIRC 00074; (2014) 94 WAIG 425

*Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146

*Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141

*Reasons for Decision*

**SCOTT CC and MATTHEWS C:**

- 1 Ms Annie Derkacs appeals against the Commission's decision to dismiss her claim of harsh, oppressive or unfair dismissal (2019 WAIRC 00749).

**Background**

- 2 Ms Derkacs is a podiatrist. She worked for the respondent, Ms Tetyana Podkas, for a number of years. The arrangement came to an end following an exchange between them over the signing of a contract.

**The matter at first instance**

- 3 There were two major issues in contention at first instance. The first was whether Ms Derkacs was an employee of the respondent or an independent contractor. That matter is not the subject of this appeal. The second, based on the conclusion of the Commissioner that Ms Derkacs was an employee, was the circumstances under which the employment came to an end. What happened in the exchange between Ms Derkacs and Ms Podkas became the central issue for determination.

**The reasons for decision**

- 4 The issues in the appeal arise from the question of whether the dismissal was unfair and essentially relate to the way the evidence was dealt with and the credibility of witnesses.
- 5 The Commissioner dealt with a number of conflicts between the evidence of Ms Derkacs and that of Ms Podkas. The Commissioner resolved those differences by preferring the evidence of Ms Podkas. She said that 'Ms Podkas' written and oral evidence was consistent and not diminished under cross-examination. Ms Derkacs' evidence was muddled and inconsistent and, at times, evasive' [68].
- 6 The Commissioner then went on to find:

In response to being told she was not to see clients, Ms Derkacs raised her voice to the level of a shout and swore at Ms Podkas. Ms Derkacs shouting for another member of staff to witness their exchange loudly demanded Ms Podkas say she was firing her (TP 108-110)]. A client who overheard the exchanges says Ms Derkacs was yelling at Ms Podkas in a disrespectful, abusive, intimidating and threatening manner. (Witness Statement of Kerry Valentine).

Ms Podkas responded by asking Ms Derkacs to return her keys to the clinic and leave the premises (TP [111]). Ms Derkacs briefly left the clinic to retrieve her keys from her vehicle remarking with profanities to a client as she passed through the waiting area that she had been sacked (TP [114]) (ts 66).

In this matter I conclude that Ms Derkacs was not dismissed unfairly, harshly or unreasonably in the circumstances. Ms Derkacs did not comply with a lawful direction from her employer to not attend clients of the clinic, in order to use that time to consider a revised draft Agreement and further discuss any issues in response to Ms Podkas' instructions. Ms Derkacs used abusive language to directly challenge her supervisor and employer. I find Ms Derkacs' conduct was destructive of the necessary confidence between employer and employee.

I find that Ms Podkas was entitled to summarily terminate the contract of employment and I dismiss the application.

Paragraphs [69] – [72].

- 7 Therefore, the dismissal was found to be justified on the basis that Ms Derkacs did not comply with a lawful instruction, used abusive language to directly challenge her employer and that her conduct was destructive of the necessary confidence between employer and employee.

### **Grounds of appeal**

- 8 We think it is fair to summarise Ms Derkacs' grounds of appeal as being that the Commissioner's conclusions regarding the conflict in the evidence were in error. Ms Derkacs pointed to a number of matters.
- 9 Firstly, the Commissioner is said to have wrongly refused to allow Ms Derkacs to call a witness, Ms Christina Hewitt, she had summonsed. Ms Hewitt was the member of staff referred to in [69] of the Reasons who was called to witness the exchange. She was present when the exchange which resulted in the dismissal occurred. The respondent says that the issue is one dealt with in *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141, of whether the evidence of Ms Hewitt would have brought forth further information that could possibly have made any difference. The respondent says there was no practical injustice by the refusal to hear Ms Hewitt's evidence.
- 10 Secondly, the appeal alleges that the Commissioner erred in finding that Ms Derkacs' evidence was 'muddled, inconsistent and at times, evasive' [68]. However, she found that Ms Podkas'

written evidence and oral evidence were consistent and not diminished in cross-examination [68]. Ms Derkacs points to a number of instances in the evidence which she says demonstrate that this was an error. The respondent says that an examination of the evidence supports the Commissioner's conclusion regarding both Ms Derkacs' and Ms Podkas' evidence, and there was no error.

- 11 Thirdly, the appellant says that the finding that Ms Derkacs did not comply with a lawful order results from a misunderstanding of the evidence. Ms Derkacs says the direction was not lawful and Ms Podkas' actions were unfair and excessive. The respondent says that this appeal ground is an attempt to re-litigate the claim and does not raise an appealable error. Ms Derkacs' and Ms Valentine's evidence demonstrate Ms Derkacs' abusive conduct and language, and that they were destructive of the necessary confidence in the employment relationship.
- 12 Fourthly, Ms Derkacs says that the evidence demonstrated that there was no urgency in Ms Derkacs finalising the contract. Ms Podkas allegedly feared for the security of her business by Ms Derkacs wanting more time to finalise the contract. However, Ms Derkacs says Ms Podkas had already removed Ms Derkacs' access to the patient records system a week or so before the exchange. The respondent suggests that even if this were so, it does not alter the situation as the issue is Ms Derkacs' conduct which led to the dismissal.
- 13 Fifthly, Ms Podkas also says that the Commissioner's finding about her use of what was described as explicit language was in error because it was in response to the dismissal, not the cause of it. The respondent says that this is contrary to the evidence at first instance, including Ms Valentine's evidence both about Ms Derkacs' abusive language and its timing. The respondent also says that this is an attempt to re-litigate the matter.
- 14 Finally, Ms Derkacs says that the Commissioner erred in accepting Ms Valentine's characterisation of Ms Derkacs' manner towards Ms Podkas as being disrespectful, abusive, intimidating and threatening, when Ms Valentine gave a very different characterisation in cross-examination (ts 138).
- 15 For the reasons set out below, we would uphold the appeal, suspend the operation of the decision at first instance and remit the matter for further hearing and determination. We do so by reference to the first and last grounds of appeal as, in our respectful view, the errors concerned affect the foundation stones of the reasons and consequently, affect the remainder of

findings about credibility and the facts. In our view, it is not necessary or appropriate for the Full Bench to deal with the remainder of the grounds because the issues they raise may be affected by what is found when the matters in grounds 1 and 2 are reconsidered. They are matters for the re-hearing.

### **The refusal to allow Ms Hewitt's evidence**

- 16 On 6 March 2019, the Commissioner held a directions hearing for the purposes of preparation for the substantive hearing of the matter and issued directions (2019 WAIRC 00112). They included directions that evidence-in-chief be by witness statement and they were to be filed and served by specified dates.
- 17 The matter was listed for hearing for one day on Wednesday, 15 May 2019.
- 18 The Commissioner's Associate received a telephone call from Ms Derkacs on 11 March 2019. One of the matters it covered was that Ms Derkacs said that her 'witness does not want to write a witness statement as she still works for the respondent and is concerned that she will be fired. She would prefer to give oral evidence as she feels that it looks less like she is giving evidence willingly'.
- 19 On Friday 15 March 2019, the Commissioner's Associate sent an email to Ms Derkacs. Amongst other things, the email informed Ms Derkacs that she was able to summons a witness and that 'this meant that a written witness statement would not be required'. She was referred to the appropriate form and to the Registry regarding procedures or any other questions.
- 20 On 4 April 2019, Ms Derkacs filed a number of witness summonses including one for Christina Hewitt, to attend before the Commission to give oral evidence.
- 21 The parties filed their documents. On 24 April 2019, Ms Derkacs filed a witness statement for herself and for a Ms Anne Edwards.
- 22 At the commencement of the hearing on 15 May 2019, counsel for the respondent, Mr Beetham, raised with the Commission a number of issues relating to documents that had been filed. He noted that a summons had been issued to Ms Hewitt but that no statement of evidence had been filed for her, contrary to the directions issued in March, and he opposed her being permitted to give evidence. If she were permitted to do so, then the respondent would like her to be made available for cross-examination.

23 Mr Beetham also noted that the respondent did not know what Ms Hewitt would say, its plausibility and possible relevance. In those circumstances, he said there would be serious prejudice to the respondent (ts 3, 4).

24 At p 5 of the transcript, Ms Derkacs responded that:

Um, Ms Hewitt still actually works at Phoenix, and was reluctant to give evidence for obvious reasons, because, um, she obviously feels that her job can be at risk and she didn't want to be a part.

25 In response to a question from the Commissioner, Ms Derkacs confirmed that it was not possible to file witness statements for Ms Hewitt and another witness, Ms Logan, because they did not want to provide statements because they were concerned that it would cause them problems in their current employment with the respondent (ts 7).

26 The Commissioner asked Ms Derkacs the purpose of her seeking to adduce that evidence. Ms Derkacs replied that Ms Hewitt was present and a witness to what had happened on the day of her dismissal. She could also give evidence of the hours Ms Derkacs worked and other aspects of her employment (ts 7).

27 The Commissioner then sought clarification from Ms Derkacs about the purpose of the evidence to be adduced from other witnesses Ms Derkacs had summonsed. Some of that evidence was about propensity in relation to the contractual arrangements. The Commissioner heard from the parties about other procedural issues and then adjourned to consider her decision.

28 On resuming, the Commissioner dealt firstly with the summons to another witness, Ms Edwards, and about the issue of the nature of the relationship between the parties and whether there was an employer-employee relationship. A summons issued to Ms Podkas was determined to fall away in light of the Commissioner's determination regarding the summons to Ms Edwards.

29 We set out the above matters because they demonstrate the context in which the Commissioner then moved to deal with the summons to Ms Hewitt. The Commissioner and Ms Derkacs then had the following exchange:

**WALKINGTON C:** Ms Hewitt's statement and Ms Logan's, similarly, their – in your submissions, you did not outline any other reason or rationale for the adducement of their

evidence, other than likelihood – or past likelihood of behaviour occurring in your particular relationship, being that of a similar ilk to other persons in this matter. What you need to be showing is what the relationship is between the two of you, and what it was at the time of the termination.

And I find that the admission of propensity evidence, in the absence of any other rationale, that that purpose of that evidence would be prejudicial to the respondent. So likewise, I will not be admitting those into (indistinct) 11.18.31 to provide witness statements.

**DERKACS, MS:** Sorry, Commissioner, is that – are you saying, ah, Tina – ah, Ms Hewitt as well?

**WALKINGTON C:** Yes, Ms Hewitt and Ms Logan.

**DERKACS, MS:** Cos, ah, Ms Hewitt was present on the day when Ms Podkas dismissed me, and so, um, that was evidence to the – what actually happened on that day. So she actually saw how I was dismissed.

**WALKINGTON C:** Yes, I understand that that’s what you’re saying part of the evidence you wish to adduce - - -

**DERKACS, MS:** Yeah.

**WALKINGTON C:** - - - concerns. In the absence of filing the witness statement and providing an opportunity for the respondent to file a response to that, that presents a problem in terms of the management of this case and in terms of being fair to all parties.

So therefore, on that matter as well, I’ll not be allowing that evidence to be - - -

**DERKACS, MS:** Okay.

**WALKINGTON C:** - - - submitted in the Court.

So I think that deals with all matters in the application? (ts 10, 11)

30 It is clear from this exchange and the Commissioner’s ruling that her initial conclusion regarding Ms Hewitt’s evidence was that it would not be relevant because it related only to the ‘past likelihood of behaviour occurring in your particular relationship’ rather than the behaviour at the time of termination. We take this to refer to the question of whether that relationship was one of employer and employee, not about the interactions between them. The Commissioner described it as propensity evidence and that its purpose would be prejudicial to the respondent. On that basis, it would not be received. The Commissioner’s reasons for refusing to allow Ms Hewitt to be called included that no witness statement had been filed, that



this denied the respondent an opportunity to file a response, this presented a problem in terms of case management and providing fairness to all parties.

31 The hearing proceeded for the full day for which it was listed and a further day was required. It was then listed for 6 June 2019. In this context, any concern for the benefit of case management confining the hearing to one day fell away.

32 The Commission's files indicate that between the two hearing dates, Ms Derkacs again corresponded with the Commissioner's Associate and also with a Registry officer indicating that she wished to pursue the issue of Ms Hewitt being called to give oral evidence, notwithstanding that the Commissioner had rejected her request. She sought an explanation for why her summons to Ms Hewitt had been dismissed, saying the Commissioner's reasoning went over her head due to her being unwell on the day. She also asked if she could again summons Ms Hewitt, that her testimony was relevant for a number of reasons being:

-Ms Hewitt worked alongside myself at Phoenix for the duration of my time period and can provide testimony to my duties, designated uniform, shift times and more

-Ms Hewitt was also called to witness the termination of my employment by Ms Podkas and will provide an un-bias account of the events that transpired

Due to the sensitive nature of Ms Hewitt's relationship with Ms Podkas, I believed the best course of action would have been to subpoena her, however if I was aware of the prospect that she may have been dismissed, I would have at very least, submitted a statement from her into evidence.

33 The Commissioner's Associate responded by email, saying that she could not provide legal advice but that Ms Derkacs was able to obtain independent legal advice or representation should she wish to. She informed Ms Derkacs that the transcript of the hearing so far was available and how to obtain a copy. She also referred Ms Derkacs to the section of the *Industrial Relations Act 1979 (WA)* dealing with the calling of witnesses.

34 When the hearing resumed, neither Ms Derkacs nor the Commissioner raised the issue of Ms Hewitt giving evidence.

35 Ms Derkacs says that Ms Hewitt's evidence would have assisted her case. The Commissioner made findings as to credibility in which she found that Ms Derkacs' version of events was not to be preferred to that of Ms Podkas and cited a number of reasons for doing so, saying '[t]he difference in the recollections of these exchanges are important and I find Ms Podkas's version

is preferable. Ms Podkas's written and oral evidence was consistent and not diminished under cross-examination. Ms Derkacs's evidence was muddled and inconsistent and, at times, evasive' [68].

- 36 Ms Derkacs says that the decision to not allow her to call Ms Hewitt had a negative impact on the weight given to her own evidence. Ms Derkacs said Ms Hewitt was a receptionist at the business at the time of her termination. Ms Hewitt witnessed the events that led up to Ms Podkas' decision to terminate her employment, as corroborated by both Ms Podkas and Ms Valentine. Ms Derkacs said in her witness statement that she called Tina (Ms Hewitt), the receptionist, to act as a witness to the events which she believed was unlawful [24]. Ms Podkas' witness statement also recorded this ([108] – [110]). Ms Derkacs says that she believed Ms Hewitt's testimony would have substantiated her claims that Ms Podkas was acting in an intimidatory manner, pointing her finger in Ms Derkacs' face, prior to Ms Derkacs using explicit language. She says that she feared for Ms Hewitt's job security if Ms Hewitt had provided a written statement and that she had made enquiries about having Ms Hewitt summonsed to give evidence to protect her interests in her employment.

### **Conclusion regarding Ms Hewitt's evidence**

- 37 The Commission is required to deal with matters according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (*Industrial Relations Act 1979*, (WA) s 26(1)(a)). Further, the Commission is not bound by any rules of evidence but may inform itself on any matter in such a way as it thinks just (s26(1)(b)). The Commission is also required to have regard to the interests of persons immediately concerned, whether directly affected or not (s 26(1)(c)). The Commission is entitled to determine its own procedure.
- 38 The Commission generally applies a case management approach to matters before it and regularly issues directions for the efficient and fair conduct of proceedings. Much has been said over the years about the benefits of case management as a means of courts and tribunals operating as efficiently as possible and in the interests of justice. However, as noted by the High Court in *Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 per Dawson, Gaudron and McHugh JJ:

Case management is not an end in itself. It is an important and useful aid for insuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in

changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management should be allowed to supplant that aim.

...

Justice is the paramount consideration in determining an application such as the one in question. Save insofar as costs may be awarded against the parties seeking the amendment, such an application is not the occasion for punishment of a party for a mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary Judge was, in our view, in error in the exercise of her discretion (155).

<sup>39</sup> In *Director General of the Department of Education v Mr Patrick Guretti* [2014] WAIRC 00074, (2014) 94 WAIG 425 A/President Smith noted at [75] – [76]:

Whilst the Commission is not a court of pleadings, the principles of case management demand that parties be bound by their particulars unless those particulars are amended. In *Palermo v Rosenthal* [2011] WAIRC 00069; (2011) 91 WAIG 129, Beech CC and I held that the provisions of object s 6(c), s 22B, s 26(1)(a), s 26(1)(b), s 26(1)(c), s 27(1)(ha) and s 27(1)(v) of the Act, together with the requirements of procedural fairness and the provision of a fair hearing, establish the following statutory case management regime that:

- (a) Matters should be dealt with in a way that eliminates delay with a minimum of legal form and technicality but allows for a proper and just consideration of matters;
- (b) When managing a matter the Commission should have regard not only to the interests of each party but to interests of the public in the efficient use of resources of the Commission;
- (c) There should be a fair and reasonable opportunity to both parties to each present their case. A determination of what is fair and reasonable in the circumstances of a matter should have regard to the matters raised in (a) and (b) above and:
  - (i) The parameters of relevant matters set by the particulars given by each party in the application, notice of answer and any other particulars.

- (ii) What is reasonably required for the efficient presentation by each party of their case.
- (iii) The principle that each party should not be left in any doubt about what is alleged against them and the opposing case they are required to meet ([80](a) – [80](c)).

40 The purpose of directions issued within a case management system, for the filing of witness statements, must not be to prevent relevant evidence from being called in circumstances where the witness concerned is reluctant or refuses to come voluntarily. Where a person refuses to come voluntarily, then a summons enables that evidence to be presented and considered. The ultimate purpose of the evidence is to enable the court or tribunal to do justice.

41 Where there may be prejudice to the other side, where they may be taken by surprise by the evidence, that prejudice can often be mitigated or remedied by an adjournment for instructions to be sought, or for other evidence to be obtained. Most counsel would be able to take the situation that arose in their stride, especially when they are opposed to a self-represented person.

42 The respondent is correct in saying that the question also requires consideration of whether the denial of procedural fairness by the refusal to hear Ms Hewitt’s evidence would entitle Ms Derkacs to be successful in the appeal. In *Stead v State Government Insurance Commission* (op cit), the High Court unanimously held:

The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Park L.JJ.) in *Jones v National Coal Board* (1957) 2 QB 55, at p 67, in these terms:

‘There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.’

That general principle is, however, subject to an important qualification which Bollen J. plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility [9].

For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial [10].

Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. True it is that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact (Supreme Court Rules 0.58 rr.6 and 14). However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial [11].

- 43 Ms Derkacs made clear to the Commissioner that Ms Hewitt had been present during the conversation between her employer and herself during her dismissal. Ms Podkas agreed that Ms Hewitt was ‘part of the event’ (ts 119) – (ts 120). This made her evidence relevant. No witness statement had been filed for good reason.
- 44 Given the relevance of the evidence, Ms Hewitt ought to have given evidence. This is particularly so given the conflict between Ms Derkacs’ and Ms Podkas’ evidence. Without Ms Hewitt having provided a witness statement or having given evidence, it is not possible to speculate about what she would say. However, it may have been very significant in the Commissioner determining the credit of the two protagonists. Taken with the issues arising from Ms Valentine’s evidence, which we will deal with next, there is the real possibility that Ms Hewitt’s evidence would have made a difference to the findings of credibility and of the facts.
- 45 We would uphold this ground of appeal.

**Ms Valentine's evidence**

- 46 The respondent called Ms Kerry Valentine to give evidence and she gave that evidence by telephone. The transcript records that she was affirmed.
- 47 Ms Valentine was asked by Mr Beetham for the respondent whether she recalled making a witness statement in these proceedings and she said yes, she had. However, she did not have a copy with her. She had not looked at it recently. She was asked if she was able to tell the Commissioner whether, to the best of her recollection, what is in the witness statement is true and correct. She said that she had received it by email, read it and had some amendments made and then signed it. Her witness statement was not formally received into evidence.
- 48 The questioning in cross-examination and her answers suggest Ms Valentine may have made a statement for the purposes of a complaint by Ms Podkas about Ms Derkacs to a professional body. Given the exchange between Ms Valentine and Mr Beetham, it is clear that whilst she said a statement was true and correct to the best of her recollection, it cannot be known whether the witness affirmed the statement that was filed in the Commission and quoted by the Commissioner.
- 49 Further, in cross-examination, Ms Valentine said that she did not write it but corrected a version sent to her and ultimately signed it. This raises a serious question about whether the words used were her own words, particularly if she used different words in cross-examination.
- 50 In her Reasons for decision, the Commissioner relied on what was described as Ms Valentine's witness statement. However, with respect, given Ms Valentine's oral evidence and the fact that no statement was in front of her, it was an error to rely on it. Further, the Commissioner referred to that statement saying that 'Ms Derkacs was yelling at Ms Podkas in a disrespectful, abusive, intimidating and threatening manner' [69]. This is at odds with her oral evidence under cross-examination when she described Ms Derkacs as being 'angry and upset' (ts 138), that she 'looked very upset' and 'quite distraught' (ts 139). The descriptions attributed to the statement are quite different from those used in cross-examination. Therefore, even if the Commissioner had before her a witness statement properly and formally attested to by the witness, the evidence it contained was severely undermined in cross-examination. It was no longer safe to rely on what was said in the purported statement.
- 51 We would uphold this ground of appeal.

**Conclusion**

52 As we noted earlier, given the significance of these two grounds of appeal and the effect they may ultimately have on the Commissioner's assessment of the evidence, we find it unnecessary and inappropriate to express a view on the remaining issues raised in the appeal. They are matters for the Commissioner on remittal.

**EMMANUEL C:**

53 I have read the Reasons for decision of the Chief Commissioner and Commissioner Matthews. I agree and have nothing to add.