FEDERAL COURT OF AUSTRALIA

# Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd

[2011] FCA 333

Barker J

10-12 January, 8 April 2011

*Industrial Law — Workplace rights — Industrial activities — General protections of — Workplace agreement — Made before 1 July 2009 — Continuance of after 1 July 2009 — Agreement workplace instrument — Workplace right — Exercise of — Industrial activity — Conduct constituting — Temporal limitation — Absence of — Adverse action — Dismissal — Employee's position — Prejudicial alteration of — Negative assessment of employee — Making of — Communication of — Actor's actual intention — Relevance of — Statutory protection contravened — Curial application in relation to — Actor's reason for acting — Allegation of — Reason presumed unless proved otherwise — Actor's reason not evidenced — Contraventions proved — Loss suffered — Distress and humiliation — Compensation for — Judgment — Interest to judgment — Inclusion of — Workplace Relations Act 1996 (Cth) — Fair Work Act 2009 (Cth), ss 12, 340(1)(a)(i), (ii), 341(1)(a), (b), (c)(ii), 342(1), 346(b), 347(b)(v), (vii), 361(1), 544(2)(b), 547 — Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth), Sch 3, Pt 2, cl 3(c) — Federal Court of Australia Act 1976 (Cth), s 51A.*

On 1 July 2009, the *Fair Work Act 2009* (Cth) (the FW Act), relevantly, commenced and the *Workplace Relations Act 1996* (Cth) (the WR Act), was repealed, save for Sch 1 to it.

Objects of Pt 3-1 of the FW Act (ss 334 to 378) included protection of workplace rights and freedom of association.

Section 340 provided:

> (1) A person must not take adverse action against another person:
>
> (a) because the person:
>
> (i) has a workplace right; or
>
> (ii) has … exercised a workplace right;

By s 342(1), adverse action was taken by an employer against an employee if the employer: dismissed the employee (Item 1(a)); injured the employee in his or her employment (Item 1(b)); or altered the position of an employee to his or her prejudice (Item 1(c)).

Section 341 provided:

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

(a) is entitled to the benefit of, or has a role or responsibility under a workplace law, workplace instrument …; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or enquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee — in relation to his … employment.

Section 12 defined workplace instrument to mean one that:

(a) is made under, or recognised by, a workplace law; and

(b) concerns the relationships between employers and employees.

Section 12 defined workplace law to include (by para (d) of the definition):

any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees …

Section 346 provided:

A person must not take adverse action against another person because the other person:

…

(b) engages, or has at any time engaged … in, industrial activity within the meaning of paragraph 347 … (b); or

Section 347 provided:

A person engages in industrial activity if the person:

…

(b) does …

…

(v) represent or advance the views, claims, or interests of an industrial association; or

…

(vii) seek to be represented by an industrial association.

By s 361(1), in proceedings relating to contravention of Pt 3-1, if a person were alleged to have taken action for a particular reason, or with a particular intent, the reason or intent was presumed unless proved otherwise. Under s 545(2)(b), the Court could award compensation for loss suffered because of contravention of s 340 or s 346. Section 547 dealt with interest on judgment. It applied to an order in relation to an amount a person was required to pay under the FW Act or a fair work instrument.

Clause 3(c), Pt 2 of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Transition Act), provided for the continued existence of a WR Act instrument which included a workplace agreement being an individual transitional employment agreement (ITEA).

The business of the respondent (IASA) was maintaining aircraft of its customers. The maintenance work was done by engineers. The work included certifying release of aircraft for flying. A major customer (Garuda) required engineers employed by IASA who were to certify release of its aircraft to be so authorised by Garuda, such authorisation to be annually renewed.

In 2008, IASA employed P as an engineer. His work included certifying release of Garuda's aircraft. He was authorised by Garuda so to certify. His employment

was dependent on Garuda's authorisation continuing. The employment agreement was an ITEA. Clause 19 dealt with dispute resolution. By cl 19.4, stopping work was prohibited. By cl 19.5, P could seek representation of his choice in resolving disputes.

P was a member of the applicant (ALAEA), an employee organisation and industrial association under the FW Act.

P became concerned about rosters and payment of overtime and complained in relation to his concerns. On 7 April 2009, work on a Garuda aircraft P was rostered to work on was rescheduled. P considered he would have to work overtime. He complained to his supervisor, who gave no assurance he would be paid overtime. He stopped work at the end of his scheduled roster without certifying release of the aircraft. He did so knowing the release of the aircraft would be delayed and IASA and Garuda would be adversely affected. His employment was suspended.

P wanted to be represented by a man whose authority to act IASA declined to recognise.

P authorised an officer of ALAEA to represent him and so informed IASA on 24 April 2009.

On 5 May 2009, IASA purported to end the ITEA.

On ALAEA's application to the Federal Court, reinstatement was ordered by consent with effect from 5 May 2009. In that application, an affidavit made by P was filed.

In September 2009, a written application to Garuda for renewal of P's authorisation was prepared by IASA. In the application, provision was made for IASA's assessment of P's personality. The assessment made was negative. IASA gave the assessment to Garuda.

Garuda did not renew P's authorisation.

By letter dated 16 October 2009, IASA dismissed P.

Neither IASA's employee who decided to dismiss P nor the signatory of the letter gave evidence in this proceeding.

*Held*: (1) The Transition Act is a law of the Commonwealth regulating the relationships between employers and employees by providing for the continuing existence of an ITEA. [234], [235], [238]

(2) The ITEA was a workplace instrument as defined in the FW Act. [238]

(3) The Transition Act is an instrument concerning the relationship between employers and employees within the definition of workplace instrument in the FW Act. [239]

(4) The FW Act does not limit the time or period when a workplace right, as defined in it, was exercised or enjoyed, or when conduct constituting industrial activity occurred. [260], [284]

(5) The dismissal was adverse action within Item 1(a) of the meaning of adverse action in s 342(1). [291]

(6) Making the negative personality assessment and giving it to Garuda were adverse actions within Item 1(c) of the meaning of adverse action in s 342(1). [292], [300]

(7) Neither of the actions referred to in holding (6), above, was adverse action within Item 1(b) of the meaning of adverse action in s 342. [301]

*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [4]; *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93 at [18], [20], applied.

(8) Actual intention to cause prejudicial alteration in an employee's position is irrelevant to deciding whether action was action prejudicially altering an

employee's position within Item 1(b) of the meaning of adverse action in s 342. [303], [311]

*Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22 at [65], not followed.

*BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97; *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93 at [21], distinguished.

(9) Actual intention is relevant to deciding whether action was taken because of a circumstance in s 340 or s 346. [304], [306], [311]

*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at [25], [27], [28], [199], applied.

(10) Exercise of the right in cl 19.5 of the ITEA was not conditional on compliance with cl 19.4 of it. [318]

(11) To give the ITEA efficacy, there was not implied a term that P had to tell IASA he had exercised his right in cl 19.5 of the ITEA. [320]

*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, applied.

(12) P exercised a workplace right within s 341(1)(a) when he exercised the right under cl 19.5 of the ITEA. [325], [326]

(13) P exercised a workplace right within s 341(1)(b) when he filed his affidavit in the earlier Federal Court proceedings. [341]

(14) P exercised a workplace right within s 341(1)(c)(ii) when he complained around 7 April 2009. [351]

(15) P engaged in industrial activity within s 347(b)(v) when he made and filed his affidavit in the earlier Federal Court proceedings. [367]

(16) P engaged in industrial activity within s 347(b)(vii) when he sought to be represented by ALEA. [366]

(17) Section 361(1) does not relieve an applicant in proceedings in relation to a contravention of Pt 3-1 of the FW Act from establishing objective facts suggesting contravention. [329]

*Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd* (1999) 140 IR 131 at [161]-[162]; *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306 at [49]-[50]; *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22 at [10], followed.

*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at [34], applied.

(18) ALEA established objective facts suggesting contraventions of ss 340 and 346. [334], [343], [352], [368]

(19) IASA having failed to prove otherwise than is presumed by s 361(1), it contravened ss 340 and 346 when it:

(a) dismissed P; [384], [385], [406]

(b) made the negative personalty assessment; [403], [406]

(c) gave the negative personality assessment to Garuda. [404], [405], [406]

*Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197 at 205; *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at [32], [202], applied.

*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at [35], followed.

(20) The power to award compensation under s 544(2)(b) is very broad. [441], [448]

(21) P was entitled to compensation for distress and humiliation suffered as a direct consequence of the contraventions. [450]

(22) Section 547 of the FW Act was inapplicable. [452]

(23) Interest to judgment was payable under s 51A of the *Federal Court of Australia Act 1976* (Cth). [457]

*Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at [41], applied.

**Cases Cited**

*Australian Securities and Investments Commission v Rich* (2005) 191 FLR 385.

*Baltic Shipping Company v Dillon* (1993) 176 CLR 344.

*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212.

*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

*BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97.

*Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197.

*Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144.

*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.

*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* (2006) 150 IR 179.

*Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93.

*Compafina Bank v Australia & New Zealand Banking Group Ltd* [1982] 1 NSWLR 409.

*Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd* (1999) 140 IR 131.

*Country Roads Board v Neale Ads Pty Ltd* (1930) 43 CLR 126.

*Crisp & Gunn Co-operative Ltd v Hobart Corporation* (1963) 110 CLR 538.

*Damberg v Damberg* (2001) 52 NSWLR 492.

*Deva v University of Western Sydney* (2010) 197 IR 411.

*General Motors-Holden's Pty Ltd v Bowling* (1976) 136 CLR 676 (note).

*Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62.

*Guthrie v News Ltd* [2010] VSC 196.

*Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22.

*McIlwain v Ramsey Food Packaging Pty Ltd (No 4)* (2006) 158 IR 181.

*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1.

*Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306.

*Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520.

*Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

**Application**

*JW Nolan*, for the applicant.

*THF Caspersz*, for the respondent.

*Cur adv vult*

8 April 2011

**Barker J.**

**Fair work claims**

1 The applicant, the Australian Licenced Aircraft Engineers Association (Union), is both an "employee organisation" and an "industrial association" for the purposes of the *Fair Work Act 2009* (Cth) (FW Act).

2 The Union is entitled to represent the industrial interests of its members and at material times has represented those of its member, Mr Djoko Puspitono (Mr Puspitono), as it does in this proceeding.

3 The respondent, International Aviation Service Assistance Pty Ltd (IASA) is a company incorporated under the *Corporations Act 2001* (Cth). For the purpose of the FW Act it is both a "constitutional corporation" and an "employer". IASA carries on the business of aircraft maintenance.

4 At all material times, Mr Puspitono was employed by IASA as a licensed aircraft maintenance engineer or LAME.

5 On or about 16 October 2009 Mr Puspitono's employment was terminated by IASA on four weeks notice.

6 In this proceeding the Union alleges breaches by IASA of the general protection provisions of Pt 3-1 of the FW Act. The application seeks remedies against IASA concerning the termination of Mr Puspitono's employment, to the following effect:

1. A declaration that IASA took adverse action against Mr Puspitono in contravention of s 340(1) of the FW Act.
2. A declaration that IASA took adverse action against Mr Puspitono in contravention of s 346(1) of the FW Act.
3. The imposition of penalties on IASA under s 546 of the FW Act for the contraventions of ss 340 and 346 of the FW Act.
4. Orders under s 545 of the FW Act that IASA, by itself, its servants or agents, refrain from treating as valid, acting on or giving effect to the dismissal.
5. Further, or in the alternative, orders under s 545 of the FW Act that IASA reinstate Mr Puspitono in his employment.
6. Orders under s 545 of the FW Act that IASA pay compensation to Mr Puspitono for loss or damage, suffered by him as a result of the contraventions of ss 340 and 346 of the FW Act.
7. Interest pursuant to s 547 of the FW Act.

7 However, in closing its case, the Union, in recognition of the fact that Mr Puspitono no longer held a visa which permitted him to work in Australia, indicated that it did not pursue reinstatement remedies in terms of Items 4 and 5 of the preceding paragraph and confined its substantive claim to an order for compensation under the FW Act.

**Mr Puspitono's employment agreement**

8 Mr Puspitono is an Indonesian citizen. In early February 2008, when he was living in Indonesia, he saw a newspaper advertisement for a position as an aircraft engineer with IASA and made application for the position.

9 On 6 April 2008, Mr Puspitono received a phone call from Mr John Lantang, an IASA representative in Jakarta. In his first affidavit filed 25 August 2010 and received into evidence, Mr Puspitono said that Mr Lantang asked him whether

he would work for IASA in a position "outside of Australia". I construe that evidence, in context, to mean "outside of Indonesia". Mr Puspitono said that he would. Mr Lantang then said that Mr Puspitono would have to attend training in Jakarta. Mr Puspitono commenced training and sometime near the end of his training IASA offered him a position in Perth, Western Australia, which he accepted. IASA completed a visa application for Mr Puspitono to travel to Australia.

10 Mr Puspitono commenced employment with IASA in Perth on 12 May 2008. Before leaving Indonesia, Mr Puspitono executed an agreement signifying his acceptance of IASA's offer of employment. The formal written agreement made by the parties was produced as Exhibit DP2 to the affidavit of Mr Puspitono. Some further comments about it — when and where it was made — are appropriate.

11 The agreement is stated to be made "on Tuesday the 8th April 2008" in the first line on page 2. In the "Introduction" or recital part of the agreement, a number of things are noted, including that:

> A. The Company provides aviation maintenance service and assistance to airlines at major airports in both Australia and overseas.
>
> B. The Employee has accepted an offer of employment in a position described in schedule 1 with the Company to provide support and assistance with the delivery of aviation maintenance service and assistance on the Company's behalf.
>
> C. This Agreement is governed by any relevant Australian legislation, regulation or standard in place.
>
> D. Where this Agreement is executed in a Jurisdiction outside Australia, this Agreement will be subject to the laws of that Jurisdiction.
>
> E. The Company is not a party to the Aircraft Engineers (General Aviation) Award 1999 and is therefore not bound by that award.
>
> F. The Employee has accepted this offer and agrees to be bound by the following terms and conditions contained in this agreement.

12 Schedule 1 describes the position and provides related information in the following terms:

| | |
|---|---|
| Position: | Aircraft Maintenance Engineer (AME) |
| Base location: | Perth, Western Australia, Australia |
| Start date: | Date this agreement is signed |
| End date: | 31 December 2009 |
| Hours of Work: | • ordinary hours up to 40 hours per week; and<br>• subject to rotational work roster |
| Overtime Hours: | • one and a half (1 & ½) for any hours worked above normal hours on a rostered day; and<br>• double time if called into work on a rostered day off; and<br>• all overtime will be paid monthly in arrears |
| Annual Leave: | Up to 160 hours per year and an additional 40 hours if actually worked 40 hours per week per 12 month period |
| Sick and Carers Leave: | Up to 10 days |

13 I should also mention cl 19 of the agreement, which deals with Dispute Resolution in the following terms:

19.1. The Employer and the Employee agree to follow this procedure to resolve any concerns or dispute arising from this Agreement or the employment of the employee.

19.2. If the employee has a concern, grievance or issue with the Company, the matter and its potential resolution will be discussed with the employee's immediate Supervisor/Manager as soon as possible. The Supervisor/ Manager must respond to the employee within five (5) working days.

19.3. If the employee is not satisfied with the outcome, the employee may refer the matter to a more senior Company or Human Resources for further consideration and resolution.

19.4. While a concern, grievance or issue is being dealt with, work will continue as normal except where there is a bona fide concern regarding an immediate threat to the health or safety of the employee. Where there is a bona fide safety issue, the employee must perform alternative work as directed. There will be no bans, stoppages or limitations on the way that work is customarily performed.

19.5. At any stage you may seek help, assistance or representation from a person of your choice.

14 Mr Puspitono signed the agreement at page 17 on 6 May 2008, while still in Indonesia.

15 For IASA's part, the agreement was signed for IASA in Perth by Mr Iosefo Tapusoa on 14 May 2008.

16 As to whether the agreement was designed to cover merely the responsibilities of an aircraft maintenance engineer, or AME — as described in Sch 1 — or also governed work done by Mr Puspitono for IASA in Perth as a licenced aircraft maintenance engineer, or LAME, I formed the clear view having heard all the evidence and find that the parties to the agreement shared the common understanding at all material times that the agreement governed Mr Puspitono's work as either an AME or a LAME.

17 In his first affidavit, at [10], Mr Puspitono refers to the agreement as an "Individual Transitional Employment Agreement" or ITEA. This is not an expression to be found in the agreement itself. Rather, it is a description the parties have applied to the agreement at all material times, being an expression employed in the FW Act. I will return to that characterisation later. However, for the sake of brevity and consistency, I will usually refer to the agreement as the ITEA.

**Events of April 2009**

18 It appears that after nearly a year working for IASA as a LAME in Perth, Mr Puspitono became concerned about the extent to which IASA was honouring its obligations under the ITEA to pay him overtime. His concerns were apparently shared by another LAME, Mr Riza Fauzi.

19 On 1 April 2009, Mr Puspitono and Mr Fauzi circulated a letter, by email to senior management of IASA including Mr Mario Fialho (Managing Director), Mr David Moore (Maintenance Manager), Mr Iosefo Tapusoa (Legal and HR Manager), and Mr Roderick Searle (Supervisor, Perth). The letter (which is Exhibit DP3 to Mr Puspitono's first affidavit) commences by referring to a telephone conversation between Riza Fauzi and David Moore on Tuesday 31 March 2009 at 5 pm. It reads (as in original) that:

> we would like to give you some problems of us in Perth. We have spoken to Rod [Searle] on numerous times regarding these issues and we have had no solutions or answers.

20 I should note that it became apparent during cross-examination, that while Mr Puspitono has a reasonable grasp of English, his oral skills are by no means perfect. The correspondence exhibited to his affidavit of which he was the author also suggests that his written skills are not those of a person whose first language is English. He was assisted by an interpreter of Indonesian on occasions when giving evidence.

21 The main complaints made to management in the 1 April letter were that IASA had:

- failed to pay 173 hours per month;
- failed to make payments in relation to overtime;
- created problems with the roster affecting ordinary time; and
- failed to pay superannuation.

Comparisons in relation to overtime were made by reference to the conditions governing aircraft maintenance engineers who worked for other airlines in Perth, and for IASA in Darwin.

22 It seems, as became clearer during the course of his cross-examination, that Mr Puspitono had an expectation that he would ordinarily be paid for 173 hours work each month, regardless of the hours actually worked, but in recent times leading up to April 2009 had been paid for fewer hours than that.

23 Mr Puspitono and Mr Fauzi ended their letter — which was in a typed form — by stating to management:

> Could you please follow up on all of these issues and get back to us within 5 days, otherwise we will take further action.

24 Mr Fialho, the Managing Director, did not take kindly to the April 1 letter. Having received it, he immediately emailed Mr Tapusoa — and seems, perhaps inadvertently, to have copied his email, not only to all recipients of the original but also to the original senders. Mr Fialho noted (as in original):

> Iosefo,
>
> Please inform Djoko [Puspitono] that there is no such thing in IASA "OUR PROBLEM" if Djoko has a problem he has the rights to come up and speak on his behalf he doesn't represent anyone in the company to claim that he can speak in behalf of them!
>
> I hope this is the last time I see anything from Djoko like that otherwise WE HAVE A PROBLEM with Djoko not with anyone else!

25 Mr Tapusoa followed up the same day by emailing Mr Puspitono (and copying the email to all senior management of IASA) stating that:

> We will look into this and get back to you by Friday.

26 The 1 April demand by Mr Puspitono and Mr Fauzi also induced an email from Mr Moore the same day directly to Mr Fauzi, in which he observed:

> This is an exact copy of what Djoko has already sent & this is not what I told you I wanted you to do in our phone conversation last night …

Mr Moore then explained that he had wanted Mr Fauzi and Mr Puspitono to send an email to himself and Mr Beamon, another senior manager in Indonesia, about his apparent "salary problems". Instead, Mr Moore complained, issues not

to do with salary problems were raised, including reference to the position of aircraft maintenance engineers in Darwin and the position with Garuda flight schedules and Tiger flight schedules in Perth.

27 By email dated 2 April 2009, Riza Fauzi responded to the email from Mr Moore explaining the position in more detail, including why the Darwin position and Tiger's schedule were relevant to their concerns.

28 It appears there was a meeting on 3 April between Mr Searle and one or the other, or both, of Mr Puspitono and Mr Fauzi, because Mr Searle emailed both gentlemen on 3 April 2009 at 10.26 pm stating:

> After the meeting tonight, you are both going to be paid 173 hours per month minimum. I am going to have to reschedule the hours for April, but until I am back Monday, I ask you both to do G+ED as 0400-0800 & 1500-*1900* and GS as 1500-*1900*. I will see you both on Monday.

(Emphasis in original.)

29 From Mr Puspitono's point of view, this response met some but not all of the issues raised. For example, it failed to mention payment for outstanding overtime claimed by Mr Puspitono.

30 On 7 April 2009, Mr Puspitono was to work a split shift. That is, he was to start work at 0400 hours and break at 0800 hours; then return to work at 1500 hours and finish at 1730 hours.

31 On 7 April 2009, the aircraft Mr Puspitono was rostered to work on, prior to the end of his final shift at 1730 hours, was rescheduled. Mr Puspitono considered the effect of the rescheduling was that he would have to work beyond 1730 hours and so have to work overtime to ensure that the maintenance check was complete on the aircraft.

32 As events transpired, Mr Puspitono left work at the end of his scheduled roster at 1730 hours without authorising the release of the late scheduled Garuda aircraft. Before doing so, he says he asked Mr Searle to guarantee him that overtime would be paid, but Mr Searle would not do so, saying instead that my "hands are tied".

**The May 2009 suspension**

33 On 9 April 2009, Mr Puspitono received correspondence from IASA dated 8 April 2009, suspending him from his employment.

34 The 8 April suspension letter was signed by Mr Tapusoa. The suspension — with pay until further notice and completion of further investigation, effective immediately — was stated to be based on the following actions of Mr Puspitono:

> Your actions yesterday in walking off the job and not being available to release the aircraft when you confirmed to your supervisor that you would, constitutes a serious breach of the above terms of your employment contract *and* have significantly jeopardised the interests and reputation of the company with a major airline customer.
>
> Your conduct as described above constitutes sufficient cause for disciplinary action and given the seriousness of the breach, the following action is taken.

(Emphasis in original.)

35 The provisions of the employment agreement that Mr Puspitono was alleged to have breached were stated to be as follows:

- Section 4.2 concerning compliance with lawful directions and requirements of the company.

- Section 4.3 concerning compliance with company policies, procedures and employee manual.
- Section 4.4 concerning the requirement at all times to act in good faith and use the employee's best endeavours to promote the interests of the company.

36 The company's employment policy and procedures, set out in the employee manual, were also mentioned in relation to the section 4 standards of conduct.

37 IASA made it very clear in the letter that it was "extremely upset" with Mr Puspitono's actions in the matter. The purpose of the suspension was stated in the following terms:

> to impress upon you the seriousness with which we regard the above violation of employment and to give you the opportunity to reflect upon your future compliance with our employment standards.

38 By the letter Mr Puspitono was given the opportunity to respond in writing.

39 Significant portions of the cross-examination of Mr Puspitono at the trial of this proceeding focussed on the question of the appropriateness of Mr Puspitono's conduct in not remaining beyond the completion of his roster on 7 April 2009, to complete the clearance of the Garuda aircraft in question.

40 Put quite shortly, Mr Puspitono justified his action on the basis that he had not been properly paid for earlier overtime, there had been the difficulties with the rosters that he had been given, and when he inquired of Mr Searle on the evening in question whether he would be paid overtime if he remained to clear the Garuda aircraft, he was told by Mr Searle that "my hands are tied". In other words, Mr Searle could not give him a clear guarantee that he would be paid overtime. In those circumstances, and given the background events, he felt justified in not remaining beyond the completion of the scheduled roster.

41 Mr Puspitono also suggested in cross-examination, when pressed to justify his conduct, that he was concerned that, if he stayed on in such circumstances, he might breach the law — because, as he attempted to explain it, only a LAME could release a plane, and if he were not officially on paid overtime, he would not be an *authorised* LAME. Counsel for IASA rightly submits this was the first time such an explanation for his conduct had ever been proffered by Mr Puspitono in the course of disputation between the parties.

42 Mr Puspitono did not accept that his conduct breached either the ITEA or the standards of conduct usually expected of an aircraft maintenance engineer or licensed aircraft maintenance engineer generally speaking, or as a member of the Union.

43 In substance, Mr Puspitono considered that, in all the circumstances, as he assessed them at the time, it was reasonable and appropriate for him to take the steps he took on the evening of 7 April 2009, even though his conduct was bound to have an immediate effect by causing delay in the clearance of the Garuda aircraft and its timely turnaround, which would adversely affect Garuda as a customer of IASA.

44 Mr Puspitono clearly held the view at that point that the industrial concerns that he had been agitating were illustrated and heightened by the inability or unpreparedness of Mr Searle, on behalf of IASA, to give him a guarantee that overtime would be paid beyond the completion of the roster at 1730 hours.

**The aftermath of the suspension letter**

45 In light of the 8 April letter from IASA, Mr Puspitono sought assistance from Mr Mark Jones, a retired air traffic controller, who offered to represent him in his dealings with IASA. At the time of trial Mr Jones was deceased.

46 Mr Jones apparently attempted to speak with Mr Fialho on or about 14 April 2009, but at the direction of Mr Fialho's secretary finished up sending a letter by email to Mr Fialho. In the letter he introduced himself and advised that Mr Puspitono had appointed him as his representative "under the terms of his contract with IASA". Mr Jones purported to lodge a notice of dispute under cl 19.5 of the "IETA" and sought a meeting at the earliest opportunity to discuss the allegations, to see what assistance Mr Puspitono could provide to the investigation IASA had commenced. Mr Jones provided telephone numbers for Mr Fialho to contact him on, as well as an email address, "kito@bigpond.net.au". He also sent a covering email to Mr Fialho explaining that his secretary had advised that he was overseas and would prefer to be contacted by email.

47 Mr Fialho responded to Mr Jones' email on the same day, 14 April 2009, addressing the letter to "Mark, Graham or Kito". Mr Fialho's letter betrays some frustration or bemusement that Mr Jones would purport to represent the interests of Mr Puspitono. The letter (as in original) commences:

> With all respect I have no reasons to recognise your authority to represent Mr Djoko Puspitono, and above all I am overseas and unable to meet you now or even in the future.
>
> First of all who are you? What gives you the rights to represent anyone in this world?

48 Mr Fialho then proceeded to explain the suspension with pay until further notice had been given, namely (as in original):

> in order for us to investigate what it was the reason that he deliberately jeopardise our company contract with of our customers causing the possibility for us to be liable to hundreds of thousands of dollar in fees and penalties by abandoning a customer aircraft on ground without informing his supervisor of his act … until we are satisfied about the reasons that he commit such unacceptable action for a responsible License Aircraft Maintenance Engineer and make sure that will not happen again.

49 Mr Fialho completed his email by indicating Mr Jones' intervention was completely unnecessary and (as in original):

> might cause some negative interference in this process, and if you insist in calling me or our offices we might need to fail harassment complain to the police against you and your accomplices.

50 As indicated, the letter betrays frustration and bemusement, and certainly conveyed to Mr Jones and Mr Puspitono that IASA was not interested in dealing with agents or representatives of Mr Puspitono and did not intend to deal with Mr Jones.

51 On 14 April 2009, Mr Tapusoa sent an email to Mr Puspitono at 4.39 pm, late in the afternoon, on the face of it prior to Mr Fialho's email to Mr Jones. Mr Tapusoa's letter to Mr Puspitono is in terms which suggests some attempt at prior communication. Mr Tapusoa noted in his email:

> As you know, I have received a phone call from a man who said he was your lawyer with concerns about your health and well being. I left a message on your mobile on Saturday but have not heard from you.
>
> The letter states that you are suspended with pay until completion of an investigation. I also asked you to send me by email your side of the story. The company is also well within its rights, if there is a serious concern to suspend an employee. We also did that with pay.
>
> As requested, I need you to email me a full statement of what happened.

52 Mr Puspitono responded to the requests for a full statement on 15 April 2009, by emailing Mr Tapusoa in the following terms (as in original):

> I just want to explain again hapened that day. Many times I asked to Rod. Do you have guarantee for me to work after my roster. 5.30 my finish time. I said to Rod do you want me to continues — please check with david? He not answer my question. I finish at 5.30. Same as roster. this is difficult time for me.

53 Mr Tapusoa responded with a further email asking whether there was anything else. Mr Puspitono replied, on 16 April 2009: "No. That is what happened."

54 On 23 April 2009, Mr Brad Stewart, an organiser with the Union emailed Mr Fialho concerning Mr Puspitono's circumstances, which email he also forwarded to Mr Tapusoa later in the day on 23 April. The email to Mr Fialho included in its text a typed authorisation from Mr Puspitono for the Union to represent him in the "current stand down dispute".

55 On 24 April 2009, Mr Puspitono sent an email to Mr Fialho authorising the Union and/or their legal representatives to act on his behalf in relation to the employment related matters between IASA and himself. He listed those matters as follows:

- Non and late payment of superannuation.
- Non and late payment of wages.
- Non and late payment of overtime.
- Workplace bullying.
- Rostering.
- Discrimination.
- 457 VISA matters.
- And any other suspected breach of my employment contract as per Clause 19 of my ITEA.

56 On 24 April, Mr Purvinas, the Federal Secretary of the Union, telephoned Mr Fialho. Mr Fialho took the call. At this stage, Mr Purvinas was aware of Mr Puspitono's email to Mr Fialho of 24 April authorising the Union to act for him. That email had indeed been copied to him at the time it was sent to Mr Fialho.

57 Mr Purvinas says that he explained to Mr Fialho that he wanted to discuss the disciplinary action that IASA had taken against the Union's member, Mr Puspitono. Mr Fialho said it was a matter between IASA and their employee and that the Union assistance was not needed.

58 Mr Purvinas says he explained that Mr Puspitono had sent Mr Fialho authority for the Union to act for him. Mr Purvinas took notes of the conversation from that point on, which he sought to rely on without objection at trial.

59 Relying on his notes, Mr Purvinas says that Mr Fialho then said:

> I need something in writing, read his contract, you must get it to my office and then I will decide if I want to speak to you.

Mr Purvinas responded:

> We have sent it to you. You have an email that authorises us to represent him. Surely this is good enough; we will get to represent him eventually.

Mr Fialho then said:

> I told you I need it in writing, don't you understand that. An email is not writing. He already has got some other people to help him. If you get involved it will only complicate the decision.

Mr Purvinas said:

> Come on mate, we have a legal right to represent our member and you can refuse to talk now but ultimately we will be able to assist him because that is the law.

Mr Fialho said:

> IASA does not deal with unions. If you push the issue, I will terminate him without pay.

Mr Purvinas responded:

> You can't say that …

60 Mr Purvinas says that before he could finish the sentence Mr Fialho raised his voice and started to speak over the top of him. He was yelling at him. While he was yelling he repeated words to the effect that the company would not deal with unions and he would not deal with Mr Purvinas. This made it impossible for Mr Purvinas to keep further notes as both were trying to speak at the same time. Mr Purvinas says that Mr Fialho then ended the phone call abruptly shortly afterwards. Shortly after that, Mr Purvinas sent Mr Fialho an email dated 24 April 2009 challenging him on these various observations.

61 Upon receiving Mr Purvinas' email, Mr Fialho responded by email, with copies to a number of other persons, challenging the precision or correctness of observations made by Mr Purvinas in his email:

- As to Mr Purvinas' statement that "IASA does not deal with unions", Mr Fialho stated that "IASA has an employment agreement with Djoko not with the Union".
- As to Mr Purvinas' statement that Mr Fialho had said: "if you push the issue, I will terminate him without pay", Mr Fialho said that: "I said that so far Djoko didn't lost any of his benefits or rights so far considering that IASA only suspended him with pay in order to evaluate the malicious act of gross negligence."
- As to Union representation, Mr Fialho made it clear that he was simply wanting a "duly recognised appointment document" as IASA had already received claims from four persons who said they were representing Mr Puspitono. He said he was not disputing the right of the Union to represent its Australian LAME associate.

62 The same day, 24 April 2009, Talbot Olivier, lawyers acting for IASA, wrote to the Union, which letter was sent by email and fax, to the attention Mr Purvinas. A copy was sent by email to Brad Stewart at the Union. Talbot Olivier referred to the emails of "today and on 23 April 2009". Talbot Olivier noted that:

IASA strongly refutes the contents of your email to Mr Mario Fialho received today at 10.00am (WST) regarding today's telephone conversation between you and Mr Fialho. In particular, Mr Fialho did not say, or make any representation to the effect that, Mr Puspitono's employment would be terminated. Further Mr Fialho denies that he at any time said he "does not deal with unions". IASA at all times has complied with its obligations under the *Workplace Relations Act (1996) Cth*.

We understand that IASA has received several calls from at least four different individuals or organisations purporting to represent Mr Puspitono's interests. We note that under clause 19.5 of Mr Puspitono's Individual Transitional Employment Agreement, he is entitled to receive representation from a person of his choice. In light of this and in response to your emails we request the following:

- that you provide us with a written signed authority of the appointment of a named ALAEA representative to act on behalf of Mr Puspitono, which you have received from Mr Puspittono; or alternatively
- that you arrange for Djoko to provide us with a written signed authority for a named ALAEA representative to act on his behalf.

IASA requires this in order to protect Mr Puspitono's personal and confidential information, and to comply with IASA's privacy obligations.

IASA is currently undertaking a thorough investigation into Mr Puspitono's situation and completing is likely to complete this investigation by Friday 1 May 2009. As part of the investigation, Mr Puspitono will be given the opportunity to meet with IASA to provide IASA with further information, and to respond to the information gathered.

IASA further notes your email received today at 1.22pm (WST), and in particular your statement: "… it appears that you have already made this assumption before he has replied to any allegation". As stated, IASA is conducting a thorough investigation and no decision has been made, or will be made, regarding the outcome until the investigation process is complete. IASA confirms that Mr Puspitono will be given the opportunity to meet with IASA to provide IASA with information, and to respond to the information gathered as part of the investigation.

63 A week later, on 30 April 2009, Mr Puspitono received a pay slip from IASA showing a back payment of overtime.

64 On 1 May 2009, IASA, by Mr Tapusoa, wrote to Mr Puspitono — not to the Union — concerning the alleged breaches of his employment contract and provided the following advice:

- Superannuation payments were up to date.
- The allegation of non or late payment of wages was false.
- The January/February/March overtime was paid on 28 April 2009.
- Overtime is only paid after 173 hours per month have been worked and is not automatically paid monthly.
- The allegation of workplace bullying is completely false and had not been raised before.
- The matter of rostering was resolved by way of an email from Rod Searle on 3 April 2009.
- The allegation of discrimination is completely false and had not been raised before.
- The allegation of 457 Visa matters is completely false and had not been raised before.

65 Mr Tapusoa further noted in the letter that the issues Mr Puspitono had raised were "not in any way related to your suspension from duties on 8 April 2009 arising from the incident on 7 April 2009, which we are handling as a separate matter".

66 Mr Tapusoa then said that in order to progress the matter, IASA needed the name of a person who represented him.

67 Mr Tapusoa also stated that they had not had a response from Mr Puspitono following their letter to his proposed representative on 24 April 2009 — this presumably being a reference to the letter of Talbot Olivier.

68 On 4 May 2009, Mr Puspitono sent an email to Mr Fialho, which he copied to Mr Purvinas confirming his appointment of the Union to assist him in the matters currently in dispute and nominating Mr Purvinas as the person responsible.

69 On 5 May 2009, Mr Purvinas wrote to Mr Fialho requesting advice as to the company's position in relation to the current disciplinary matter.

**The May 2009 termination**

70 That same day, by letter dated 5 May 2009, IASA, by Mr Tapusoa, purported to terminate the ITEA with Mr Puspitono effective from 2 June 2009.

71 The 5 May termination letter commences by referring to a telephone message and email of 1 May 2009 and to text messages sent on 5 May 2009 and 4 May 2009. The letter states that: "We have attempted several times to arrange a discussion with you, however you have not responded to any of IASA's attempts to contact you."

72 Mr Tapusoa, on behalf of IASA, then proceeds to lay out in the letter the justification for the termination decision, as follows:

> As a result of the global economic crisis, IASA is experiencing an unprecedented downturn in work for its aviation engineers. There have been redundancies at IASA last month as a result of this. In relation to your position, Garuda has for some time been considering its Australian flight schedule, and very recently it has informed us of its decision to significantly reduce its flights between Australia, with the effect that IASA has now been forced to close down its Darwin operations.
>
> As a consequence of these recent developments, IASA has unfortunately come to the decision that your position is no longer required to be filled due to changed operational requirements and has become redundant.
>
> IASA has looked at possible alternatives to terminating your employment including redeployment, and unfortunately there are no other alternatives. You were employed by IASA specifically to service the Garuda services, given your experience and qualifications. You were also the last of the 3 engineers hired for the Garuda services.
>
> We have considered additional training and job sharing within the Garuda engineers section, however that is not practical. IASA has also considered whether there are opportunities for you in its other Australian operations however you are not licensed by the Civil Aviation Safety Authority and this would be a requirement.
>
> IASA will consider you in any opportunities which may arise at a later date, in the event that Garuda increases the volume of its flights to Australia.

73 The letter finally notes that, as Mr Puspitono was employed under a subclass 457 working visa, IASA was required to cancel the working visa within five days of the last day of employment.

74 On 5 May 2009, Mr Tapusoa also wrote to Mr Purvinas. In his letter, Mr Tapusoa denied that there was any "prejudgment" made. He also advised that the investigation of circumstances was not completed and would not be completed.

75 On 11 May 2009, Mr Lantang of IASA, in Indonesia, sent an email to various persons in these terms (as in original):

> The engineer has been suspended permanently. We apologise for this matter and we assure that this would not happened again. Please note that we have responded this matter to Pac Usman on 8 May 2009, the below email to Pac Usman refers.
>
> That is why one of the reasons we have ask for our engineer Mr Mark Scott and Robert Hammond for their GA Authorisation Licence, but until today we still waiting the confirmation from GA.

**The reinstatement proceedings**

76 On 13 May 2009, the Union lodged an application for relief in relation to termination of employment in the Australian Industrial Relations Commission under the then operative *Workplace Relations Act 1996* (Cth) (WR Act). The application was made pursuant to s 643(1) of the WR Act and complained that the termination was harsh, unjust or unreasonable or was on the basis of contravention of s 659, being discrimination or other prohibited reasons, citing Mr Puspitono's trade union membership. The claim ultimately stated that the termination was not for redundancy given that:

- Forthcoming leave for other employees that would need to be covered.
- Advertisements for other aircraft maintenance positions with the company on its website.
- The fact that there was no downturn in work in Perth.

The Union claimed that Mr Puspitono's employment had been terminated "because of reasons including his having acted in the capacity of a representative of employees, and including his trade union membership".

77 On 21 May 2009, the Union lodged an application in the Federal Court of Australia, Perth Registry, in respect of the termination seeking declarations concerning the termination claiming that it was effected for a prohibited reason under the WR Act, and also seeking interlocutory relief designed to achieve reinstatement.

78 Subsequently, pursuant to consent orders of the Federal Court, Mr Puspitono was reinstated in his position with IASA, effective from 5 May 2009. Mr Puspitono returned to work on 24 July 2009, a fact not in dispute between the parties.

**Events following reinstatement up to mid-October 2009**

79 On his return to work on 24 July 2009, Mr Puspitono met with Rod Searle and Mr Mark Scott, who had been recently appointed Maintenance Manager Australia for IASA on 16 May 2009, to discuss rosters, at Mr Scott's request. Mr Puspitono said he considered his roster was discriminatory and told Mr Searle and Mr Scott as much. He said Mr Scott then proceeded to make a telephone call. Mr Puspitono said he then left the meeting to call Steve Purvinas at the Union and learned that Mr Purvinas had come to an agreement with Mr Tapusoa about the roster. Mr Puspitono says that when he went back into the meeting, Mr Searle said words to the effect, "Why does the Union always help you?". Mr Puspitono said he considered Mr Searle said this in an "angry way".

80 About a week later Mr Scott emailed Mr Puspitono and two other LAME, Naman Muhajir and Riza Fauzi on the topic of shifts and asked them to consider two options. On 1 August 2009, Mr Fauzi responded to Mr Scott's email and copied his reply to Mr Muhajir and Mr Puspitono. He indicated that he considered option 2 was good and added (as in original):

> Also Naman's ide[a] is better and I agree with him however we have more times to preparation before aircraft arival.

81 The record of email or other exchanges concerning these options, from the evidence received at trial, does not appear to be complete.

82 Mr Scott sent two emails on 10 August relevant to his dealings with Mr Puspitono. The first was sent at 2.50 pm to Mr Puspitono and also to Mr Fauzi. He asked them to contact him in regard to the start of the new roster: whether it should start 12 August or 14 August. He noted that Naman Muhajir was "happy" — presumably either way.

83 Mr Puspitono seems to have responded to Mr Scott by email dated 10 August 2009 in these terms (as in original):

> Hi Mark,
>
> I am agree for the new roster, and I can do this start on wednesday 12 august 2009. If on duty need help for unschedule maintenance can you give us warranty overtime?

84 The second email of Mr Scott on 10 August was sent at 5.44 pm to Mr Puspitono alone but was copied to Mr Muhajir, Mr Fauzi, Mr Tapusoa, Mr Beamon, Mr Fialho, Mr Searle and Mr Billimoria. Mr Scott stated:

> Hi Djoko
>
> Thanks for confirmation.
>
> With the new shifts, it brings all the sections on the same shift pattern. We as a Company are to work together to assist each other. We have many qualified LAME's but with different type licences who are there to help. The time has come to USE the assistance as shown on the roster.
>
> The LAME releasing the aircraft has duties to perform which includes the supervision and observation and inspection of the other engineers NOT licenced who are assisting him.
>
> So, in answering your question, a wheel change or brake change can be handled in this manner and released by the licence engineer affected.
>
> For example, Naman was in DRW for approximately 6 months and handled the station alone. What did he do when changing a wheel or a brake as being the only LAME on the station with NO assistance as we have here in Perth?
>
> Overtime is to be minimised as much as possible for all of us to keep costs down as all Companies are experiencing a downturn in the market.
>
> *Therefore overtime will only be if I request it for the work requirements.*
>
> There are enough qualified and experienced Engineers on the station to assist each other.

(Emphasis in original.)

85 Mr Scott recalls that, during August 2009, Mr Puspitono applied for annual leave starting in the second week of October.

86 On 31 August 2009, Mr Puspitono sent an email to Mr Scott (which he copied to Mr Beamon, Mr Tapusoa and the Perth LAMEs) on the subject of "responsibilities of the assist engineer". In it he set out what he considered the "assist engineer" should do and asked Mr Scott to ensure that his message was

available to and understood by all the "assist engineers" as he "did not wish any miss communication between the release engineer and the assist engineers". He referred to some instances where assist persons were not available to carry out those duties leaving it to him to carry them out.

87 Instead of responding to this email with a further email, that he had in fact drafted, Mr Scott decided to visit Mr Puspitono while he was working on the ramp and discuss the issues raised personally with him. He did this on 2 September 2009 during the afternoon, following which he assisted Mr Puspitono to complete the servicing of an aircraft. This approach and its consequences are discussed in greater detail below. Suffice it to say at this point that Mr Scott considered, from reports he received from other LAMEs, that this approach to Mr Puspitono had been a useful one to which Mr Puspitono had responded in a positive way.

88 A few weeks later, in mid-September 2009, Mr Scott was required to coordinate the lodgment of authorisation applications for the LAME engaged by IASA in Perth so that their existing authorisations could be renewed and put into alignment with the licence IASA held from Garuda Indonesia to maintain its aircraft.

89 As explained in greater detail below, on 18 September 2009, Mr Scott received from IASA Jakarta GA-Authorisation Applications for signature, or completion and signature, by him in respect of each of the Perth LAME, including Mr Puspitono.

90 Mr Scott says that on about 23 September 2009, by prior arrangement, Mr Puspitono called at his office and signed the GA-Authorisation Application that had been prepared for him. On that application, Mr Scott had completed by hand section 3 in respect of "Personality" and in respect of two of the three categories mentioned Quality and customer oriented and Relationship, had marked Mr Puspitono down as "*UN*satisfactory". He also prepared a typed one page attachment particularising the unsatisfactory assessments.

91 Mr Puspitono, as will also be explained further below, denies that he signed this application.

92 Mr Scott insists that Mr Puspitono did sign the document but concedes he did not draw to Mr Puspitono's attention the unsatisfactory ratings he had given him in the Personality section or the attachment.

93 On 12 October 2009, Mr Puspitono went on annual leave.

94 There does not appear to have been any other issue of consequence concerning IASA and Mr Puspitono between Mr Scott's approach to Mr Puspitono on 2 September 2009 and Mr Puspitono going on annual leave on 12 October 2009, save for the apparently inconsequential signing of the GA-Authorisation Application by Mr Puspitono, as alleged by Mr Scott on or about 23 September 2009.

**The October 2009 termination**

95 On 16 October 2009, Mr Puspitono's employment with IASA was again terminated.

96 By letter dated 16 October 2009, signed by Mr Tapusoa on behalf of IASA, mailed to Mr Puspitono (while he was on leave) and copied to Tom Beamon, Mark Scott and John Lantang, Mr Puspitono was advised that his employment "will be terminated and we provide the required 4 week notice period".

97 The reason given for the termination was set out in the first two paragraphs of the letter, in these terms (as in original):

> On 14 October, we received a letter from Garuda Indonesia confirming that the extension of your GA Authorisation License has failed and therefore no longer able to authorise from 12 October 2009.
>
> A condition of your employment was that you have this license. This means that you no longer meet this condition of your employment. We have considered alternative positions that may be suitable however there are no other positions available in your department.

**Mr Puspitono's circumstances since the October 2009 termination**

98 Following the termination of his employment on four weeks notice by letter dated 16 October 2009, Mr Puspitono eventually left Australia on 1 February 2010. He says he left for three reasons:

- He could not find another sponsor to take over his subclass 457 visa.
- He did not want to be in Australia illegally.
- He did not have enough money.

99 He had to pay to transport his possessions from Australia back to Indonesia.

100 One of the reasons he had to leave Australia was because he could not find another employer to take over sponsorship of his subclass 457 visa. He does not have a separate CASA licence. He tried to find another sponsor but was unable to do so. He tried to obtain work with John Holland and get that company to take over his visa, but was not successful because he did not have a CASA licence.

101 To get another visa Mr Puspitono says he will now have to get another sponsor and that will be difficult because he does not have a CASA licence and he cannot afford to sit for the CASA licence until he finds work.

102 Part of the reason he says he had to leave Australia was because of his family — his wife and two school age children — and he could no longer afford to live in Australia and for him to look for work. When he returned to Indonesia he paid for his airline ticket. Since returning to Indonesia, he has not been able to find work on a professional basis. Positions such as aircraft engineers in Indonesia are not often advertised, he has however posted his resume to a number of airlines in Indonesia, but has not received any responses.

103 He says he and his family are living off his wife's wages in Indonesia at the moment. He only has intermittent unskilled work, working for friends.

104 Mr Puspitono says that he and his wife borrowed money from friends to purchase their home and following his dismissal by IASA he borrowed additional money to continue making payments. He is currently indebted in relation to this loan.

105 His two children are now enrolled in a government school. To maintain their grades they need additional tuition which costs an additional amount each month. Due to the loss of his job Mr Puspitono says he has been unable to pay for this tuition.

106 He also says that due to his financial position he has not been able to afford nutritional food and clothing for his children.

107 Ideally he wishes to return to his position at IASA.

108 Mr Puspitono says he was also very distressed at the way IASA treated him. He suffered headaches, stress and vomiting. He saw the doctor three times.

109 Mr Puspitono says that the airline community in Indonesia is small. He has been told that he has a bad reputation in the community. He finds it upsetting that he cannot work in his chosen profession.

110 More recently, Mr Puspitono has obtained a temporary contract with Air Atlanta in Indonesia. He commenced on 1 October 2010 and earns $70 a day from his contract. It is due to expire on 31 January 2011. He is hopeful that it might be extended into a permanent arrangement but if not he will need to find alternative work after this date.

**Respondent's evidence concerning the negative personality assessment and the October 2009 termination**

111 At the trial the only viva voce evidence given on behalf of IASA concerning the adverse actions alleged against it was that given by Mr Scott, Maintenance Manager Australia for IASA. Mr Scott's evidence bears on events leading up to the September 23 negative Personality assessment, the transmission of that assessment to Garuda Indonesia and the October 2009 termination and I will turn to it shortly.

112 First, however, I should note that I refused IASA leave to file an affidavit of Mr Fialho late in the trial. By that affidavit the respondent wished to lead evidence as to the basis upon which it had terminated the employment of Mr Puspitono in October 2009. The application to lead this evidence late in the trial was strongly opposed by the applicant. I accepted the substance of the applicant's objection that to allow this evidence in at that point of the trial would affect the manner in which the applicant had approached the proceeding to that point. I accepted that there was potential for a real impact on the way the applicant had run its case to that point and how it might need to respond if the affidavit of Mr Fialho were allowed in at that late stage. I considered that at the least the applicant would need to carefully consider how the deponent might need to be cross-examined. The issues raised might potentially also necessitate some additional lines of inquiry. I indicated that, having regard to the history of the proceeding, and my earlier ruling in December 2010, when I acceded to the respondent's application for an adjournment of the trial following a change of solicitors on the record, but only on terms and only for a short period, that any leave granted by the Court that would in all probability see a further adjournment of the case to enable these further inquiries to be made, which indicated prejudice to the administration of justice, should not be permitted in the particular circumstances of this proceeding. In short, the respondent had had more than ample time to prepare for the trial and to put on all evidence it required to respond to the case brought against it. That the respondent chose to change its solicitors at a late stage in the getting up process before trial should not be considered a decisive issue, in all the circumstances of the case, to the application made to put on late evidence. For those reasons the application for leave to file and rely upon the evidence of Mr Fialho was refused.

113 Also late in the trial, counsel for IASA tendered as a business record, a copy of a letter from IASA dated 15 September 2009, signed by Mr Beamon, to Garuda Indonesia. I reserved my decision on its admissibility under the *Evidence Act 1995* (Cth). For the reasons that now follow, I admit the copy letter into evidence as Exhibit 12.

114 The document is a copy of the letter from Thomas L Beamon, General Manager Engineering of IASA, to the "VP Airworthiness Management" of

Garuda Indonesia dated 15 September 2009 concerning the "application of GA Authorisation". The substance of the letter (as in original) reads as follows:

> Further to our letter No: 036/IASA/VII/09 dated August 18th 2009, requesting to re new GA Certificate of Approval for IASA, we hereby would liken your approval to extend our engineers GA Authorisation as follows:
>
> 1. Mr. Djoko Puspitono
> 2. Mr. Mark Anthony Scott
> 3. Mr. Naman Muhajir
> 4. Mr. Riza Fauzi
> 5. Mr. Robert James Hammond
>
> Attached are the application forms and supporting documents.
>
> Thank you for your attention and assistance.

115 In my view, the document is admissible as a business record under the *Evidence Act* even though the author of it, Mr Beamon, has not been called to prove it or was available for cross-examination in relation to it.

116 Under the *Evidence Act*, s 48(1)(b) allows the tender of copies of documents. The parties accept the relevance of this provision. However, documents proposed for tender under s 48 are subject to the hearsay rule found in s 59(1). The applicant objects to the tender on the ground that the document is hearsay. The respondent however submits that the business records exception to the hearsay rule, found in s 69, applies.

117 Section 69 provides as follows:

> (1) This section applies to a document that:
>
> (a) either:
>
> (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
>
> (ii) at any time was or formed part of such a record; and
>
> (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
>
> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
>
> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
>
> (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

118 The primary question is whether subs (1) applies to the document, as it is clear — and I think accepted by the applicant — that any representation in the document was made by a person, namely Mr Beamon as General Manager Engineering of IASA, who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

119 So far as s 69(1) is concerned, when broken down there are three main preconditions to the application of the section, namely:

(1) That the evidence in question constitutes a "document".

(2) That the document either "is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business" or "at any time was or formed part of such a record".

(3) That the document contains a "previous representation" made or recorded in the document in the course of, or for the purposes of, the business.

120 There is no dispute that the copy letter is a "document". In the dictionary to the Act a "document" includes "something on which there is writing". I find there is then a document for the purposes of s 69(1).

121 I am also satisfied that the document in question forms part of the records belonging to and indeed, kept, by a person, body or organisation — namely, IASA — in the course of its business of aircraft maintenance. It is not necessary that the document constitute an original document. It has been held that a carbon copy of a letter written by one company to another, where it was part of the first company's business to do so, was a "record" or "part of a record": *Compafina Bank v Australia & New Zealand Banking Group Ltd* [1982] 1 NSWLR 409.

122 The word "kept" has been construed in *Australian Securities and Investments Commission v Rich* (2005) 191 FLR 385; 216 ALR 320 at [180]-[190] to mean "retained or held". The copy letter has, self-evidently, been kept by IASA. Plainly it forms part of its "records". I so find.

123 I note it is dated 15 September 2009. This is the same date that the evidence discloses all documents to do with the renewal process were dated and suggests it was created in Indonesia at the same time as the GA-Authorisation Applications sent to Mr Scott on 18 September 2009.

124 The document was authored by an employee of IASA, who by the original sought Garuda's authorisation for particular people to work as engineers on Garuda aircraft. It was plainly enough written "for the purposes of" the business of IASA, and I so find.

125 In these circumstances, the remaining question is whether the document "contains a previous representation" made or recorded in the document in the course of, or for the purposes of, the business.

126 I consider the letter contains the following representation, namely, that the application forms and supporting documents for renewal of GA certificates of approval for IASA for the persons mentioned in the letter, including Mr Puspitono, were sent by Mr Beamon to Garuda Indonesia on or about 15 September 2009.

This is an assertion of fact, not of opinion.

127 The expression "previous representation" is defined in the dictionary to the *Evidence Act* to mean:

> A representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

128 The representation in the copy letter was not a representation made in the course of giving evidence in a proceeding. It was a representation made on or about the date shown on the letter, namely 15 September 2009, well before these proceedings were on foot, out of court and between the respondent and a third party.

129 The representation was made on an earlier occasion and was made in the course of, or for the purposes of, the business of IASA.

130 In these circumstances I find that the copy letter is capable of being admitted as a business record.

131 Counsel for the applicant nonetheless contended that the Court should, in its general discretion to exclude evidence under s 135 of the *Evidence Act*, decline to accept the document into evidence. In this regard, the Court has a discretion under s 135 to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing; or
(c) cause or result in undue waste of time.

132 Alternatively, under s 136, the Court may limit the use to be made of evidence, if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing.

133 In my view, in all the circumstances of this case, including the nature of content of the letter and the fact that it well pre-dates the matters in issue in this proceeding, there is nothing unfairly prejudicial to the applicant if the Court receives the document into evidence. It relates to an issue that could otherwise be the subject of a finding of fact by inference. There is nothing misleading or confusing about the representation contained in the document. It is not likely to result in undue waste of time. There is no real suggestion that the applicant would wish to cross-examine on that letter.

134 Nor in all of these circumstances do I see any reason, upon reception of the document into evidence, to limit its use under s 136.

135 I note that *Cross on Evidence* (8th Australian ed (JD Heydon)) at [35545], p 1364, suggests that the discretion to exclude, or limit the use of, evidence to be found in ss 135 to 137, can "in appropriate circumstances" be exercised in relation to business records. Reference is made to the Australian Law Reform Commission Report 26 at [341]-[344] and [701]-[709]. One might say that ordinarily a simple business record of an event or fact is unlikely to raise the discretionary concerns. However, if a business record contained assertions of opinion, then a court may well be inclined either to exclude or limit the use of evidence containing such a representation in a business record. But, as I have indicated, there is no opinion expressed in this case in the representation in question.

136 In the end, the probative value of the representation contained in the document outweighs any of the dangers articulated by s 135 or s 136. The evidence makes plain what happened to the applications prepared by Mr Scott on behalf of IASA that included his personality assessment of Mr Puspitono. From that representation it is reasonable to infer that the documents prepared by Mr Scott, referred to in detail above, found their way to Garuda Indonesia.

137 I now turn to Mr Scott's evidence concerning the negative assessment. Mr Scott first commenced employment with IASA as project manager, based in Perth on about 27 January 2009. Mr Scott has qualifications, current certificates of competency, licences and current authorisations concerning aircraft maintenance. He did not commence in the position of Maintenance Manager Australia until about 14 May 2009, after the May dismissal of Mr Puspitono. He reported directly to the Managing Director of IASA, Mr Fialho. At all material times he was based in offices located at Perth International Airport and Mr Searle reported to him.

138 Mr Scott says, in his affidavit setting out his evidence in chief, that he first met Mr Puspitono in early May 2009, shortly after commencing in the position of Maintenance Manager.

139 Mr Scott said he was aware of Mr Puspitono's suspension following the April incident, but was not otherwise involved in that matter. He believed, from discussions with Mr Searle, that the termination in May 2009 was due to redundancy.

140 Mr Scott recalled Mr Puspitono returning to work. He sent an email to Mr Puspitono on 23 July 2009 confirming his return and advising that his roster would be discussed with him, as it was on 24 July, as noted above.

141 Mr Scott gave evidence to the effect that, following his reinstatement on 24 July, Mr Puspitono openly relished his success in the Federal Court proceeding. For example, Mr Scott said:

- He overheard Mr Puspitono several times between his reinstatement and September 2009, when he was working on the ramp, speaking loudly and in a manner that he perceived to be arrogant and unprofessional, singing the praises of the Union and bad mouthing IASA.
- During that same period, he overheard Mr Puspitono talking in and around the office and workshop area saying words like, "I won my case against IASA" and "the Union is so good".

142 Mr Scott said he took no action about this conduct on the advice of Mr Beamon.

143 Mr Scott also said that he recalls that Mr Puspitono stopped wearing his IASA provided cap and started wearing a cap with the Union logo on it. However, he did not say anything about this to Mr Puspitono as the logo on the cap was not a safety issue and it was not compulsory to wear the IASA cap.

144 Mr Scott says he also received complaints from three other IASA engineers, or LAME, about Mr Puspitono's conduct following his reinstatement. This evidence — which was received as to the fact of the complaints, not their truth, in order to explain Mr Scott's later actions — was to this effect:

- One engineer complained in about June that he was not happy and could not work with Mr Puspitono's "unprofessional behaviour". He was making comments like "The union is so good", "I've won and IASA lost" and "I'm the man".
- Two others claimed that Mr Puspitono was destabilising the workforce by making adverse comments about IASA and he was too busy talking to do his job properly. There was also a suggestion that he refused to work with anyone other than other Indonesian engineers employed by IASA in Perth.

145 As explained above, on 31 August 2009, Mr Scott received an email from Mr Puspitono complaining about not having assistance to prepare aircraft for arrival and take off. Instead of responding with another email, Mr Scott said he went to the ramp where Mr Puspitono was working at about 3 pm on 2 September 2009, and had a general discussion with him about his duties and the duties of assisting the aircraft engineers. Mr Scott said that he explained how the engineers all work as a team. He stated that Mr Puspitono did not say much to him during the discussion but "appeared to me to be surprised that I was having this discussion with him and unsettled by what I was saying". Following the discussion, Mr Scott then assisted Mr Puspitono in setting up to

bring a Garuda airways flight in. Mr Scott gave evidence that he believed this meeting produced encouraging results, as he received reports from others that Mr Puspitono now seemed to be a changed man.

146 Mr Scott gave evidence that it was his impression from all of these things that Mr Puspitono's actions and behaviour were creating a "hostile atmosphere" in the workplace.

147 As to work performance, Mr Scott said he had personally formed the view that Mr Puspitono often appeared to do the "bare minimum" at work and to pass off as much work as he could to other engineers, particularly other Indonesian engineers. However, he never mentioned these issues to Mr Puspitono or anyone else.

148 Mr Scott says that on about September or October 2009, he had to change the work roster pattern and established the work roster of four days on and two days off, working eight hours a day per shift, due to aircraft scheduling changes caused by the start of daylight saving. He recalls that Mr Puspitono complained to him about the new work schedule and he recalls participating in a three party telephone conversation with Mr Purvinas, Mr Puspitono and Mr Tapusoa. This resulted in Mr Puspitono being "instructed by his Union to follow the IASA schedules as planned". Mr Scott also noted that Mr Puspitono wanted two hours preparation time when, in his view, one hour was more than ample. I observe that whether this meeting is the same as that of 24 July of which Mr Puspitono provides an account of is not clear on the evidence. Mr Purvinas recalled such a telephone conversation but not the date of it. Mr Scott is quite uncertain of the date of this three-way telephone discussion. In all probability it is the one which Mr Puspitono gave evidence as having occurred on 24 July 2009.

149 One of Mr Scott's duties as Maintenance Manager Australia was to make the necessary request to Garuda Indonesia to renew the authorisation of each of the LAMEs, which were due for renewal about 19 September. Mr Scott understood that all Garuda Indonesia authorised personnel authorisations needed to be renewed at the same time. Mr Scott recalls learning from Mr Lantang in mid-September that Garuda Indonesia had changed the timing so that the Garuda Indonesia authorisations expired at the same time as the individual Indonesia DGCA Airworthiness Authorities Licence.

150 In his evidence in chief, Mr Scott stated that on or about 15 September 2009, he completed the Garuda Indonesia Authorisation application forms for all IASA employees working on Garuda Indonesia aircraft at Perth International Airport, including a one page evaluation form. He sent the authorisations to John Lantang in Indonesia, to submit them to Garuda Indonesia for processing. In doing all this he said he completed renewal forms for Mr Puspitono, Mr Hammond, Mr Muhajir, Mr Fauzi and himself.

151 The evaluation form required Mr Scott to complete, amongst other sections, a section headed "Personality" that dealt with three categories: "Technical decision-making", "Quality and customer oriented", and "Relationship". Against these categories Mr Scott entered the words, respectively, "Satisfactory", "*UN*satisfactory", "*UN*satisfactory".

152 Mr Scott said he also completed an additional typed page concerning the personality assessment, which he referred to in his affidavit as "a one page annexure", setting out why "Unsatisfactory" had been registered against two of the categories. In this annexure, in respect of the Quality and customer oriented category, Mr Scott noted the following:

- Unreliable.
- Not a team player.
- Neglect of duty — on one occasion left the ramp area with aircraft unattended and did not return to despatch the aircraft.
- Is not open to correction.
- Lacks respect for senior management.
- Abrasive with fellow workers and customers.
- Argumentative.

153 In the annexure in relation to Relationship category, Mr Scott noted:

- Does not get along well with fellow workers.
- Disregards the senior management and resists carrying out lawful instructions.

154 Mr Scott says he assessed Mr Puspitono as unreliable because of what he knew of the April event.

155 Further, there were at least two occasions when he had called Mr Puspitono on his telephone during work hours but could not locate him. As a result he concluded that Mr Puspitono had left the workplace when he was rostered on to work. He could not however recall specific times and dates.

156 Mr Scott says he assessed Mr Puspitono as not a team player for several reasons. First, because he "may have been involved" in an alleged assault in the workplace. Secondly, because he refused to do any additional tasks and insisted on only doing the tasks assigned to him, rather than take up the slack as a team player. He also relied on what the other engineers told him in this regard.

157 Mr Scott says he formed the opinion that Mr Puspitono neglected his duties on one occasion by leaving the aircraft ramp area unattended and failing to return to despatch an aircraft — a further reference to the April incident. He formed the opinion that Mr Puspitono lacked respect for senior management as he had to speak numerous times to him about teamwork and doing all tasks as required and not just a specific job and because he argued the starting times when offered alternative shifts.

158 He formed the view that he was abrasive from what he had been told.

159 He formed the opinion that he did not get along with fellow workers because of the complaints he had received from three of them and because of the incident where he had witnessed Mr Puspitono ordering other engineers about on the ramp.

160 Mr Scott says he signed the form and presented it to Mr Puspitono for his signature in the level one office of the administration building. He said Mr Puspitono "appeared to read it" and did not ask any questions before signing it. His signature was witnessed by another employee, Mr Billimoria.

161 It may be noted, however, that the additional annexure prepared by Mr Scott explaining the grounds of his negative assessment, was apparently not shown to and not signed by Mr Puspitono.

162 Mr Scott says that after he prepared Mr Puspitono's evaluation he did the same for others, including one other negative assessment in the case of Mr Muhajir, and then posted them to John Lantang in Jakarta without a covering letter.

163 In the course of cross-examination of Mr Scott, a number of things Mr Scott had stated in his affidavit were challenged and changed or clarified, including:

- That Mr Puspitono was suspended and then terminated from 8 May 2009 and did not return to work until 24 July 2009, so he (Mr Scott) could not have had any dealings with Mr Puspitono until 24 July at the earliest.
- That he had little direct contact with Mr Puspitono before 24 July 2009 and was reliant on others for information about the April incident and suspension and the May termination, and following his reinstatement was largely reliant on the comments of the other engineers when it came to Mr Puspitono's performance.
- That the documents headed "GA-Authorisation Application" that Mr Scott signed in respect of each LAME, while bearing the typed date 15 September 2009, were in fact signed at various later dates. The date 15 September 2009 was inserted to "align" with the IASA application for the Garuda licence on 15 September 2009.
- That on 18 September 2009, the GA-Authorisation Application forms for each LAME were received by him from IASA Indonesia with most of the information typed on them. They "had all the dates already pre-completed into all the sheets and that was how it was printed off".
- That in the case of Mr Fauzi, Mr Hammond and himself, the GA-Authorisation Application was fully completed in Jakarta in all relevant respects, including as to section 3 Personality assessment. In the case of each of those persons, the typed assessment prepared in Indonesia by IASA in relation to each of Technical decision-making, Quality and customer oriented and Relationship was "Excellent". All that remained for Mr Scott to do was to sign the acknowledgment of the General Manager at the foot of the form in each of these cases and arrange for the applicant to sign where indicated, which they did at various dates following receipt of the forms by Mr Scott.
- In the case of each of Mr Muhajir and Mr Puspitono, the GA-Authorisation Application form was typed up in Jakarta and sent to Mr Scott as well, save that the section 3 Personality was not completed in Jakarta. It remained for Mr Scott to complete that section and then arrange for each LAME to sign the form.
- In the case of Mr Muhajir, each category in the Personality section was marked by him as "*UN*satisfactory". In the case of Mr Puspitono he marked him as "Satisfactory" in Technical decision-making, but "*UN*satisfactory" in relation to Quality and customer oriented and Relationship.
- Mr Scott estimated that Mr Puspitono signed the GA-Authorisation Application form on 23 September 2009 — not 15 September. Mr Scott insisted that Mr Puspitono did sign the form and rejected the proposition, at least by inference, that Mr Puspitono had never signed the form or that the form produced in evidence was a fabrication.
- That at no time, when Mr Scott invited Mr Puspitono to sign the GA-Authorisation Application, did he read the form out to him or tell him about or explain to him the assessment. Mr Scott said he did not bother to explain the assessments he had made:

> Because he just signed it. He had the choice to read it, go through it and we could have gone through it, if he had have queried it. By signing it

and having nothing to say he accepted what was written on there.

Mr Scott said he felt no obligation to point out the unsatisfactory assessments that he had made in the form.

- That Mr Muhajir, while receiving an unsatisfactory assessment from Mr Scott in relation to each category in the Personality section, did not later have his authorisation withdrawn or not renewed by Garuda, as did Mr Puspitono soon afterwards.
- That Mr Scott did not himself send the applications directly to Mr Lantang in Jakarta, but sent them to the IASA head office in Perth where he understood they were couriered to Mr Lantang in Jakarta.
- That following his approach to Mr Puspitono on 2 September 2009, Mr Puspitono, by all reports, had changed his ways and that apparently Mr Scott's "heart-to-heart" with him had achieved encouraging results. However, this did not change his assessment of Mr Puspitono about three weeks later as he considered his performance from what he knew of the whole of the preceding year.
- That he came to learn, on or about 14 October 2009, following a telephone conversation with Mr Lantang, that Garuda Indonesia had decided not to renew the authorisation of Mr Puspitono.
- That he did not terminate Mr Puspitono's employment. He was not involved in the decision to terminate it and no-one consulted him prior to the decision being made. He found out about Mr Puspitono's termination from Mr Tapusoa on or about 16 October 2009. Up to then he was expecting Mr Puspitono to return to work from annual leave on about 10 November 2009.

**Mr Puspitono's evidence concerning events leading to the October 2009 termination**

164 Mr Puspitono says — and this is not in dispute — that prior to receiving the termination letter dated 16 October 2009, he was not aware that his GA Authorisation had not been extended and had not been provided with any letter from Garuda to that effect. He did not have any contact with Garuda concerning the renewal of the authorisation. Accordingly, he had no opportunity to respond to any concerns about his authorisation.

165 Mr Puspitono says that the first time he saw information from IASA to Garuda about this was when he was shown a copy of Mr Tapusoa's affidavit, sworn 22 March 2010, filed in this proceeding. That included IASA's letter to Garuda of 6 October 2009, as well as an application form purportedly signed by him on 15 September 2009.

166 As to these various workplace allegations made against him, Mr Puspitono says, in the affidavit responsive to that of Mr Scott, that he was suspended through May and June up to 24 July 2009, and so did not make any of the comments attributed to him then. He denies the general allegation that he bad mouthed IASA. He admits, however, he did on occasion talk with colleagues about his case and did confirm that the Union had supported him strongly, but only did this when asked by other employees. He denies he was arrogant. He says Mr Scott never raised any concerns with him. Mr Puspitono says he did not go out of his way to harass, or brag, to other employees about his circumstances. Mr Scott did not raise any concerns with him in any event.

167 Mr Puspitono denies he was ever unprofessional in his dealings with colleagues or that he ever said words to the effect "I am the man".

168 Mr Puspitono denies other allegations or that he ever threatened other people in the workplace or said words attributed to him.

169 He denies that he failed to associate with other team members and did not deliberately only associate with Indonesian born colleagues. He never insisted that he should only work with Indonesian employees.

170 Mr Puspitono recalls the discussion with Mr Scott on 2 September 2009. He agrees that Mr Scott and he discussed the issue of the importance of teamwork. However, he says he was not "unsettled" by what Mr Scott was saying, he was simply disappointed that his genuine concerns had not been addressed. He felt that Mr Scott was protecting the non-Indonesian engineers. He agrees however that Mr Scott assisted him in bringing in the Garuda Indonesia flight that afternoon.

171 Mr Puspitono says he was never aware of any allegations that other employees felt intimidated by him and did not want to work with him. Particularly, there was never a complaint about him creating a hostile atmosphere in the workplace. He considered that he worked well with colleagues, including his Indonesian colleagues, and always worked as part of the team.

172 He agreed however that he continued to be concerned about his work rosters.

173 Mr Puspitono denies signing the assessment form prepared by Mr Scott on 15 September 2009. He states that he was not at work on 15 September 2009 and never saw the form referring to the assessment made by Mr Scott. He denies the signature on it is his. He says that Mr Scott never raised with him any concerns relating to his relationships with others or his customer relationship skills.

174 He rejects the basis upon which Mr Scott says he formed the opinion that his personality was unsatisfactory in the respects noted. He says any such assessments are not fair and reasonable. They were not based on his work performance. They were not based on his interactions with Mr Scott, as they had limited contact. It was not based on complaints or concerns that he had been aware of.

175 As to the complaint that he did not answer the telephone, there could be a number of reasons for that. He did not agree that he was absent from the workplace.

176 Mr Puspitono also rejects the allegation that he was involved in an assault. He never witnessed an assault. He did not refuse to assist IASA with its investigation but at the same time did not want to involve himself unnecessarily in something he did not see.

**Whether Mr Puspitono signed the GA-Authorisation Application**

177 Having recounted the narrative evidence adduced by the respondent, principally through Mr Scott, and that of Mr Puspitono, there are relatively few disputed facts in relation to which the Court needs to make findings.

178 For example, while Mr Puspitono and the Union strongly reject the unsatisfactory assessments made by Mr Scott and the basis upon which those assessments were made, the fact that Mr Scott recorded the assessments that he

made in the way that he did, is not in dispute. Indeed, in respect of many of the events recounted above, the documentary record corroborates the evidence or itself constitutes the narrative of what occurred at material times.

179 However, one factual dispute that requires resolution is that relating to whether or not Mr Puspitono signed the GA-Authorisation Application on 23 September 2009, as asserted by Mr Scott.

180 Mr Puspitono's position is that he did not sign any such document. Part of his response is to say that on 15 September 2009, the date shown on the form, he was somewhere else and could not have signed the document that day.

181 Mr Scott's evidence in chief suggested that the application was indeed signed on the typed date it bore — namely 15 September 2009. However, as noted above, in cross-examination this was clarified. In fact, Mr Scott did not receive the typed application form from IASA Indonesia until 18 September. He then made arrangements for the various LAME to call by his office to sign their application. He saw Mr Puspitono, he says, on 23 or 24 September 2009. In the end he believed it was 23 September 2009.

182 While Mr Puspitono maintained that he had not signed the document, I am satisfied, on the balance of probabilities, that he did and that he is mistaken in his belief to the contrary. There is no particular reason to doubt that he did sign the document. It was a simple one page document. I accept it was presented to him by Mr Scott on or about 23 September. As Mr Scott explained in cross-examination, he made nothing at all of the document, so far as its potential significance was concerned, when Mr Puspitono called at his office to sign it. This may well explain why Mr Puspitono has no recollection of signing it. Mr Scott took absolutely no steps and made no effort to bring to Mr Puspitono's attention that there were negative assessments made in it. Nor is there any evidence to show that Mr Scott drew to Mr Puspitono's attention the annexure to the application.

**The basis of the claims**

183 The primary claims made in this proceeding arise under Pt 3-1 of the FW Act. That part of the FW Act has the following objects, as set out in s 336:

> (a) to protect workplace rights;
> (b) to protect freedom of association by ensuring that persons are:
> (i) free to become, or not become, members of industrial associations; and
> (ii) free to be represented, or not represented, by industrial associations; and
> (iii) free to participate, or not participate, in lawful industrial activities;
> (c) to provide protection from workplace discrimination;
> (d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

184 By virtue of s 338, Pt 3-1 applies to action taken by a constitutionally-covered entity. A constitutionally-covered entity is defined by s 338(2) to mean, in the current setting a constitutional corporation, which the respondent IASA is.

185 Section 340(1) provides that a person must not take "adverse action against another person", by reason of or account of certain rights or for certain purposes namely:

(a) because the person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

186 The expression "adverse action" is relevantly defined by s 342 to include circumstances where an employer:

- dismisses an employee; or
- injures an employee in his or her employment; or
- alters the position of an employee to the employee's prejudice.

187 The expression "workplace right" is given meaning by s 341 as follows:

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

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee — in relation to his or her employment.

188 A "workplace right" depends on there being a relevant "workplace instrument", among other things. As to the expression "workplace instrument", this is defined by s 12 as follows:

*Workplace instrument* means an instrument that:

(a) is made under, or recognised by, a workplace law; and

(b) concerns the relationships between employers and employees.

189 This in turn raises the question of what is a relevant "workplace law", which is defined by s 12 as follows:

*Workplace law* means:

(a) this Act; or

(b) Schedule 1 to the *Workplace Relations Act 1996*;

(c) the *Independent Contractors Act 2006*;

(d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).

190 Section 346 of the FW Act provides that:

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage in, industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

191 The term "industrial activity" is given meaning by s 347, which provides that:

A person *engages in industrial activity* if the person:

(a) becomes or does not become a member, or remains or ceases to be, an officer of member of an industrial association; or

(b) does, or does not:

(i) become involved in establishing an industrial association; or

(ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or

(iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or

(iv) comply with a lawful request made by, or requirement of, an industrial association; or

(v) represent or advance the views, claims, or interests of an industrial association; or

(vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or

(vii) seek to be represented by an industrial association.

192 In recognition of the importance of the freedom of association object of the FW Act, s 361 has the effect of reversing the onus in contravention proceedings that action was taken for a particular reason or with a particular intent, "unless the person proves otherwise".

193 In this proceeding, the Union submits "adverse action" as defined in s 342 was taken by IASA against Mr Puspitono:

(1) when IASA gave Mr Puspitono four weeks notice of dismissal on or about 16 October 2009;

(2) when IASA injured Mr Puspitono in his employment when it dismissed him;

(3) when IASA altered the position of Mr Puspitono to his prejudice when it dismissed him; and

(4) because IASA solicited, counselled, procured, induced or caused Garuda Indonesia to refuse to provide a renewal to Mr Puspitono, which had the effect of denying him the opportunity of continuing to certify Garuda planes and so had the effect of injuring him in his employment or altering his position to his prejudice.

194 As to (4) the Union says there was relevant adverse action when the negative assessment was made, as well as when it was given to Garuda.

195 The Union contends the adverse action taken was because Mr Puspitono exercised relevant workplace rights and engaged in industrial activity as defined by the FW Act, including in the period prior to 1 July 2009.

196 IASA raised a number of "jurisdictional issues" to do with the existence of any "workplace instrument" under any "workplace law" for the purposes of the FW Act. I should deal with those issues before turning to the question of whether the substantive claims are made out. The Union accepts that unless it can establish relevant "workplace rights" arising under a relevant "workplace instrument" and "workplace law", this proceeding must fail.

**Jurisdictional issue — "workplace instruments"**

197 First, IASA denies that the employment agreement between it and Mr Puspitono, which they accept is properly described as an ITEA, is a "workplace instrument" for the purposes of s 340(1)(a) of the FW Act. If it is not, then the applicant concedes it is unable to prove the existence of any "workplace rights" as defined in the FW Act, and the contravention proceedings must fail. The respondent's argument is detailed, relying on a careful account of the legislative steps that have led to the current state of the law. I will largely reproduce the respondent's written contentions in this regard.

198 IASA note that s 340(1)(a) came into operation on 1 July 2009, when the FW Act commenced for all relevant purposes. The concept of a "workplace instrument" was also introduced as from that day by the definition of that term in s 12. In this regard IASA emphasise that a workplace instrument is an instrument that is made under, or recognised by, a "workplace law".

199 IASA complain that for the first time, in its opening address, the applicant particularised this aspect of its claim, contending that the ITEA is a workplace instrument because it is a workplace agreement that is recognised by a workplace law, namely, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act).

200 IASA note that the ITEA was made at the time of the former WR Act. It accepts that IASA and Mr Puspitono were parties to the ITEA and that the employee had the benefit of it. The respondent argues however that the ITEA is not a "workplace instrument" as defined.

201 IASA argue that the term ITEA replaced the term "AWA" when the WR Act was amended in order to repeal the making of AWAs: see Item 20 of Sch 1 to the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) (TFF Act). Section 326 of the WR Act was inserted into the WR Act to enable the making of ITEAs: see Item 1 of Sch 1 to the TFF Act. At the same time, the definition of "workplace agreement" in s 4(1) of the WR Act was amended to replace the term AWA with the term ITEA: see Item 20 of Sch 1 to the TFF Act. Accordingly, IASA contends, once made, an ITEA was a workplace agreement for the purposes of the WR Act.

202 IASA say the parties approved the ITEA by signing and dating it, as required by s 340(1) of the WR Act. Section 342(1) of the WR Act required that the employer then lodge the ITEA with the Workplace Authority Director, who had to issue a receipt for it both to the employer and the employee, under s 345.

203 An ITEA came into operation either when it was lodged or on the seventh day after the date specified in a notice issued under s 346M(1) or s 346Q(2) of the WR Act: see s 347(1)(a) to (b) of the WR Act. Whether it was one date or the other depended on whether the ITEA was made with:

- a person whose employment did not commence more than 14 days before the day on which the ITEA was made, and either had not previously been employed by the employer or had previously been employed by the employer in employment that had not ceased for reasons including that the employer would re-employ the person under an ITEA; or
- a person who was in an employment relationship with the employer that was regulated by an ITEA or another specified agreement,

see s 326(2)(b)(i) to (iii) of the WR Act.

204 Accordingly, the respondent contends that a workplace agreement is a WR

Act instrument. IASA contends that Item 2(2) of Sch 3 to the Transitional Act identifies certain instruments as "WR Act instruments". Item 3(1) of Sch 2 to the Transitional Act provides that WR Act means the *Workplace Relations Act 1996*. For the purposes of the Transitional Act, save for certain Parts that are not relevant for current purposes, Schs 2 to 22 of the Transitional Act are known as transitional schedules: see Item 1 of Sch 2 to the Transitional Act.

205 IASA then contend that by reason of Item 4(1)(a) of Sch 2 to the Transitional Act, unless a contrary intention appears, expressions used in a transitional schedule that were defined in the WR Act (other than Sch 1 to that Act) have the same meanings in the transitional schedule as they had in the WR Act. Schedule 3 to the Transitional Act is a transitional schedule. Therefore, as the expression "workplace agreement" was defined in the WR Act to include an ITEA, the same expression "workplace agreement" as it appears in Item 2(2)(c) of a transitional schedule such as Sch 3 to the Transitional Act, includes an ITEA.

206 IASA contend that a WR Act instrument continues in existence in accordance with Sch 3 of the Transitional Act (see Item 2(1) of Sch 3 to the Transitional Act) *if* it becomes a "transitional instrument": see Item 2(3) of Sch 3 to the Transitional Act. Thus, an ITEA, being a workplace agreement and, as such, a WR Act instrument, continues in existence with Sch 3 to the Transitional Act if it becomes a transitional instrument.

207 The question then posed by IASA is, "What is a transitional instrument?" It contends that a WR Act instrument is a transitional instrument if it is of the kind specified in either of Items 2(3)(a) to (c) of Sch 3 to the Transitional Act. It says no particulars have been provided by the applicant of what it contends is the case in this regard.

208 Accordingly, the respondent contends that when considered against this legislative background and history, the Union's contention that the ITEA is a workplace instrument raises two issues:

- first, as a matter of construction, whether Sch 3 or any other part of the Transitional Act as it relates to an ITEA is a law "that regulates the relationships between employers and employees", such that the Transitional Act is a "workplace law" within the meaning of para (d) of the definition of that term in the FW Act;
- secondly, whether the ITEA became a transitional instrument.

209 The respondent contends that the starting point of an analysis of these issues is in Item 3(3) of Sch 2 to the Transitional Act, which relevantly explains that:

> If an item of the transitional Schedules provides for the WR Act, or a provision or provisions of the WR Act, to continue to apply on or after the WR Act repeal day …, the WR Act, or the provision or provisions, continue to so apply despite the WR Act repeal.

210 The expression "WR Act repeal" is defined in Item 2 of Sch 2 to the Transitional Act to mean "the commencement of Schedule 1 [to the Transitional Act]". Schedule 1 commenced on 1 July 2009 — that is, the WR Act repeal day: see the definition of this term in Item 2 of Sch 2; and see discussion in *Deva v University of Western Sydney* (2010) 197 IR 411 at [11].

211 IASA says the object of the Transitional Act as a whole can be divined from its long title: it is an Act to amend laws, and deal with transitional matters, in

connection with the FW Act, and for other purposes. Consistent with this, Sch 3 to the Transitional Act provides for the continued existence of awards, workplace agreements and certain other WR Act instruments.

212 IASA then note that Pt 2 of Sch 3 to the Transitional Act provides for the continued existence of WR Act instruments as transitional instruments: see the title to Pt 2 of Sch 3. This is achieved by providing that certain aspects of transitional instruments persist as "if the WR Act had continued in operation"; in other words, as if the WR Act had never been repealed.

213 In so doing, Pt 2 of Sch 3 to the Transitional Act effectively provides that certain provisions of the WR Act continue to apply to transitional instruments. For example, consider Item 3(1) of Pt 2 of Sch 3 to the Transitional Act, which states that "a transitional instrument covers the same employees, employers and any other persons that it would have covered … if the WR Act had continued in operation"; and Item 3(2) of Sch 3 to the Transitional Act, which states that:

> A transitional instrument applies to the same employees, employers and any other persons the instrument covers as would, if the WR Act had continued in operation, have been:
>
> (a) required by the WR Act to comply with terms of the instrument; or
>
> (b) entitled under the WR Act to enforce terms of the instrument.

214 The respondent contends in effect these provisions concern the matters of coverage and application of transitional instruments. IASA say the relevant provisions of the WR Act that applied to workplace agreements such as ITEAs in relation to such matters were s 340 of the WR Act, which prescribed who was bound by a workplace agreement (namely, the relevant employer and employee); and s 721(1) of the WR Act, which provided that a party to an ITEA who suffered loss or damage as a result of its breach by another party could recover the amount of the loss or damage in an eligible court. The effect of Items 3(1) and (2) of Pt 2 of Sch 3 to the Transitional Act is to continue to apply those provisions to a workplace agreement that becomes a transitional instrument. In so doing, it is plain that it is not Items 3(1) and (2) of Sch 3 to the Transitional Act that regulate those aspects of the relationship between the employer and employees who are parties to the workplace agreement. Rather by reason of such items of Sch 3, the relevant provisions of the WR Act continue on as the laws that regulate such aspects of the relationship.

215 IASA thus contend that other items of Pt 2 of Sch 3 of the Transitional Act do not regulate employer/employee relationships. It contends that Items 4(1), 5(1) and 5A(1) of Pt 2 of Sch 3 are to similar effect as Items 3(1) and (2) of Pt 2 of Sch 3. Item 6 of Pt 2 of Sch 3 to the Transitional Act concerns the meaning of the reference to the commission in a transitional instrument; it does not regulate the relationship of employers and employees. Item 7 of Pt 2 of Sch 3 to the Transitional Act concerns preservation of rights under a transitional instrument if it terminates or ceases to apply. Those rights were created when the transitional instrument was made under the WR Act and, therefore, Item 7 of Pt 2 does not regulate the relationship of employers and employees. Item 8 similarly concerns the relationship between transitional instruments and law; it does not regulate the relationship between employers and employees.

216 Additionally, IASA contends that Pt 3 of Sch 3 of the Transitional Act provides for how transitional instruments can be varied and terminated: Item 9 of Sch 3. Item 10(1)(a) of Pt 3 of Sch 3 to the Transitional Act permits variation to remove ambiguity or uncertainty in the instrument. In doing so, Item 10(1) is

not a law that regulates the relevant employer/employee relationship; it is simply a mechanism to ensure that the transitional instrument can be varied to reflect the intention of parties to it.

217 Items 10(1)(b) and (c) of Pt 3 of Sch 3 to the Transitional Act permit variations to a transitional instrument to accommodate the relationship between it and another instrument (that is, a modern award), IASA contend; and the relationship between it and Pt 3-1 of the FW Act. As such, the respondent contends these items are not laws that regulate the relevant employer/employee relationship, but are laws that regulate the relationship between the instrument and other instruments and laws. It contends Item 11 of Pt 3 of Sch 3 to the Transitional Act is similar in that it permits variation to a transitional instrument to accommodate the relationship between it and anti-discrimination laws.

218 IASA submit that Items 17 to 19 of Pt 3 of Sch 3 to the Transitional Act apply to workplace agreements such as ITEAs, if they become a transitional instrument, because an ITEA is known as an "individual agreement-based transitional instrument": see definition Item 2(5)(d)(i) of Pt 2 of Sch 3 to the Transitional Act. However, Items 17 to 19 of Pt 3 of Sch 3 to the Transitional Act do not regulate the employer/employee relationship — they simply provide for termination of the transitional instrument. IASA argue that the regulation of the employer/employee relationship whilst the instrument is in operation, is by the continued operation of the various provisions of the WR Act kept alive by items such as Items 3(1) and (2) of Pt 2 of Sch 3 to the Transitional Act as discussed earlier.

219 IASA says that Pt 4 of Sch 3 to the Transitional Act concerns the relationship between transitional instruments and the Australian Fair Pay and Condition Standards — accordingly, it does not regulate the relationship between employers and employees. Part 5 of Sch 3 to the Transitional Act concerns the interaction between transitional instruments and the National Employment Standards (see Div 1); the interaction between transitional instruments and FW Act instruments (see Div 2); and other general provisions about how the FW Act applies in relation to transitional instruments (see Div 3) — and does not regulate the relationship between employers and employees. Part 6 of Sch 3 is in relation to the preservation of redundancy provisions in agreements — and of itself does not regulate the relationship between employers and employees.

220 IASA further contend that Items 9(1)(e) and (2)(d) of Pt 3 to Sch 3 to the Transitional Act direct attention to Sch 8 to the Transitional Act. Part 2 of Sch 8 contains transitional provisions relating to workplace agreements. Division 4 and following of Pt 2 of Sch 8 concern ITEAs that become transitional instruments.

221 The respondent says that Div 4 of Sch 8 to the Transitional Act relates to ITEAs made before the WR Act repeal day. Item 14(2) of Div 4 applies various provisions of Pt 8 of the WR Act to an ITEA made before the WR Act repeal day: see Item 14(2) of Div 4 of Sch 8 to the Transitional Act.

222 The respondent says that, as with the items in Sch 3 to the Transitional Act discussed earlier, in so doing, Item 14(2) of Div 4 of Part 2 of Sch 8 simply applies certain provisions of the WR Act to a workplace agreement. Consequently, it is those provisions of the WR Act that regulate the relevant employer/employee relationship, not Div 4 of Sch 8 to the Transitional Act.

223 The respondent says that, in similar fashion, Div 5 of Pt 2 of Sch 8 to the Transitional Act, which concerns transitional provisions relating to variations of

ITEAs made before the WR Act repeal day, applies various provisions of Pt 8 of the WR Act to an ITEA made before the WR Act repeal day: see Item 16(1) of Sch 8 to the Transitional Act. For the same reasons as concern Div 4 of Sch 8 to the Transitional Act, Div 5 of Pt 2 of Sch 8 does not regulate the relationship between employers and employees. Similarly Div 6 of Pt 2 of Sch 8, Div 7 of Pt 2 of Sch 8, Div 8 of Pt 2 of Sch 8 and Div 9 of Pt 2 of Sch 8 cannot be characterised as laws that regulate the relationship between employers and employees.

224 Consequently, IASA submits that on a plain reading of para (d) of the term "workplace law" in s 12 of the FW Act, it is apparent that to be a workplace law, the law in question is itself the one that regulates the relationships between employers and employees.

225 The respondent submits that none of the relevant items of Sch 3 to, or any other provision of, the Transitional Act constitute laws "that" (of themselves) regulate the relevant relationships. Instead, all of such items either effectively continue the operation of relevant provisions of the WR Act with the result that it is those provisions *of the WR Act* "that" regulate the relevant relationships; or concern the mechanics of various matters such as the variation or termination of transitional instruments. Accordingly, none of such provisions of the Transitional Act constitute a workplace law within the meaning of para (d) of the definition in the FW Act. Consequently, the ITEA in question in this proceeding is not an instrument that is recognised by a workplace law and, therefore, is not a workplace instrument for the purpose of this proceeding.

226 The Union contends that on any plain and sensible reading the Transitional Act is a law of the Commonwealth that "regulates the relationships between employers and employees".

227 Insofar as the word "regulate" means to control or supervise by means of rules and regulations, the Unions submits it is clear that the Transitional Act continues to regulate the relationship between employers and employees.

228 The Union says evidence of this "regulation" is evidenced by the fact that the Transitional Act continues to provide for the very existence of an ITEA made under previous legislation.

229 The Union notes that the Transitional Act provides in Sch 3 for the "Continued existence of awards, workplace agreements and certain other WR Act instruments", including — notably — ITEAs. Schedule 3, Pt 2, cl 2 provides that the following instruments are defined as WR Act instruments:

> (c) a workplace agreement;
>
> Note 1: Workplace agreements are either collective agreements or ITEAs.

230 Consequently the Union submits there can be no doubt that ITEAs are "workplace instruments" being recognised by the Transitional Act which is a relevant law of the Commonwealth and, with respect to IASA, so much was admitted when it was challenged on this point by the Court in the course of argument.

231 The Union further submits that the Transitional Act confers duties and functions upon Fair Work Australia — a creature of the FW Act — in connection with, inter alia, the variation and termination of ITEAs.

232 In these circumstances, the Unions submits the Court should accept that the Transitional Act is a workplace law that recognises the ITEA.

233 The Union additionally contends that the ITEA, on its face, regulates the

relationship between the employer, IASA, and the employee, Mr Puspitono. There can be no serious dispute about this and, in fact, IASA admitted that Mr Puspitono had the benefit of the ITEA until at least 31 December 2009, in [5] of its defence in the proceeding.

234 Both parties recognise that the Court must give effect to the definitions of "workplace law" and "workplace instrument" as they are found in s 12 of the FW Act. In my view, the argument of the respondent, to the effect that the Transitional Act does not of itself regulate relationships between employers and employees when it provides for the continuance of an ITEA, should be rejected. I understand the argument put on behalf of the respondent. But it advances a constrained view of a law "that regulates the relationships between employers and employees". It depends on that expression being interpreted to mean a law that directly impacts, whether in a positive of negative way, or authorises a court or some other body to make decisions that directly impact, on, or on the exercise of, particular rights, duties or obligations that define the relationships of employers and employees. No doubt laws of such a description would very clearly be within the definition of a "workplace law" provided by s 12 of the FW Act. However, that is not to say a law that preserves the underlying agreement that gives rise to such rights, duties and obligations does not also answer the description.

235 In my view, the Transitional Act "regulates the relationships between employees and employers" by expressly providing that an ITEA has force and effect and continues to govern the relationship between an employee and employer. In this regard it is useful to note that the verb "regulate" (which is not defined in the WR Act) is defined by the *Macquarie Dictionary* (4th ed) in the following ways:

> 1. to control or direct by rule, principle, method, etc.
> 2. to adjust to some standard or requirements, as amount, degree, etc: *to regulate the temperature*
> 3. to adjust so as to ensure accuracy of operation: *to regulate a watch*.
> 4. to put in good order: *to regulate the digestion*.

The *Shorter Oxford English Dictionary* (5th ed) defines "regulate" as:

> 1. control, govern, or direct by rule or regulation: subject to guidance or restriction: adapt to circumstances or surroundings. Bring or reduce (a personal group) to order.
> 2. alter or control with reference to some standard or purpose; adjust (a clock or other machine) so that the working may be accurate.

236 For the purposes of administrative law, courts have contrasted the concept of regulation with that of prohibition. In *Country Roads Board v Neale Ads Pty Ltd* (1930) 43 CLR 126 at 133, Knox CJ, Starke and Dixon JJ noted that the word "regulate" primarily bears a restrictive meaning, which implies the continued existence of the thing to be regulated. By contrast, the power to prohibit an activity totally carries with it an understanding that the activity may be totally prohibited or permitted subject to some form of regulation.

237 The Transitional Act, by recognising and giving legal effect to an ITEA, gives legal life to an agreement which itself prescribes the rights, duties and obligations governing an employment relationship and assumes its continued existence. Given that the agreement is properly characterised as one which regulates the relationship between the employee and the employer, so too, in my

view, is a law which recognises and gives legal life to the agreement. Put another way, the law thus adapts the agreement to the circumstances of the employee and employer and, in that sense, regulates the relationship, or controls it. I am not satisfied that the legislative history recounted above and relied upon by the respondent requires any different view to be adopted.

238 In these circumstances, I am satisfied that the Transitional Act is a "workplace law" and consequently the agreement is a "workplace instrument".

239 I should add that, in my view, for the same reasons, the Transitional Act plainly "concerns" the relationship between employees and employers, as required by the s 12 of the FW Act definition of a "workplace instrument".

**Whether the applicant has pleaded and proved there is an ITEA**

240 I should at this point also deal with an alternative argument put by IASA, that there is no plea or evidence that the ITEA in this proceeding became a transitional instrument.

241 IASA say that, as is evident from Item 2 of Pt 2 of Sch 3 to the Transitional Act, the fact that the ITEA was a workplace agreement as referred to in Item 2(2)(c) of Sch 3 to the Transitional Act, does not of itself mean that it became a transitional instrument. IASA contend that in order to do so, it was necessary that the ITEA, as a matter of fact, be one of the instruments described in Items 2(3)(a) to (c) of Sch 3 to the Transitional Act — for example, a WR Act instrument (ie a workplace agreement) that was in operation immediately before the WR Act repeal day: see Item 2(3)(a) of Sch 3 to the Transitional Act.

242 IASA admitted in its defence that the ITEA was made, and that Mr Puspitono had the benefit of it. However, in light of the respondent's denial that the ITEA was a workplace instrument, that admission cannot be understood as being an admission that the ITEA became a transitional instrument in some unidentified manner.

243 IASA says that if the applicant contends, for example, that the ITEA became a transitional instrument because it was a WR Act instrument that was in operation immediately before the WR Act repeal day, as provided for in Item 2(3)(a) of Sch 3 to the Transitional Act, then it should have pleaded the material facts in support of such a contention — for instance, that the ITEA was lodged with the Workplace Authority Director, or a relevant notice had been issued — which, if proven by the Union, would have established that the ITEA became a transitional instrument. No such facts are pleaded in the statement of claim, nor was anything particularised in the applicant's opening and there is no evidence that establishes it one way or the other.

244 The respondent says that the fact the ITEA became a transitional instrument is an essential element for the applicant to establish in order to prove that the ITEA was a workplace instrument. There is no basis upon which to find that it did become a transitional instrument. Accordingly, the applicant cannot establish that the ITEA in question was a workplace instrument.

245 The Union's responds to this alternative submission by contending that, in the circumstances, it is not relevant or necessary to plead anything apart from the fact Mr Puspitono was employed under an ITEA and had the benefit of an ITEA with IASA. IASA admitted he was entitled to the benefit of an ITEA in [5] of the defence in the proceeding.

246 The Union says that, having admitted the ITEA was in force between the parties (and the evidence clearly establishes that the parties were reliant on it,

given that Mr Fialho emailed Mr Puspitono and Mr Purvinas referencing the need to comply with the agreement), it is simply "incomprehensible" for the respondent now to submit that the ITEA was not a transitional instrument for the purposes of these proceedings. It was IASA itself that pleaded that the ITEA remained in force with a nominal expiry date of 31 December 2009 as set out in [5] of the defence.

247 The Union says the character of the ITEA, and its operation, is ultimately a matter of law. In the premises, and on the basis of the pleading that the ITEA was in existence, the acceptance in the defence that the ITEA was in existence and relied upon (whether or not it was accepted as being a "workplace instrument" which is a matter for legal construction rather than pleadings) and the evidence establishing that both parties relied on the ITEA, the Court can comfortably find that the ITEA by operation of the Transitional Act, is taken to be a workplace instrument.

248 The Union says the admission by IASA was not contradicted by any evidence that it was able to bring to the proceedings. In the premises, the Court is entitled to rely on the admission where there is no reason to doubt its correctness. The evidence clearly points to the existence, and reliance of the parties upon the ITEA.

249 In the circumstances of this case, I consider, in light of the pleading in [5] of the defence of the respondent and the manner in which this proceeding has proceeded to trial, that I should accept the submissions made on behalf of the Union in relation to this alternative point.

250 It is far too late in the piece for the respondent, at trial, to attempt directly or indirectly to resile from the pleading in [5] of the defence. Until the trial commenced, that there was an ITEA in relevant form for the purposes of the FW Act, was not in issue. On the basis of the pleadings and the evidence of the parties, I am not prepared either to allow, in effect, the withdrawal of the [5] plea or the taking of a point that the Union has not proved that this particular agreement was registered, or the like in order to contend the statutory character of an ITEA has not been made out. In my view, it is appropriate for the Court to treat [5] of the defence as an admission that the ITEA was an ITEA for the purposes of the FW Act. The admission in [5] of the defence had the effect, in my view, of narrowing and identifying what was bona fide in dispute in the proceeding: see *Damberg v Damberg* (2001) 52 NSWLR 492 at [154] per Heydon JA (as his Honour then was). That the ITEA was an ITEA for the purposes of the FW Act in this proceeding was not in issue.

### Jurisdictional issue — whether the FW Act applies to pre-1 July 2009 conduct

251 The respondent next contends that each claim of contravention impermissibly relies upon conduct that occurred prior to 1 July 2009, when the WR Act was still in operation, and so is incapable of being characterised as a "workplace right" or the exercise of workplace right or a denial of the right to engage in industrial activity, for the purposes of the FW Act.

252 The respondent's argument is put in two ways. First, that prior to 1 July 2009 and the commencement of the FW Act, there was no relevant "workplace law" to support the "workplace right". The respondent's argument in this regard is detailed and carefully framed and I will largely repeat it from the respondent's written closing submissions.

253 In this regard, it is said that the term "workplace law", as it is used in s 341(1)(b) of the FW Act has the meaning ascribed to it in the definition of that term in s 12 of the FW Act. It is apparent from those portions of the statement of claim relied on that the applicant contends that the WR Act is a "workplace law" and that the freedom of association proceedings were therefore brought under a workplace law.

254 The respondent says the definition of the term "workplace law" came into effect as from 1 July 2009. Save for Sch 1 to the WR Act, the rest of the WR Act was repealed from that day (see Sch 1 to the Transitional Act), a fact that is reflected in the definition of the term "workplace law": see para (b) of the definition of the term "workplace law". Consistent with this it is plain from the express reference to Sch 1 to the WR Act and para (b) of the definition of the term "workplace law" that none of the remaining provisions of the WR Act constitute a workplace law.

255 The respondent says none of the provisions particularised in [26] of the amended statement of claim, as being particular provisions of the WR Act pursuant to which the freedom of association proceeding was brought, are within Sch 1 to the WR Act. Hence, none of those provisions are a workplace law.

256 For these reasons, the respondent submits that the facts pleaded in [18]-[30] of the statement of claim and, to this extent in [36]-[38], do not disclose any cause of action that Mr Puspitono exercised a workplace right by initiating or participating in a process or proceedings under a workplace law and its claim should be dismissed on this basis.

257 The Union in response contend that the premise of the respondent's argument — that the WR Act is not a workplace law — is startling and should be rejected. It would mean, for example, that all union activity undertaken prior to the introduction of the FW Act could not be protected from any adverse action which occurred under the FW Act.

258 The Union contends that it must be steadily borne in mind that recourse to a right invoked under the WR Act is in no special category, but one of a number of "workplace laws" called up by s 12 — "any other law of the Commonwealth, a State or Territory that regulates the relationships between employers and employees". The sweep of the section is broad and exactly the same considerations would have applied had Mr Puspitono commenced proceedings under a state occupational health and safety law (specifically recognised by s 12) or under a state industrial relations law regarding his award rights, had a state award or agreement applied to him rather than the ITEA. In other words, the "workplace law" can be any law that fits the description under which the worker initiated or participated in proceedings.

259 The Union says that as the use of the past tense in s 340(1)(a)(ii) — "has, or has not, exercised" — suggests, the definition of a "workplace law" in s 12 does not require that the law actually apply to the employee or person who seeks to rely on it at the time of the impugned act — that is, when the dismissal occurred. It can (and often will) relate to an earlier event. The definition of workplace law simply provides that the law sought to be invoked must be "any other law of the Commonwealth". It does not matter, for the purposes of the definition, whether the WR Act continues to regulate the relationship between the particular employee and the particular employer in all or any of its aspects at the moment the impugned conduct occurred. All that is required is that there be

a law of the Commonwealth; that the law in question regulates the relationship between employers and employees; and that a right under that law was invoked, relied upon or revoked.

260 I accept the argument put on behalf of the Union. There is nothing in s 340 or s 346 concerning the proscribed adverse action that suggests that the particular workplace right identified by the FW Act and currently relied upon for the purpose of making out an adverse action case in relation to adverse action that occurred after 1 July 2009, may not have been conferred or have arisen under other legislation, or indeed other earlier legislation since repealed. The FW Act introduced the concept of a "workplace right", but it is given particular content by the FW Act, such that it includes the rights noted: to initiate or participate in process or proceedings; to make a complaint or inquiry in relation to employment; to participate in an industrial activity. If at any time, under a Commonwealth law, for example, an employee had such a right, then that will, in my view, potentially be relevant for the purposes of a proceeding under the FW Act alleging that adverse action took place by reference to it or its exercise. That this is so, in my view, is textually supported by the fact that s 340(1)(a)(ii), amongst other things, refers to a workplace right having been "exercised", that is to say, exercised in the past. Similarly s 346, which proscribes adverse action in respect of industrial activities, by para (b) also identifies the proscribed activities in the past tense — "has at any time engaged" — in industrial activity.

261 The fact that the expression "workplace right" may not have been used previously in the WR Act, in my view, is irrelevant on a proper construction of the term and understanding of the way the protective provisions of the FW Act in provisions like ss 340 and 346 are intended to work.

262 The respondent maintains similar submissions concerning the pre-1 July 2009 conduct relied on by the Union as conferring a workplace right or constituting the exercise or not of a workplace right, for example in relation to the workplace right pleaded in relation to the making of complaints, attempts to rely on cl 19.5 of the ITEA, and participation in the freedom of association proceedings in the Federal Court.

263 The respondent again submits that "workplace right", as used in s 340(1) of the FW Act, is a term of art and has the meaning ascribed to it by in s 341(1). It commenced operation on 1 July 2009 without any retrospective operation, a matter that is reinforced by the fact that the Court has no jurisdiction under the FW Act in relation to pre-1 July 2009 conduct, but only jurisdiction in respect of contraventions of the FW Act that occur after that date: see Item 11 of the table set out in s 539(2) of the FW Act.

264 The respondent says that prior to it commencing operation, there was no such concept known to law as a "workplace right". Accordingly, the applicant's contention that workplace rights could be had or exercised or be proposed to be exercised before the commencement of the FW Act, "defies all logic".

265 The respondent says that in light of this none of the pre-1 July 2009 conduct alleged in the statement of claim can be characterised in terms of a "workplace right". Further, and alternatively they do not disclose a cause of action under the FW Act, namely [10]-[34] and, to this extent [36]-[38] of the statement of claim.

266 The respondent notes that Item 11(1) of Pt 3 of Sch 2 to the Transitional Act provides that the "WR Act continues to apply, on and after the WR Act repeal day, in relation to conduct that occurred before the WR Act repeal day". The

respondent says the expression "in relation" to is one of wide import and has the effect of applying the WR Act to conduct that occurred before 1 July 2009 as well as in relation to conduct that occurred before that date. The respondent says this interpretation is reinforced by Item 3(3) of Pt 1 of Sch 2 to the Transitional Act which provides relevantly that "If an item of the transitional Schedules provides for the WR Act … to continue to apply on and after the WR Act repeal day …, the WR Act … continue to so apply despite the WR Act repeal".

267 The respondents says when these provisions are read together they mean that, even after 1 July 2009, the WR Act repeal day, the whole of the WR Act including the provisions relating to freedom of association, applied to pre-1 July 2009 conduct as well as to post-1 July 2009 conduct where it is in relation to pre-1 July 2009 conduct.

268 Hence, the respondents say, if a circumstance is alleged in which a person has taken adverse action after 1 July 2009, because of pre-1 July 2009 conduct, the WR Act continues to apply in relation to all of such conduct. In other words, even though the circumstances constituting the adverse action arise after 1 July 2009, if such circumstances are in relation to pre-1 July 2009 conduct, then the matter is actionable under the WR Act, and the Court has jurisdiction under the WR Act to deal with such a matter, as provided for by Item 21(b) of Pt 5 of Sch 17 to the Transitional Act.

269 The respondent therefore says that if a person who is unlawfully dismissed or otherwise the subject of adverse action after 1 July 2009 because of conduct that occurred pre-1 July 2009 is not without a remedy. However, their action is not under the FW Act, but under the WR Act. Accordingly, as concerns the pre-1 July 2009 conduct complained of, the applicant should have brought the claim under the WR Act, and not the FW Act. It is now too late for it to do so.

270 As to [35] of the statement of claim concerning the pleaded conduct of Mr Puspitono in industrial activity, the respondent says that once again, all of the conduct relied upon is pre-1 July 2009 conduct.

271 The respondent says that like the definition of the term "workplace right" in s 341(1) of the FW Act, ss 346 and 347 of the FW Act also came into operation as from 1 July 2009. Therefore, logically the pre-1 July 2009 conduct does not disclose a cause of action under these provisions of the FW Act. Once again, the applicant should have brought any claim in this regard under the WR Act, and not the FW Act.

272 The Union says the submissions of IASA concerning pre-1 July 2009 evidence a fundamental misunderstanding of the case put by the Union, and the conduct complained about by the Union in the proceedings.

273 The Union says the relevant conduct in this case was the dismissal of Mr Puspitono and the injury to his employment and alteration of his employment to his prejudice. That conduct occurred after 1 July 2009 which was after the introduction of the FW Act.

274 Thus, the rights conferred by s 340 of the FW Act do not crystallise until adverse action has been taken. In this case, the adverse action was the conduct, and the conduct was taken after 1 July 2009. It naturally follows that the FW Act is the relevant Act under which to bring the proceedings.

275 The Union says it is instructive to review the FW Act at this time.

Section 340(1) provides that a person must not take adverse action because another person "has" a workplace right: s 340(1)(i) and also s 340(1)(ii) and (iii).

276 A plain construction therefore of the provision mandates that adverse action not be taken. It also requires that the action not be taken because the person "has" a workplace right.

277 The Union says that at the time of the action being taken against Mr Puspitono, namely the conduct, he had (or has) a workplace right (as it was defined by the FW Act) as the conduct occurred in October 2009 after the FW Act came into force. Without the adverse action there is no justiciable controversy.

278 The Union says insofar as IASA submits that these proceedings should have been brought under the WR Act those submissions are misconceived. The relevant discriminatory act — the conduct which occurred in October 2009 — is after the FW Act came into operation. Without the discriminatory conduct, there would have been no jurisdiction for the Court in the proceedings.

279 Thus, when IASA engaged in the conduct in October 2009 — the second dismissal — it engaged in conduct that was then covered by the FW Act. That conduct was the (second) dismissal of Mr Puspitono. The reason for the conduct — or a contributing reason — was the earlier exercise of his rights to participate in proceedings under the WR Act and other "workplace rights" as defined presently under the FW Act.

280 I agree with the substance of the submissions made on behalf of the Union and reject those made on behalf of the respondent. The starting position with provisions like ss 340 and 346 of the FW Act is whether, following the coming into operation of the FW Act (for current relevant purposes) on 1 July 2009, there has been an adverse action. If a person for example has been dismissed after 1 July 2009, then the FW Act speaks to that action. The expression "adverse action" is given very particular definition in s 342. Once conduct is identified as falling within the meaning of "adverse action" as defined, then the question under s 340 is whether the adverse action has been taken because of one or other of the reasons or purposes described in s 340(1)(a), 340(1)(b) or s 340(2). If a person suffers the adverse action by reference to their engagement in industrial activity, then s 346 provides protection.

281 It is important to note this, in effect, is a two stage process. First, it is necessary to identify the adverse action. Secondly, there will only be a finding of a contravention if the reason for that adverse action is one of those particularised by s 340 (in the case of workplace rights) or s 346 or s 347 (in the case of industrial activity) of the FW Act provisions just referred to.

282 When one comes to the s 340 proscribed reasons, they depend on an understanding of the expression employed in the FW Act provisions — "workplace right". That expression is given meaning by s 341 of the FW Act. It speaks, as we have seen, to an entitlement or an ability to do certain things under a workplace law or workplace instrument, as those latter expressions are defined by the FW Act. They do not of themselves speak to an entitlement or ability that arises under the FW Act itself, or at the time the identified adverse action occurred. Rather, having regard to the proper construction of the meanings given to the expressions "workplace law" and "workplace

instrument", they encompass adverse action taken because of entitlements or abilities arising under earlier Commonwealth or State legislation of a particular type.

283 The same reasoning applies to alleged contraventions of s 346.

284 There is therefore, in my view, no temporal limitation placed by the relevant FW Act provisions on the time or period when a "workplace right", as defined by the FW Act, should have been exercised or enjoyed in the past or when the conduct that constitutes industrial activity occurred.

**Whether objective facts proved to establish contravention of workplace rights and trigger s 361 reverse onus**

*Whether adverse actions*

285 First, a question arises as to what "adverse actions" are established by the evidence before considering other aspects of the contravention claims.

286 The Union submits "adverse action" as defined in s 342 was taken by IASA against Mr Puspitono:

(1) when IASA gave Mr Puspitono four weeks notice of dismissal on or about 16 October 2009;

(2) when IASA injured Mr Puspitono in his employment when it dismissed him;

(3) when IASA altered the position of Mr Puspitono to his prejudice when it dismissed him; and

(4) because IASA solicited, counselled, procured, induced or caused Garuda Indonesia to refuse to provide a renewal to Mr Puspitono, which had the effect of denying him the opportunity of continuing to certify Garuda planes and so had the effect of injuring him in his employment or altering his position to his prejudice.

287 In relation to (4), the Union relies on both the making of the negative assessment by Mr Scott for IASA, and the giving of that negative assessment to IASA in late September 2009, as separate adverse actions.

288 The meanings given to "adverse action" that are set out in s 342 of the FW Act have their beginnings in earlier industrial relations legislation. For example, for similar purposes, s 298K(1) of the WR Act proscribed conduct described in exactly the same terms as Item 1(a), (b) and (c) of s 342(1) of the FW Act.

289 In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 (*Patrick Stevedores*) at [4], the majority (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ) in a joint judgment observed that:

> Paragraph (a) ["dismiss an employee"] covers termination of employment; par (b) ["injure an employee in his or her employment"] covers injury of any compensable kind; par (c) ["alter the position of an employee to the employee's prejudice"] is a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.

290 In that case, the employees submitted that a series of steps taken by the members of the four companies in the Patrick Group of Companies and by certain officers of the member companies were taken because the employees were members of the union. They claimed the steps taken altered the position of the employees of four companies in the group to their prejudice, and that if the intended conclusion of those steps were to be realised, the employees would be dismissed.

291 The action of IASA in dismissing Mr Puspitono, effective from November 2009, was "adverse action" as defined in Item 1(a). In these circumstances, it seems to me to be redundant to characterise the dismissal as also fitting the description of "adverse action" in Item 1(b) and/or (c). In any event, the definitions in Items 1(b) and (c) would seem to pre-suppose the continuance of the employment relationship in some form or another. Once a person is dismissed, as here, there is no subsisting relationship that may be considered injured or altered.

292 However, in my view, the action of IASA, in both making Mr Scott's negative Personality assessment of Mr Puspitono and then conveying it to Garuda in late September 2009, constituted in each case "adverse action" under Item 1(c) of the definition, as that provision has been explained in *Patrick Stevedores*.

293 In *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93 (*CPSU v Telstra*), the Full Court was required to decide whether the sending of an email by the managing director of Telstra's Employee Relations Group to managers and team leaders in that group at a time when redundancies within Telstra were imminent, constituted adverse action for the purposes of s 298K(1)(c) of the former WR Act. The primary judge had concluded that there had not been a contravention of that Act. That decision was reversed on appeal. The Full Court noted:

- It was open to find that the email was sent to 275 managers and team leaders who were all involved in and to a large extent were to supervise the "downsizing" of Telstra (at [14]).
- That although the process of selection for redundancy was required to be "fair and consistent", the system was largely "grounded in the subjective opinion of management when matters of impression can often be as important as facts" (at [14]).
- The selection process was one which could be influenced by senior management (at [14]).
- Many managers would understand the email to be an instruction to give employees on an individual contract more favourable treatment in the redundancy selection process (at [14]).
- The announcement in the email that 8,000 further redundancies "would" occur by June 2002, suggesting further redundancies were imminent and there could be little doubt that the email was to be taken into account in respect of them (at [15]).
- The email refined the five criteria involved in the resource rebalancing process by requiring that preference will be given in that process to employees who had signed Australian Workplace Agreements (at [15]).
- In those circumstances the email constituted an instruction that employees employed under awards or certified agreements were to be discriminated against in the redundancy process (at [16]).

294 The Full Court observed that, in *Patrick Stevedores* at [4], the majority held that s 298K(1)(c) of the WR Act covered "not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question". The Full Court noted that in the majority's view the reorganisation of companies within the Patrick Group resulted in the security of the employer companies' businesses being "extremely tenuous" with the "security of the employees' employment [being] consequentially altered to their

prejudice". The reorganisation did not directly affect or alter any legal rights or obligations of the employees but it left their future employment less secure.

295 The Full Court, at [18], observed that where the alteration of position is alleged to be indirect or consequential, as in *Patrick Stevedores*, a difficult question may arise as to whether a prejudicial alteration of position has in fact occurred. Answering that question may involve questions of degree. The Full Court considered it sufficient for their present purposes to state that if the prejudicial alteration is "real and substantial, rather than merely possible or hypothetical", it will answer the description in s 298K(1)(c).

296 In the context of the facts in *CPSU v Telstra*, the Full Court considered that there was an adverse affection of, or deterioration in, the prior redundancy benefit process after the sending of the email as a result of the additional detrimental criterion applicable to employees employed under awards or certified agreements. The Full Court considered the detrimental criterion was real and substantial for the employees whom it affected.

297 The Full Court, at [20], further considered that while the refined or amended criterion had not been acted upon and therefore may not have caused any injury to an employee, the employment of employees on awards or certified agreements had become less secure, in a real and substantial manner, than it had been previously. In those circumstances the position of relevant employees had been altered to their prejudice within the meaning of s 298K(1)(c).

298 Similarly, in my view, in this case, the making of the negative assessment by Mr Scott on behalf of IASA in relation to Mr Puspitono adversely affected the continuance of his employment relationship or marked a deterioration in the benefit that he currently enjoyed under that employment relationship because the making of the assessment was not some inconsequential act, but an important step in the process, as IASA fully appreciated, of renewing the authorisation of Mr Puspitono to work on Garuda's aircraft. The making of the negative assessment made his continued employment less secure and therefore had a real and substantial affect, and an adverse affection on his position as an employee, as without the authorisation he was at risk of being dismissed.

299 The subsequent action taken by IASA in sending the negative assessment to Garuda made Mr Puspitono's employment even less secure in a very real and substantial way, and it too had an adverse affection on the employment relationship because the likelihood of authorisation being withheld and dismissal following was even greater.

300 I find therefore that the actions of IASA, first by Mr Scott in making the negative assessment of Mr Puspitono in late September 2009, and secondly in sending the negative assessment to Garuda Indonesia later in September 2009, constituted "adverse action" as defined in Item 1(c) of s 342.

301 I do not consider that either of those actions constituted "adverse action" under Item 1(b) of s 342, because of itself it did not cause any injury which produced what the majority in *Patrick Stevedores* termed a "compensable injury".

302 In *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22 (*Jones*) at [65], Collier J suggests that the term "alters the position of the employee to the employee's prejudice" also appears to refer to an intentional act directed to an individual employee or prospective employees. In expressing this view, her Honour refers to *BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97 (*BHP Billiton*) at 107-108. Her Honour

also goes on to refer to *CPSU v Telstra*, but I apprehend more by way of illustration of the ambit of the term and the factual circumstances in which an alteration of position to the prejudice of an employee might be found.

303 For my part, I do not consider that there is some additional requirement to identify an "intentional act" directed to an employee in order to find that there has been an alteration of position to an employee's prejudice. The simple statutory question for the purpose of identifying an "adverse action", is whether, in a given case, there is an action taken by an employer against an employee that in fact "alters the position of the employee to the employee's prejudice". It does not appear in the FW Act in s 340 or s 342 or elsewhere that there is any requirement for that action to have been "intentional", at least in the sense that there was a subjective intention or mental element in the employer's action to cause the result of alteration in the employee's position to the employee's prejudice, before "adverse action" as defined can be found.

304 To the extent that intention or mental element may be relevant, in my view, it will be during the second stage of the contravention assessment determination. At that stage, a court must determine whether an identified adverse action was taken "because of" one or other of the circumstances mentioned in s 340(1) or for engaging in industrial activity as defined by ss 346 and 347. In determining whether an adverse action was taken "because" of one or other of these reasons or with such intent, the actual intent or mental element of a respondent employer may and usually will become relevant.

305 In *CPSU v Telstra* at [21], the Full Court noted that in the earlier Full Court decision in *BHP Iron Ore* at [35], the Full Court had suggested that the proscription in s 298K(1) of the WR Act, "is essentially against an intentional act of the employer directed to an individual employee or prospective employee". In *BHP Iron Ore*, the Full Court had considered that the language used in the former s 298(K) proscribes conduct by "an employer" directed to "an employee" or "other person" and the use of the singular suggested that the alleged injury or alteration of position had to be examined in the light of the circumstances of each individual employee, and that the conduct struck at by each paragraph of s 298(K) as expressed by an active verb: "dismiss", "injure", "alter the position", "refuse to employ", and "discriminate", implied that the proscription was essentially against an intentional act of the employer directed to an individual employee or prospective employee. The Court also considered, at [36], that the implication was reinforced by the terms of s 298L(1) which contained an exhaustive catalogue of prohibitive reasons prefaced by the statement:

> Conduct … is for a prohibited reason if it is carried out because the employee, independent contractor or other person concerned …

306 In my view, the process of statutory interpretation adopted by the Full Court in *BHP Iron Ore* and apparently endorsed by the Full Court in *CPSU v Telstra* in relation to the relevant provisions of the former WR Act, does not arise in the proper interpretation of the relevant provisions of the FW Act. Section 340 provides protection in respect of workplace rights by subs (1), providing that a person must not take adverse action against another person because of the factors set out, or "to prevent the exercise of a workplace right by another person". The meaning of "adverse action" given in s 342 merely sets out, in subs (1), the "circumstances in which a person takes *adverse action* against another person". There is nothing in the language or context of those provisions

to suggest that the adverse action must be "an intentional act" as suggested by the Full Court in *BHP Iron Ore* in relation to the provisions of the former WR Act, and any such a requirement is an unnecessary additional requirement not to be found in the FW Act. As I have suggested, the question of whether or not an intentional act was taken by an employer may and usually will become relevant in the process of determining whether an adverse action was taken "because of" one or other of the circumstances mentioned in s 340(1) or for engaging in industrial action as defined by ss 346 and 347 of the FW Act, but it is not, in my view, a necessary aspect of the process of determining whether a particular action constitutes an "adverse action" as defined.

307 Indeed, in the recent decision of the Full Court of the Federal Court in *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 (*Barclay*) at [27]-[28], Gray and Bromberg JJ, in a joint judgment state that the central question under s 346 (and, in context, s 340) is why was the aggrieved person treated as he or she was. On the facts of that case, if the aggrieved person was subjected to adverse action, was it "because" the aggrieved person did or did not have the attributes, or had or had not engaged or proposed to engage in the industrial activities, specified by s 346 in conjunction with s 347?

308 Their Honours said the determination of those questions involves characterisation of the reason or reasons of the person who took the adverse action and that the state of mind or subjective intention of that person will be centrally relevant, though not decisive. Their Honours, at [25], expressly rejected the applicants' contention that the introduction of the word "because" into ss 340 and 346 had the effect of making irrelevant the state of mind of the person taking the adverse action.

309 Their Honours said, at [28], that what is required is a determination of what Mason J in *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617 called the "real reason" for the conduct. The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.

310 Lander J, who dissented in the result of the appeal in *Barclay* at [197], also rejected the appellants' submission that subjective intention was irrelevant to the operation of ss 340 and 346. The difference between Lander J and the majority seems to have been as to the relevance of a finding as to subjective intention. Lander J, at [198], said that the Court will not consider an alleged contravenor's evidence in a vacuum before deciding whether the evidence should be accepted. Like in any case the evidence should be considered with all the other evidence in the case. However, at [199], his Honour stated:

> The subjective intention of the alleged contravenor if accepted by the Court to be the actual intention will be determinative.

Then at [202], Lander J observed that:

> In assessing whether or not the persons' evidence ought to be accepted, the Court will no doubt have regard to all of the facts and circumstances surrounding the taking of the adverse action to determine whether or not the reason which is claimed to be the reason for taking the adverse action is truly stated.

311 Either way, the judgments in *Barclay* make it plain, as I have suggested, that the actual intent or mental element of a decision-maker may and usually will become relevant at the second stage of the determination process, not in identifying whether or not there is "adverse action" as defined in the FW Act.

**Entitlement to benefit of a workplace instrument**

312 Turning then to the substantive contravention claims, first, the Union contend that Mr Puspitono possessed an entitlement to the benefit of a workplace instrument, namely the ITEA signed in April 2008, which is recognised as a workplace right by s 341(1)(a) of the FW Act.

313 The Union contend the evidence shows that in or after April 2009, Mr Puspitono exercised this workplace right in the following circumstances, namely:

- On or about 8 April 2009, he was suspended by ITEA.
- On 14 April 2009, he sought to rely on cl 19.5 of the ITEA, by seeking help, assistance, or representation from a person of his choice, namely, Mr Mark Jones.
- Then again on 23 April 2009, he sought to rely on cl 19.5 of the ITEA when he sought to have Mr Brad Stewart, an organiser in the employ of the Union, represent him.
- Then again on 24 April 2009, he sought to rely on cl 19.5 by having Mr Steve Purvinas, the federal secretary of the Union, represent him.

314 IASA submit that, even if the ITEA is a workplace instrument, there is insufficient evidence that cl 19 was invoked by Mr Puspitono. The respondent says that Mr Puspitono's conduct on 7 April 2009, when he left the workplace without certifying the Garuda aircraft, was plainly related to his demands for overtime that he had earlier raised.

315 While that is correct, having regard to the earlier account of events leading up to the April suspension, the facts also show that Mr Puspitono thereafter sought to rely on his cl 19 workplace rights in the manner contended for by the Union.

316 The respondent also refers to cl 19.4, compliance with which, it says, is a precondition to an entitlement to act under cl 19.5. As noted above, cl 19 deals generally with dispute resolution. Clause 19.4 provides:

> While a concern, grievance or issue is being dealt with, work will continue as normal except where there is a bona fide concern regarding an immediate threat to the health or safety of the employee. Where there is a bona fide safety issue, the employee must perform alternative work as directed. There will be no bans, stoppages or limitations on the way that work is customarily performed.

317 Clause 19.5 then provides that:

> At any stage you may seek help, assistance or representation from a person of your choice.

318 Given that under cl 19.5 help, assistance or representation from a person of the employee's choice may be sought "at any stage" it does not seem to me to be open to argue that compliance with cl 19.4 is a precondition to the exercise by the employee of the cl 19.5 entitlement.

319 IASA argue in the alternative that, properly construed, cl 19.5 does not impose any obligation on IASA to deal with anyone unless and until Mr Puspitono himself notified IASA of who that representative was. IASA says there is no evidence that he had notified IASA of Mr Jones being his representative or that the Union was going to be representing him before contact was made by those parties. As a matter of fact, that seems to be largely correct. Not until 24 April 2009 did Mr Puspitono formally notify Mr Fialho by email of the Union representation by Mr Purvinas.

320 To the extent that IASA contend that it is an implied term of the agreement, to give it efficacy (according to the principles stated in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337), that Mr Puspitono was first required to notify IASA that he had appointed a person of his choice to assist him, I reject that submission. It is by no means necessary to give business efficacy to this term of the ITEA that Mr Puspitono should have given such notification in order to exercise his entitlement to seek help, assistance or representation from someone else. The clear words of cl 19.5 are that the employee may seek help, assistance or representation. Why there should be a restriction on the employee's ability to do this only with notice to the employer is not clear. It may be helpful and make good sense for the employee to let the employer know they have exercised this entitlement, but it is by no means necessary that they should do so to give the agreement business efficacy.

321 In a practical sense, this is made clear by the fact that Mr Fialho knew exactly what was going on when, first Mr Jones, and later Union representatives attempted to contact him (in Mr Stewart's case) or contacted him (in Mr Purvinas' case) to discuss Mr Puspitono's case. He ignored or parried their advances in blunt, and in Mr Jones' case, threatening terms.

322 The respondent further argues that, in any event, there is no evidence that IASA refused to deal with the Union after receiving Mr Puspitono's email on 24 April 2009. This is, I consider, correct.

323 IASA further says there is no basis for any finding that there was any refusal to recognise that the Union was Mr Puspitono's representative after this date. That, I consider, is also correct.

324 However, up until that date, Mr Fialho plainly rejected or ignored the approaches from Mr Puspitono's representatives and thereby prevented Mr Puspitono from exercising his workplace right under the ITEA.

325 Importantly, it remains the case that Mr Puspitono actually exercised his workplace rights effectively when the Union succeeded in representing him in dealings with IASA.

326 The question is whether the identified adverse actions were taken because Mr Puspitono both tried (unsuccessfully) to exercise his identified workplace right and/or because he (successfully) exercised it through the Union representatives.

327 Section 340(1)(a)(ii), when applied in the circumstances of this particular workplace right, provides that IASA must not take adverse action against Mr Puspitono because he has exercised the workplace right to take advantage of the benefits the ITEA gave him.

328 At this point, the "reverse onus" created by s 361(1) of the FW Act becomes important. That section provides:

> (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, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

329 It is generally accepted that s 361(1), in reversing the onus of proof in the way that it does, like predecessor provisions in earlier industrial relations legislation, does not relieve an applicant of the obligation of establishing objective facts that suggest contravention of the law. In *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd* (1999) 140 IR 131 at [161]-[162], Branson J said that the impact of the former s 298V of the WR Act, which is similar to s 361, was simply to alleviate the evidentiary difficulty facing an application of providing proof of the intent or reason which motivated, or formed part of the motivation for, the respondent's conduct. Thus, in her Honour's view, the reverse onus provision did not relieve the applicant, in that case, from the obligation of establishing as a fact that the relevant employee absented himself from work without leave for the purpose of carrying out duties as an officer of an industrial organisation, and that the employee applied for leave before absenting himself, and that leave was unreasonably refused or withheld.

330 In *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306 at [49]-[50], Moore J held that, in the proceeding before him, it was not sufficient for the applicant to simply allege that he was a member and delegate of an industrial organisation. Rather, on the assumption that the applicant was able to prove the fact of membership or delegateship of an industrial organisation, the burden was cast on the respondent to prove that his membership or delegateship of an industrial organisation did not form part of the reason for the termination of his employment.

331 Similarly, in *Jones* at [10], Collier J considered it was not sufficient for the applicant simply to allege that she had a workplace right and that she was the subject of adverse action. Rather, on the assumption that she was able to prove those allegations, the burden was then cast on the respondent to prove that the adverse action was not taken because of a workplace right.

332 In *Barclay*, Gray and Bromberg JJ in their joint judgment in the Full Court emphasised, in the context of that case, that it is important to appreciate that not all of the circumstances specified by s 346 (in conjunction with s 347) are circumstances specified for the purpose of identifying whether the causal link of an operative reason exists. They observed that objective facts, dependent on the determination of questions of mixed fact and law, have now been included in s 346 to a much greater extent than they were in the section's predecessor in the WR Act. They noted that s 347, for example, is replete with examples. For instance "lawful activity" in para (b)(ii) and (iii) and "lawful request" in para (b)(iv). Whether a person is or is not a member or officer of an industrial association is also a fact to be ascertained objectively by reference to a legal standard, usually the rules of the association. Their Honours, at [34], noted that it is for an applicant to prove the existence of objective facts of the kind they have identified.

333 I proceed in this case on a similar understanding in relation to both ss 340 and 346 (and s 347).

334 I find that the facts contended for by the Union have been established objectively. From those facts it is open to the Court to find the respondent contravened s 340 in relation to the exercise of the workplace right when it took the adverse action identified above.

335 Consequently, the respondent has an onus, pursuant to s 361 of the FW Act, to "prove otherwise".

*Right to participate in process or proceeding*

336 Secondly, the Union contend for Mr Puspitono's workplace right, at material times, recognised by s 341(1)(b), to be able to initiate, or participate in, a process or proceedings under a workplace law.

337 The Union says that the evidence shows that when Mr Puspitono's employment was terminated the first time, following the April suspension, with effect from 5 May 2009, he was able to make an application for reinstatement pursuant to a workplace law, namely the former WR Act. He was also able to participate in court proceedings, namely the "freedom of association" proceedings in the Federal Court for a breach or breaches of s 792 of the WR Act.

338 The Union says the evidence shows he exercised those workplace rights to the obvious chagrin of IASA. The Union says that the proceedings initiated by Mr Puspitono and it, respectively, were notorious within the ranks of IASA from the Managing Director Mr Fialho down, and that Mr Scott's evidence demonstrates that the whole issue loomed large at least from the date of Mr Puspitono's reinstatement. Mr Scott was well aware of the sensitivities surrounding this and elected to deal with him, at first, with circumspection, notwithstanding resentment of the behaviour which he described in Court as inappropriate, arrogant and the like.

339 The Union says there can only be one rational source for the sentiments expressed by Mr Scott in evidence and that is the apparent humiliation inflicted on IASA by Mr Puspitono's reinstatement. Mr Scott's evidence shows there was a simmering resentment over his victory. There is no reason to believe that this was not a shared resentment among management and that Mr Scott's articulation of it was not his alone.

340 IASA argue that it is very difficult to see how Mr Puspitono's conduct in obtaining the benefit of consent orders in the freedom of association proceedings amounts to the exercise of a workplace right. IASA submits the ordinary meaning of the word "participate" as it is used in s 341(1) of the FW Act, is to "take or have a part or share, as with others; to share in": *Concise Macquarie Dictionary* (1982).

341 I have no difficulty in finding that the conduct of Mr Puspitono in filing an affidavit in the proceedings commenced by the Union in the freedom of association proceedings — albeit for his benefit — in a very practical sense involved his participation in those proceedings which, in turn, were under a workplace law, namely the WR Act.

342 The real question is whether the adverse actions identified above were because of the exercise of this workplace right.

343 I find that the facts contended for by the Union have been established

objectively. From those facts it is open to the Court to find the respondent contravened s 340 in relation to the exercise of this established workplace right, when it took the adverse action identified above.

344 Consequently the respondent has the onus, created by s 361 of the FW Act, to "prove otherwise".

*Complaint or inquiry in relation to employment*

345 Thirdly, the Union contend for Mr Puspitono's workplace right, the ability to make a complaint or inquiry in relation to his employment, recognised by s 341(1)(c)(ii) of the FW Act.

346 The Union says the evidence shows that this right was exercised on the following occasions:

- On 31 March 2009 when Mr Fauzi, on behalf of Mr Puspitono, complained to David Moore about various matters relating to Mr Puspitono's employment.
- When Mr Puspitono emailed the letter dated 1 April 2009 to the Managing Director and other senior management in IASA.
- When Mr Puspitono and Mr Fauzi emailed further complaints to senior management on 2 April 2009.
- When Mr Puspitono complained about his rosters to Mr Rod Searle on 6 April 2009.
- When Mr Puspitono further complained about his rosters to Mr Searle on 7 April 2009.
- When Mr Puspitono complained further about his employment to Mr Searle on 7 April 2009 and eventually declined to work overtime when Mr Searle did not answer Mr Puspitono's question as to whether or not overtime would be paid if he remained beyond the rostered time of 5.30 pm.

347 The nature of the workplace right recognised by s 341(1)(c), to make a complaint or inquiry in relation to employment, is very broad. There is nothing in the ITEA in this instance that suggests a complaint cannot be made.

348 As noted above, cl 19 of the ITEA deals with dispute resolution. Clause 19.1 provides:

> The Employer and the Employee agree to follow this procedure to resolve any concerns or dispute arising from this agreement or the employment of the Employee.

In my view, cl 19.1 presupposes a general right or entitlement of an employee to raise concerns with IASA, as Mr Puspitono did about his overtime, for example.

349 The evidence of how IASA responded to the actual complaints made suggests that IASA accepted and understood that Mr Puspitono was entitled to make complaints, although Mr Fialho took the view that it was inappropriate for the complaints to be made directly to him. Mr Tapusoa responded in a more measured way immediately after the 1 April 2009 complaints. Steps were then taken to deal with those complaints.

350 In the written closing submissions of the respondent, particular attention is given to the evidence that Mr Puspitono was seeking to enforce "an alleged promise made in 2008 regarding overtime" when he finished work at the end of his scheduled roster on 7 April 2009. IASA ultimately make the submission that the evidence is too vague and imprecise to establish what, if any, promise was allegedly made prior to the events involving Mr Puspitono and Mr Searle on

7 April 2009. The respondent thus says that Mr Puspitono's insistence on the alleged "guarantee" of overtime could not amount to the exercise of a workplace right because the right to the alleged "guarantee" did not arise under the ITEA, but, on his own evidence, from some sort of extra-ITEA right that he claimed.

351 This may be, but the issue is whether the workplace right to make a complaint or inquiry in the first instance, which I find on the evidence was exercised at material times around 7 April 2009 as pleaded, was the reason for the adverse actions identified.

352 I find the facts contended for by the Union have been established objectively. From those facts it is open to the Court to find the respondent contravened s 340 of the FW Act in relation to the exercise of this established workplace right when it took the adverse action identified.

353 Consequently, the respondent has the onus, under s 361 of the FW Act, to "prove otherwise".

*Industrial activity*

354 Fourthly, the Union contend for Mr Puspitono's right to protection recognised by s 346 of the FW Act.

355 The Union say the evidence shows that Mr Puspitono exercised the right to engage in industrial activity (as defined by s 347) in the following ways:

- At all materials times Mr Puspitono had become and remained a member of the Union.
- On or after 22 May 2009, he participated in a lawful activity organised by the Union, namely Federal Court proceedings WAD 77 of 2009 (the freedom of association proceeding).
- On 22 May 2009, he represented or advanced views, claims or interest of the Union by swearing and filing an affidavit in those proceedings.
- On 23 April 2009, he sought to be represented by an industrial association, namely the Union when he arranged for Mr Brad Stewart to represent him in the disputation with IASA.
- On 24 April 2009, he sought to be represented by the Union by Mr Steve Purvinas in relation to that same dispute.
- On 24 April 2009, he sought to be represented by the Union, which as the evidence shows, resulted in Mr Puspitono emailing Mr Fialho authorising the Union to represent him.

356 The Union says the evidence shows that IASA's principal grievance against Mr Puspitono was that he was prone to complaining too much, including that he was presumptuous enough to copy in members of senior management of IASA, particularly Mr Fialho the Managing Director, to his complaining emails.

357 The Union says that the evidence contains numerous examples of legitimate complaints made by Mr Puspitono. The Union says it must be remembered that Mr Puspitono's ITEA provided expressly for overtime to be paid if he works outside of rostered hours.

358 The Union submits that the evidence establishes that complaints, or at the least inquiries, were made and considered and ultimately were taken into account in the decision by IASA, through Mr Scott, to make adverse comments to Garuda Indonesia in relation to Mr Puspitono's application for renewal of his authorisation to work on Garuda aircraft.

359 The Union submits the evidence discloses that senior management of IASA regarded and regard Union membership and activities with hostility, and refer in particular to the email of Mr Fialho to Mr Tapusoa on 1 April 2009, following receipt of Mr Puspitono's letter and email of that date.

360 The Union says Mr Fialho subsequently demonstrated extreme hostility to the idea of Mr Puspitono having any union representation and even threatened his earlier proposed representative, Mr Jones, with the police.

361 The Union also points to the response of Mr Fialho, as Managing Director of IASA, when Mr Puspitono sought out the Union to represent his interests in the freedom of association proceedings in the Federal Court in late April 2009.

362 IASA submit that the fact that Mr Puspitono represented or advanced his views in proceedings or sought to be represented by others is insufficient to establish that he was engaged in industrial activity at material times.

363 Section 347 gives meaning to the expression "engages in industrial activity". Amongst other things, a person engages in industrial activity if that person:

> (b) does or does not:
>
> …
>
> (ii) organise or promote a lawful activity for, on behalf of, an industrial association; or
>
> (iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association;
>
> …
>
> (v) represent or advance the view, claims or interests of an industrial association; or
>
> …
>
> (vii) seek to be represented by an industrial association.
>
> …
>
> (f) takes part in industrial action.

364 I do not consider that the steps taken by Mr Puspitono to be represented by officials of the Union at material times in April constitute "industrial activity" as defined in para (b)(ii) or para (b)(iii). There is nothing that has been organised or promoted by the Union or that he has organised or promoted on behalf of the Union in which Mr Puspitono relevantly participated.

365 Nor do I consider that it can be said, on the evidence, that Mr Puspitono took part in "industrial action" for the purposes of para (f). This expression is defined by s 19 of the FW Act. The conduct of Mr Puspitono does not fall within this definition as it did not:

- involve the performance of work by an employee in a manner different from that in which it is customarily performed, the result of which is a restriction or limitation on, or a delay in, the performance of work;
- constitute a ban, limitation or restriction on the performance of work or a refusal to attend work;
- constitute a lock out of employees.

366 However, the definition in para (b)(vii) may be considered relevant here in that a person engages in industrial activity if they "seek to be represented by an industrial association". Mr Puspitono did seek to be represented by the Union at relevant times in late April 2009.

367 In my view, the definition in para (b)(v) may also be considered relevant here. The question is whether or not the swearing and filing of an affidavit in the

freedom of association proceedings commenced by the Union in the Federal Court may be said to constitute an activity that "represents or advances the views, claims or interests" of the Union. The Union had the standing to, and chose to commence those proceedings. While the proceedings were for the direct benefit of Mr Puspitono, plainly they reflect the Union's commitment to members to advance claims on their behalf in appropriate cases. By doing so the Union is more able to represent the interests of employees in their specified industrial area. Thus, while Mr Puspitono may be said to have made the affidavit to advance his own interests, in making the affidavit and allowing it to be filed in the proceedings commenced by the Union, he also, in my view, relevantly advanced the views, claims or interests of the Union in the proceeding in question.

368 I find the facts contended for by the Union have been established objectively. From those facts it is open to the Court to find that the respondent contravened s 346 of the FW Act when it took the identified adverse actions.

369 Consequently, the respondent has the onus under s 361 of the FW Act, to prove otherwise.

**Whether s 361 reverse onus has been discharged**

*The relevance of a failure to call a decision-maker*

370 Having regard to my findings on the objective facts establishing contravention of ss 340 and 346, by s 361(1) the Court must presume for the purpose of this proceeding, that the actions of IASA, in (1) dismissing Mr Puspitono by letter dated 16 October 2009; and (2) in late September 2009, making a negative assessment of Mr Puspitono; and then (3) sending it to Garuda Indonesia, were taken in each case for the reason or with the intent alleged, unless IASA proves otherwise.

371 In *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, Tracey J, at first instance, noted at [35] that:

> If an employer, who is alleged to have contravened one of the provisions of Part 3-1 in which the word "because" is to be found, adduces evidence which persuades the court that it acted solely for a reason other than one or more of the impermissible reasons identified in a particular protective provision, it will have made good its defence. Because of the reverse onus provision the employer will normally need to call evidence from the decision-maker to explain what actuated him or her to act to the employee's detriment.

372 While this highlights the normal or usual means of responding to the reverse onus from an evidentiary point of view, it does not specify that a respondent employer must call the relevant decision-maker to explain their actions. It remains, in any case, where the decision-maker is not called, for the Court to have regard to all the evidence adduced in the proceeding, including any failure to call a relevant decision-maker, in determining whether the s 361 presumption has been displaced by the respondent. See also, in this regard, *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197 (*Bowling*) at 205 per Smithers and Evatt JJ.

373 It is also relevant here to repeat what is noted above, that in *Barclay*, in the Full Court, Gray and Bromberg JJ rejected a submission on behalf of the appellants that the introduction of the word "because" into ss 340 and 346 had the effect of making irrelevant the state of mind of the person taking the adverse action. At [32], their Honours said that the onus cast by s 361 on the person

taking the adverse action means that, to succeed, that person has to establish that he or she was not actuated by the attributes or industrial activity which s 346 seeks to protect:

> The real reason or reasons for the taking of the adverse action must be shown to be "dissociated from the circumstances" that the aggrieved person has or had the s 346 attribute or has or had engaged in or proposes to engage in the s 346 industrial activity.

374 Lander J, at [202], while dissenting in the result emphasised that the construction of ss 340 and 346 at which he had arrived did not mean that the person who has taken adverse action "can simply claim it was taken for a reason apart from a reason in s 340 or s 346 and that that is the end of the matter". His Honour added:

> The Court will have to be satisfied to the requisite standard that the person claimed he or she took the adverse action for a reason which would not amount to a contravention of the section. In assessing whether or not the persons' evidence ought to be accepted, the Court will no doubt have regard to all of the facts and circumstances surrounding the taking of the adverse action to determine whether or not the reason which is claimed to be the reason for taking the adverse action is truly stated.

*The dismissal*

375 In this case, the particular officer of IASA who made the decision to dismiss Mr Puspitono in October 2009 was not called to give evidence concerning the reasons for the dismissal, and I refused the application of IASA, far too late in the proceeding, to attempt to call Mr Fialho the Managing Director of IASA for this purpose.

376 Nor did the respondent at any time seek to call Mr Tapusoa, Mr Tapusoa being the IASA representative who signed the termination letter dated 16 October 2009.

377 As a result, the respondent singularly failed to call any person with direct knowledge of IASA's reasons for dismissing Mr Puspitono. Instead, IASA relies on all the evidence adduced to explain the dismissal and discharge the evidentiary onus cast upon it.

378 The respondent identifies the following body of evidence as relevant to the question whether, having regard to all of the evidence, including the failure of the relevant decision-makers to give evidence on behalf of the respondent in the proceeding, the presumption required by s 361 has been proved otherwise by IASA in relation to the dismissal.

379 The respondent first notes that it was a condition of Mr Puspitono's employment, under the ITEA, that he maintain authorisation to work as a LAME at Perth Airport, certifying Garuda aircraft. While there was some debate from Mr Puspitono when he was cross-examined about the employment to which the ITEA applied, I am satisfied, as I have already found above, that this submission is correct. At all times, IASA and Mr Puspitono shared the understanding and acted on the basis that the ITEA governed the employment of Mr Puspitono, whether as an AME or a LAME. Accordingly, it was always well understood by Mr Puspitono, or at least should have been, that his employment was dependent on him maintaining a Garuda authorisation to work on their aircraft.

380 IASA then says that it was required by Garuda as part of maintaining its

licence to work on Garuda aircraft for there to be annual renewals of the GA-Authorisation in respect of LAMEs such as Mr Puspitono working in Perth. I also accept that this is so. There is, for example, no suggestion that the annual renewal of that authorisation was something suddenly created in or about September 2009, when Mr Scott undertook the task of having authorisation applications renewed.

381 The respondent says that, once his authorisation lapsed, there was no relevant work for Mr Puspitono to do at Perth airport. For example, there were no full time AMEs employed in the mechanical department of IASA at Perth airport. The AMEs in the In Flight Entertainment department, servicing Qantas aircraft, had avionics qualifications, which Mr Puspitono did not possess. In any event, there was no evidence of a need for an additional full time AME in that department.

382 IASA also say there is no evidence that the mechanical department required a full time AME to assist on Garuda and Tiger aircraft. To the contrary the evidence is that there were no full time AMEs in the mechanical department, because their rosters were structured such that there was overlap between the times worked by the LAMEs in both departments and the two AMEs in the In Flight Entertainment department. Taking into account the turn around times of various aircraft, the LAMEs and the two avionic AMEs had capacity to, were expected to, and did assist LAMEs certifying Garuda and Tiger aircraft.

383 The respondent's submissions may be accepted, but only as far as they go. The fact remains that IASA has not called the person or persons who made the critical decision to dismiss Mr Puspitono, to give evidence. Rather, it points to reasons for dismissal as stated in the dismissal letter dated 16 October 2009, signed by Mr Tapusoa. Far too late in the piece, as I have noted above, the respondent sought to call Mr Fialho.

384 It is one thing for the respondent to rely on its stated documentary case. That may or may not constitute the reasons that truly actuated the dismissal decision. In a case like this, in light of the reverse onus created by s 361, the respondent needs to adduce appropriate, cogent evidence of the actual decision-making process to prove that the sole reason that actuated the dismissal did not include any of the circumstances mentioned in s 340 and proscribed by s 346 of the FW Act, as objectively established by the Union. In the face of the objective facts established by the Union, and in light of the failure of IASA to call the actual decision-maker or decision-makers to explain the reason or reasons why the decision to dismiss Mr Puspitono was taken in October 2009, I do not consider that the respondent has discharged the evidentiary onus cast upon it by s 361.

385 I find therefore that the dismissal of Mr Puspitono by letter of IASA dated 16 October 2009, contravened ss 340 and 346 of the FW Act.

*The negative assessment*

386 The respondent submits that the evidence of Mr Scott shows that IASA gave the negative assessment that was then conveyed by IASA to Garuda in late September 2009, solely for reasons other than those proscribed by ss 340 and 346. IASA encapsulates its submission in this regard in the following written submission.

> Consistent with his evidence that the reason for his assessment of P was to honestly inform Garuda of what he thought that it required, Scott's evidence was to the effect that he had no reason to in any way injure or alter P's position in his employment, or to cause his dismissal, when he did his assessment of P for

Garuda. This was exemplified by his confirmation, in cross-examination, by reference to annexure MAS 21 at p 96 of his affidavit, that he fully expected P to return to work after his leave.

387 The respondent otherwise submits that the evidence pointed to by the Union as demonstrating the existence within IASA of a contentious and negative attitude towards Mr Puspitono because of his exercise of workplace rights and because he engaged in industrial activity should be placed in a fuller light, and that, when it is, the evidentiary onus cast upon IASA to rebut the presumption of contravention is discharged.

388 In this regard, IASA submit that the circumstances in April 2009 were that:

- Mr Puspitono had made complaints about not being paid at least 173 hours;
- IASA conceded the mistake within three days of the complaint being raised in Mr Puspitono's email on 1 April;
- the pay slips from April 2009 onwards corroborate this — that is to say, that he was paid for at least 173 hours per month;
- although Mr Puspitono had complained about overtime, the pay slips evidence payment of overtime; and
- there is no evidence of how or when the employer first found out that Mr Puspitono was a member of the Union until Mr Purvinas asserted this in his conversation with Mr Fialho on 24 April 2009.

389 The respondent also says that the circumstances after Mr Puspitono returned to work in late July 2009, in accordance with the consent orders, were that:

- he worked, certifying Garuda aircraft;
- IASA sought the extension of his authorisation from Garuda because IASA wanted Mr Puspitono to continue in its employ — there was work for him as a LAME and as evidenced by Mr Scott's expectation that he would return to work after his leave;
- Mr Puspitono was employed to work as a certifying LAME on Garuda aircraft;
- Mr Puspitono did work as a certifying LAME on Garuda aircraft;
- Mr Puspitono required Garuda's authorisation to do so;
- in order to extend his authorisation, to allow him to continue to do that job, as required of him, the assessment was made by Mr Scott;
- there was no motivation, and it would not have made commercial sense, for Mr Scott and IASA to deliberately set up Mr Puspitono to have his authorisation withdrawn, simply to effect the termination of his employment;
- Mr Scott's rating of Mr Puspitono was because of his attitude to his job, fellow employees, his employer and the customer, Garuda;
- Mr Puspitono's authorisation with Garuda was withdrawn due to the assessment; and
- there had been, and continued to be after the dismissal other persons to assist certifying LAMEs.

390 IASA submits that, on the basis of the direct evidence of Mr Scott about his reasons for making his assessment of Mr Puspitono, and taking into account all of the other facts, the Court can readily find that IASA has discharged its reverse onus to prove that Mr Scott's negative Personality assessment of Mr Puspitono was not made for any prohibited reason.

391 I accept that, in the aircraft industry, maintenance of aircraft is of critical importance. One does not need to go beyond the evidence of Mr Purvinas for the Union during cross-examination to emphasise this point. Annual or other periodic renewal of a LAME's authority to work on aircraft is important to the reputation of an airline for upholding high safety standards. Therefore, if in the ordinary course of events there were concerns about the capacity of a LAME to perform as an effective member of a team of aircraft maintenance engineers, then that is something that might affect the decision of the authorising aircraft operator to maintain the authorisation of a LAME.

392 The question in this case is not whether Mr Scott's assessment was reasonable or unreasonable of itself, or whether, as a general proposition, the decision of Garuda or of IASA respectively to fail or refuse to renew Mr Puspitono's authorisation and to dismiss him, was fair and reasonable — but whether the actions of IASA were taken because of one of the circumstances mentioned in s 340 or because Mr Puspitono had engaged in industrial activity as defined in s 346.

393 In effect, in relation to the making of the negative assessment, the respondent seeks to stand behind the evidence of Mr Scott that he in the ordinary course of events provided his own personal assessment, albeit negative, in relation to Mr Puspitono, which had the consequential effect that Garuda refused to renew Mr Puspitono's authorisation to work on its aircraft. IASA's argument attempts to convey that Mr Scott was disinterested in the consequences of his negative assessment and was just doing his job in relation to the renewal process when he made the negative assessment.

394 However, when one considers Mr Scott's evidence more closely the plausibility of the respondent's position, based on his evidence, is shown to be open to serious question. First, despite the impression he initially created that he had the opportunity to form views about Mr Puspitono between May and September 2009, the reality is that Mr Scott was only appointed to his position as Maintenance Manager Australia on or about 14 May 2009, at a time when Mr Puspitono was suspended from work. Mr Puspitono did not return to work until 24 July 2009, following his reinstatement, pursuant to consent orders in the Federal Court. Mr Scott's personal opportunity to appraise Mr Puspitono's performance in fact only dated from 24 July 2009 up until the point that he signed off on the GA-Authorisation Application on 23 September 2009. The other information he used to form his assessment was hearsay, in that it was what he had been told by others in IASA, particularly as to the events of April 2009, and the May termination.

395 I also accept Mr Puspitono's evidence that, as soon as he resumed work on 24 July he met with Mr Scott and Mr Searle to discuss the roster he would be working under following his reinstatement and Mr Purvinas for the Union was also involved in the discussions. I find Mr Puspitono finished up speaking with Mr Purvinas outside the room in which he had been meeting with Mr Scott and Mr Searle about the rosters. I infer that following his telephone discussion with Mr Purvinas, Mr Puspitono acted on advice from Mr Purvinas and accepted the roster proposed by the respondent at that point. It appears Mr Scott separately spoke to Mr Purvinas.

396 In the middle of August, Mr Puspitono raised the old question of overtime, as well as assistance, to which Mr Scott responded in firm terms by email on 10 August. Then at the end of August, on 31 August, Mr Scott received yet

another email from Mr Puspitono about rosters and again about the lack of assistance when preparing aircraft. He decided on 2 September, in the afternoon, to take a different tack and to speak with Mr Puspitono and more directly try to resolve those issues.

397 By this time it is also clear that Mr Scott had already received complaints from some other engineers concerning Mr Puspitono's attitude in the workplace and his outspoken admiration for the Union.

398 Mr Scott was also being troubled about this time by the fact that Mr Puspitono was failing to wear IASA's cap in the workplace and instead was wearing the Union's.

399 Mr Puspitono's continued Union association seems not to have been supported by senior management within IASA, at any material time. Dating from Mr Fialho's email and telephone responses to advances from Mr Jones, the late retired aircraft controller, after 8 April, and more particularly from the contacts of Mr Stewart and then Mr Purvinas on behalf of the Union to obtain information and otherwise represent Mr Puspitono's interests following the April suspension, this attitude was prevalent. Mr Fialho's responses no doubt are not unique in the annals of exchanges between employers and employees and unions over the history of organised labour, but they certainly were of an unmasked nature in this case. Mr Jones was plainly threatened with the police if he were to bother Mr Fialho again. Mr Fialho's response to contact from the Union in April was barely less restrained although he knew he had to deal with the Union and did so, including initially through his lawyers.

400 While, on the face of it, as of 23 September 2009, when Mr Scott arranged for Mr Puspitono to call by to sign the GA-Authorisation Application, workplace relations between Mr Puspitono and others, including Mr Scott, were much improved or, at least, quite different from how Mr Scott had perceived them to be prior to 2 September, on 23 September he gave Mr Puspitono a negative assessment. I find it surprising, to say the least, that when he made the assessment, Mr Scott ignored the change of attitude he had apparently been successful in achieving from Mr Puspitono, following his heart-to-heart with him on 2 September 2009, some three weeks before completing the negative assessment. Mr Scott, in my view rather glibly in cross-examination, explained the apparent inconsistency in his assessment by saying he was taking a whole year approach. This evidence tends to undermine his evidence that he was just making an assessment in the ordinary course of business.

401 It is also pertinent to note that on 18 September 2009, Mr Scott received from the IASA office in Jakarta fully completed GA-Authorisation Applications in respect of all engineers, save for Mr Puspitono and Mr Muhajir. In the case of these two, Mr Scott needed to complete the section 3 Personality assessment section. In the case of Mr Puspitono he gave a satisfactory assessment in relation to his Technical skills but marked him down as unsatisfactory in the areas of Quality and customer oriented and Relationship. He handwrote the words "*UN*satisfactory" in the one page form. But Mr Scott also prepared separately and in typed form a one page annexure to the application, setting out in more detail reasons for this "unsatisfactory" assessment.

402 What is astonishing, in all the circumstances, is that when Mr Puspitono called by to sign the renewal application, Mr Scott did not bring to his attention the unsatisfactory ratings. Mr Puspitono simply signed the renewal form and left. He was not shown, and not asked to sign, the annexure document in which

Mr Scott had set out in detail what he thought about him. In my view, Mr Scott's response, when asked in cross-examination why he did not bring the unsatisfactory assessments to Mr Puspitono's attention, is highly instructive. He simply said that Mr Puspitono signed the form and did not ask any questions. If he had, he would have dealt with them. If IASA (and Mr Scott) had any desire to ensure its LAME was retained in its employment, the first thing Mr Scott would have done was flag the negative assessment with him. But it did not.

403 While I accept that Mr Scott was called upon in the ordinary course of his position as head of maintenance in Perth for IASA to sign off on the renewal forms and, in the case of Mr Puspitono, to make an assessment concerning "Personality", I consider that when one has regard to the evidence I have noted the respondent has failed to discharged the onus it has to prove that Mr Scott's action in making the negative assessment of Mr Puspitono was not made by reason of one of the circumstances mentioned in s 340 or for engaging in industrial activity in terms of s 346 of the FW Act.

*Giving the negative assessment to Garuda*

404 So far as the sending of the negative assessment to Garuda is concerned, all of the same factors that cause me to consider that the respondent has not discharged its onus in respect of that adverse action also cause me to consider that the respondent has failed to discharge the onus it has to prove that the giving of the negative assessment to Garuda was not, in part, because of one or other of the circumstances mentioned in s 340 or s 346.

405 There is, however, an additional reason why I do not consider the reverse onus has been discharged in relation to this adverse action, and it is this. It is quite clear on the evidence of Mr Scott that he did not give the assessment to Garuda. It was provided to Garuda by Mr Beamon for IASA in Indonesia (see Exhibit 12). The failure of IASA to call Mr Beamon or some other person who made the decision to send the negative assessment to Garuda is something I also take into account in finding that the respondent has failed to discharged the presumption created by s 361 of the FW Act.

*Summary of contravention findings*

406 In summary, I find that the respondent contravened ss 340 and 346 of the FW Act when it:

(1) dismissed Mr Puspitono from his employment under the ITEA by its letter dated 16 October 2009;

(2) by its officer Mr Mark Scott in Perth, made a negative Personality assessment in the GA-Authorisation Application form on or about 23 September 2009; and

(3) by its officer Mr Thomas Beamon in Jakarta, gave the GA-Authorisation Application form containing the negative assessment of Mr Puspitono, made by Mr Scott in Perth, to Garuda Indonesia.

**Remedies**

407 This Court may make any order the Court considers appropriate where it is satisfied that a person has contravened a civil remedy provision: s 545(1) of the FW Act.

408 Without limiting its powers under s 545(1), by s 545(2), the orders the Court may make include the following:

(a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
(b) an order awarding compensation for loss that a person has suffered because of the contravention;
(c) an order for reinstatement of a person.

409 The Court may also order a person to pay a pecuniary penalty that the Court considers appropriate if the Court is satisfied that a person has contravened a civil remedy provision: s 546(1).

410 Sections 340 and 346 of the FW Act, which I have found the respondent has contravened, are civil remedy provisions: Item 11 in s 539 of the FW Act.

411 If this were an ordinary case, the findings of contravention I have made would justify an order granting an injunction requiring IASA to remedy the effects of the contraventions and an order for reinstatement of Mr Puspitono. However, the Union recognises that this is not an ordinary case because Mr Puspitono no longer possesses a valid visa to work in Australia — albeit that this circumstance appears to be a direct result of the adverse actions of IASA.

412 In these circumstances, the Union submits that IASA should pay compensation to Mr Puspitono. The Union says the quantum of compensation must be measured against what, in ordinary circumstances, would have been Mr Puspitono's right to continued employment for the indefinite future, subject to usual contingencies.

413 The Court accepts the Union's submission that the ordinary remedy of reinstatement is, in the circumstances of this case, impractical. There is no certainty that an appropriate visa would be issued to Mr Puspitono to facilitate recommencement of employment with IASA if it were to be ordered. Accordingly a compensatory order is appropriate.

414 So far as the compensation claim is concerned, the Union submits that compensation should be assessed by reference to the following heads of loss:

(1) *Economic loss for having to return to Indonesia following the contraventions.*

| Actual expenses: | |
|---|---|
| (a) Shipping his personal effects back to Indonesia — | $585 |
| (b) Cost of air fare to return to Indonesia — | $254 |
| Total | $839 |

(2) *Loss of wages and remuneration as a result of the termination.*

The equivalent of 18 months wages, totalling $82,553.58, plus interest, on the basis of past and future economic loss, calculated as follows:

(a) At the time of termination in October 2009, Mr Puspitono was paid $4,586.31 per month, which equates to an annual amount of $55,035.72.
(b) Mr Puspitono was terminated on 16 October 2009 on four weeks notice, he was paid termination entitlements on or about 30 November 2010.
(c) At the time of the trial, Mr Puspitono had been dismissed for approximately 15 months, he had continued to look for work but has been unable to find alternate, full time, employment.

(d) Mr Puspitono suffered loss and damage for a period of 15 months and continuing and had a reasonable expectation of ongoing work.

(e) Mr Puspitono has attempted to mitigate his losses and economic damages but remains out of full time work.

(f) As a consequence, he should be eligible to be compensated with the equivalent of 18 months wages plus interest on the basis of past and future economic loss.

(3) *Non-economic loss*

(a) Mr Puspitono has suffered non-economic loss with regard to pain and suffering.

(b) He had to leave Australia where he was hoping that he would be able to build a financial future for his family.

(c) The humiliation associated with returning to Indonesia in the circumstances of his dismissal imposed loss on him.

(d) Mr Puspitono, as a result of the hurt, humiliation, and stress associated with the contravention, including the unique nature of his forced departure from Australia, should entitle him to a non-economic loss order of $25,000 plus interest.

415 The respondent emphasises that in making any order for compensation under s 545(1), the Court must make an order that is "appropriate".

416 The respondent submits there has to be a causal connection between the unlawful dismissal and the loss, which is always a question of fact: see *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525.

417 In the result, the respondent says the applicant must demonstrate that there was an opportunity for Mr Puspitono to work for a set period of time, and that he had a 100% chance of realising that opportunity but for the unlawful action: see *Guthrie v News Ltd* [2010] VSC 196 at [58]-[61], [167]-[168] per Kaye J. The respondent says there is no evidence to support such a finding. To the contrary, the evidence supports a finding that, without his Garuda authorisation, Mr Puspitono would have become surplus to requirements very quickly and would have been terminated in his employment for that reason.

418 IASA also submit that Mr Puspitono's evidence of a reduced income after his dismissal "is a consequence of not having an income; it is not a direct consequence of being dismissed from IASA". The respondent says that Mr Puspitono's "bad reputation in the community" was, on his own admission, because people learned of his walk away on 7 April 2008, and that this is more probably the reason why he has found it difficult to get another job, and his reduced income as a result, than the fact of the dismissal from IASA.

419 I note that, while Mr Puspitono gave some evidence concerning other financial relationships, the Union does not submit that compensation should be assessed by reference to such financial arrangements or dealings that Mr Puspitono has or had with his brother-in-law in respect of his home loan, or reduction in living standards following his return to Indonesia, or on account of food and education expenses for his children.

420 The respondent further says there is no medical evidence to support any finding for compensation on the basis that the dismissal caused any alleged stress, or humiliation or hurt: in this regard, see *Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62.

421 I have already noted that the Court has a wide power to make "any order" under s 545(1) the court considers appropriate where it is satisfied that a person has contravened a civil remedy provision. The terms of s 545(2) do not limit the ambit of this power to grant an appropriate order.

422 As I have also set out above, in the unusual circumstances of this case, the only remedy sought by the applicant Union is an order awarding compensation for loss that Mr Puspitono has suffered because of the proved contraventions. I consider that compensation should be ordered in the circumstances of this case, there being no other substantive remedy that is appropriate in this case.

423 In accordance with usual principle, an order awarding compensation must be assessed on the basis that an applicant establishes loss that a person has suffered because of the contravention and that this requires an appropriate causal connection between the contravention and the loss claimed.

424 The contraventions in this case relevantly relate to the dismissal of Mr Puspitono from his employment, effective (generally speaking) from the end of November 2009, when he was paid out his contractual entitlements and benefits, as acknowledged by the Union.

425 The contraventions relating to the making of a negative assessment and the provision of that negative assessment to Garuda Indonesia, may be considered to be the cause of loss additional to that caused by the dismissal itself, and the subject of a separate compensation order where a distinct and separate loss is disclosed.

426 As to the economic loss items claimed by the Union, I find those are a direct consequence of the contraventions. Mr Puspitono lost his job, his visa and was obliged to return to Indonesia to find work. I find the claims totalling $839 are proved and compensation in that order should be ordered.

427 So far as the loss of wages and remuneration as a result of the termination is concerned, I find loss under this head is also a direct consequence of the contraventions. I note again, as I did above, that in Mr Puspitono's affidavit in reply to that of Mr Scott, he states that he has, as of 1 October 2010, obtained some temporary employment in Indonesia. I accept that up until this point, in October 2010, he had tried to obtain alternative employment in his field, but had been unsuccessful (see [61]-[63] of his affidavit in reply). In his affidavit in reply, Mr Puspitono states:

> [64] I have now obtained a temporary contract with Air Atlanta in Indonesia. I commenced on 1 October 2010.
>
> [65] I earn $70 US dollars a day from this contract.
>
> [66] The contract with Air Atlanta is due to expire on 31 January 2011. I am hopeful it that it might be extended into a permanent arrangement but if not, I will need to find alternative work after this date.

428 The Union in its submissions, as noted above, suggests that the Court should regard the period of actual loss and damage as 15 months, as at the time of the trial. I consider that calculation to be correct or near enough. The termination took effect on four weeks notice in about the middle of November 2009. Taking into account the trial date in early January 2011, the period involved is near enough to 15 months.

429 The Union, as noted above, submits that Mr Puspitono has continued to look for work but has been unable to find alternate, full time employment. Having regard to Mr Puspitono's evidence concerning his temporary contract with Air

Atlanta in Indonesia, that commenced on 1 October 2010, that would appear to be a correct description of his position, in that the temporary contract should not be equated with "full time" employment. At the date of this judgment the position of Mr Puspitono in relation to Air Atlanta or any other employer is not known and I proceed, in the absence of any other evidence from either party, to assess compensation under this head as best I can.

430 However, the Union, by its submissions does not seek to do more, in these circumstances, than say compensation should be assessed "with the equivalent of 18 months wages being $82,553.58 plus interest on the basis of past and future economic loss". In other words, the Union is content to assume that Mr Puspitono will not suffer a compensable future economic loss going beyond 18 months of the effective dismissal of Mr Puspitono on say 13 November 2009, being four weeks from the 16 October 2009 letter of termination.

431 I find that compensation should be assessed in this regard on the basis of 18 months as submitted by the Union. While some temporary work has in fact been achieved, on the evidence the outlook for Mr Puspitono was and is uncertain. Accordingly I consider that compensation under this head for present and future economic loss should be limited to a total of 18 months, as the applicant submits and be assessed at $82,553.58, subject to bringing to account income earned in this period.

432 The only evidence of Mr Puspitono having work up to the date of trial, following unsuccessful attempts to find work, is the payment of US$70 per day from 1 October 2010 to 31 January 2011. That constitutes about 123 days at US$70 per day. Assuming that the contract provides for payment every day, including days off, that would produce a total payment of US$8,610. Treating the US$ amount as equivalent or near enough to the AU$ amount in that period, I would deduct two-sevenths (2/7ths) or $2,460 from that sum on account of the possibility that, as in Australia, Mr Puspitono would have worked a schedule and may not have been paid on each and every day during that four month period. The result is I would treat Mr Puspitono as having earned approximately AU$6,000 (rounded off) in the relevant four month period.

433 Accordingly compensation under this head should finally be assessed at $82,553.58 less $6,000, being a total of $76,553.58.

434 I have little doubt and find that but for the contraventions, there is no particular reason on the evidence to consider that the employment of Mr Puspitono under the ITEA with IASA would not have continued throughout the whole of this 18 month period in relation to which I consider compensation should be assessed.

435 The respondent, as noted above, submits that the evidence supports a finding that, without his Garuda authorisation, Mr Puspitono would have been surplus to requirements very quickly and would have been terminated in his employment for that reason. The difficulty with this submission is that, if there had been no contravention, then in all likelihood, Garuda would not have had before it a negative assessment and in all likelihood Mr Puspitono's engagement by IASA would have continued. In any event, there is no evidence to suggest the contrary. There is no compelling evidence that IASA was, for example, about to make Mr Puspitono redundant, as it had purported to do in May 2009, about the time of the renewal. In fact, the evidence of Mr Scott was that he was expecting Mr Puspitono to return to work in mid-October. There was no

suggestion that Mr Puspitono's services were not then required or were imminently likely to become "surplus to requirements", as the respondent puts it in its submission. I reject that submission.

436 I also reject the respondent's further submission that the loss identified was not as a consequence of the dismissal, or the other contravening conduct identified. The respondent says it was as the result of Mr Puspitono having a "bad reputation in the community" when people learned about his walk away on 7 April 2008. But for the contravening conduct, the likelihood is that the whole question of disputation between Mr Puspitono and IASA would not have become the subject of discussion in the aircraft maintenance sector, because he would not have been dismissed in October 2009, and the negative assessments made in respect of him would not have been created and put into circulation. His reinstatement in July 2009 under the consent court orders had effectively refuted any submission based on that ground.

437 I have no hesitation in finding that the wages loss contended for was materially caused by the contraventions found in this case.

438 As to the claim for non-economic loss, I accept the respondent's submission that there is no medical evidence to support any finding that the dismissal caused stress or, if there is any such evidence, that it identifies the nature or extent of such stress.

439 However, the Union puts its submissions more generally and points to the hurt and humiliation experienced by Mr Puspitono as a result of the contraventions, including the unique nature of his forced departure from Australia.

440 I have little hesitation in finding that the dismissal and the fact of the negative assessment made by IASA and conveyed to Garuda together relevantly hurt and humiliated Mr Puspitono, as he has claimed and was a direct consequence of the contraventions found. I accept Mr Puspitono's evidence that he was distressed at the way IASA treated him, suffered headaches and vomited, and later was upset to find that as a result of IASA's adverse actions his reputation was such that he struggled to find work in Indonesia in his area. I reject the respondent's submission that this reputation was all of his own doing.

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

442 As a matter of principle it is difficult to see why a compensatory financial order cannot be made in respect of hurt and humiliation (or "shock, distress and humiliation" as s 329(4) of the FW Act describes this head of loss) shown to be a direct consequence of a contravention. At common law, courts have been reluctant to provide damages for a breach of a contract which results in hurt and humiliation, unless the parties to the contract can be taken to have contemplated such damages for breach: *Baltic Shipping Company v Dillon* (1993) 176 CLR

344 (*Baltic Shipping*), for example at 365, Mason CJ. There are special reasons usually cited by courts as to why this common law position in respect of breach of contract should obtain. For example, in *Baltic Shipping* at 369 Brennan J suggested that if a promisor in a usual commercial setting were exposed to such an indefinite liability in the event of breach of conduct, the making of commercial contracts would be inhibited.

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

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

445 Further, in relation to the former WR Act, s 298U(c), which empowered the Court to make an order requiring the person or industrial association to pay an employee or independent contractor compensation of such amount as the Court considers necessary, this Court took a broad view of the compensation that should be paid. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* (2006) 150 IR 179 at [4], Marshall J observed that:

> "Compensation" is a broad concept which should not be interpreted in a narrow way. In an appropriate case the Court is able to order compensation for non economic loss.

446 In a similar vein, in *McIlwain v Ramsey Food Packaging Pty Ltd (No 4)* (2006) 158 IR 181 at [87], Greenwood J in this Court considered both s 298U(c) and (e) of the former WR Act and held that the Court had the power to award compensation for non-economic loss.

447 These decisions, and the view I take of the Court's power to order compensation in respect of non-economic loss for distress, hurt or humiliation is also supported by the decision of the Full Court of this Court, in relation to the power to order compensation under s 170EE of the former WR Act, in *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 156-157.

448 In my view, if anything, the power of the Court to make an appropriate order under s 545 of the FW Act is more broadly cast than provisions of the former WR Act.

449 Additionally, I do not consider that the word "loss" in s 545(2), to the extent this provision must be relied upon for the making of a financial compensation order, limits the loss that may be claimed for economic loss. While the

respondent contends that a distinction should be drawn between "loss" and "damage", and that shock, distress and humiliation should be considered as "damage", and not as "loss", I find the distinction elusive and unhelpful. Shock, distress and humiliation may be considered, where it exists, as an injury the person suffers which is apt to be described as non-economic loss or damage.

450 In my view, Mr Puspitono is entitled to some measure of compensation for the distress and humiliation I have found he suffered as a direct consequence of the contraventions proved by the evidence. The Union claims a non-economic loss order under this head of $25,000. I consider such an assessment is too high. I am prepared, however, having regard to the status of Mr Puspitono as a licensed aircraft maintenance engineer, the annual income he received of approximately $55,000 at material times, the level of distress and humiliation he felt as disclosed by his evidence, not only at the fact of dismissal, but due to the negative assessment which adversely affected his reputation in the aircraft maintenance industry in Indonesia, that a non-economic loss order in the sum of $7,500 is appropriate.

451 The applicant also claims interest on compensation up to judgment. The respondent makes no submission on interest. So far as interest on compensation, as part of the compensation is concerned, s 547 of the FW Act deals with interest up to judgment, as does s 51A of the *Federal Court of Australia Act 1976* (Cth) (FCA). By s 547(1) the section applies to an order (other than a pecuniary penalty order) under Div 2 of Pt 4-1 of Ch 4 of the FW Act, in relation to an amount that a person "was required to pay to, or on behalf of, another person under this Act or a fair work instrument". By s 547(2), in making the order the Court must on application include an amount of interest in the sum ordered, unless good cause is shown to the contrary. By s 547(3), without limiting subs (2), in determining the amount of interest the Court must take into account the period between the day the relevant cause of action arose and the day the order is made.

452 On the face of it, a question arises whether in this case there was relevantly "an amount that a person was required to pay to, or on behalf of, another person under this Act or a fair work instrument" at material times that is the subject of the compensation order. The dismissal was made in contravention of the Act but should not have occurred. On one view it might be said the respondent was "required to pay" wages under the ITEA and so the compensation for the lost wages should carry interest. I think the better view, however, is that where adverse actions have resulted in the respondent being ordered to pay compensation, this is not an amount that a person "was required to pay to, or on behalf of, another person under this Act or a fair work instrument". On this basis, s 547 is not applicable.

453 However, I consider s 51A of the FCA applies in any event. Section 51A(1) provides for the inclusion of interest in the sum for which judgment is given, "in any proceedings for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section".

454 Provisions such as s 51A are to be found in a number of Australian statutes governing the payment of interest up to judgment. The High Court considered the proper construction of s 60(1) of the *Supreme Court Act 1986* (Vic), that was not unlike s 51A(1), in *Victorian WorkCover Authority v Esso Australia Ltd*

(2001) 207 CLR 520. The plurality (Gleeson CJ, Gummow, Hayne and Callinan JJ) gave particular consideration to the expression "debt or damages" that appeared in s 60(1). Their Honours stated, at [41], that:

> the phrase should be understood as a composite expression. It embraces any proceeding in which a claim for money is made, in contrast to declaratory relief and claims for specific forms of relief such as mandatory injunctions, charging orders and orders for specific performance. The circumstance that relief of that description is sought in addition to a money claim does not deny the application of s 60 in respect of that money claim.

455 Their Honours cited the earlier decision of the High Court in *Crisp & Gunn Co-operative Ltd v Hobart Corporation* (1963) 110 CLR 538, which dealt with the words "action to recover a debt or damages" as it appeared in the *Rules of the Supreme Court 1958* (Tas) (Order XXIV, r 1). The Court (MacTiernan, Taylor and Windeyer JJ) noted, at 543, that the expression used in the rule "has a composite significance and, having regard to its history, was doubtless intended to cover any action in which a claim for money, as distinct from other specific forms of relief, was made". Thus, in *Crisp & Gunn Co-operative Ltd* the Court considered that an action under a statute to recover compensation for compulsory acquisition of land fell within the words "action to recover a debt or damages".

456 In my view, having regard to these decisions of the High Court, a proceeding in respect of a cause of action established by the FW Act that permits an applicant to claim compensation for loss suffered by a person may properly be considered an action in which a claim for money, as distinct from other specific forms of relief (such as reinstatement), is made.

457 In the circumstances, I consider s 51A applies and the various heads of loss assessed should attract interest as part of the judgment sum ordered, as claimed by the applicant (albeit inappropriately under s 547 of the FW Act).

458 Accordingly, first I would award interest on the compensation that represents lost wages and remuneration, as part of his compensation, calculated from the effective date of dismissal on 13 November 2009 up to judgment.

459 Secondly, I would award interest on the items of economic loss from the date the payments of $585 and $254 were made up to judgment.

460 Thirdly, I would also award interest on the non-economic loss order of $7,500 from the date of effective dismissal on 13 November 2009, when the relevant distress, hurt and humiliation commenced, up to judgment.

461 As to the calculation of interest under s 51A, the rates set out in the Court's Practice Note CM16, Pre-Judgment Interest are applicable.

*Summary of compensation order*

462 In these circumstances I would order compensation calculated as follows:

(1) Economic loss — $839 (plus interest to be calculated).

(2) Loss of wages and remuneration — $76,553.58 (plus interest to be calculated).

(3) Non-economic loss — $7,500 (plus interest to be calculated).

Total compensation $84,892.58 (plus relevant interest).

**Pecuniary penalty**

463 The Union seeks the imposition of a pecuniary penalty for each of the contraventions found and an order that the penalty be paid to the Union, pursuant to s 546(1) and (3).

464 Having regard to the usual principles that apply to the determination of a penalty, as summarised by Moore J in *Rojas v Esselte Australia Pty Ltd (No 2)* at [63]-[69], the Union submits that a pecuniary penalty in range of $15,000 to $20,000 for each contravention is appropriate.

465 I consider the imposition of pecuniary penalties is appropriate in this case.

466 I will hear further from the parties, particularly the respondent, in relation to the quantum of the pecuniary penalties.

**Costs**

467 Costs in a proceeding under the FW Act will only be ordered in specified circumstances. Section 570(2) empowers the Court to order costs, but only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause — which is not relevant here; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before FWA (Fair Work Australia) — which is not relevant here;

(ii) the matter arose from the same facts as the proceedings.

468 The Union says that it wishes to be heard on the question of costs, having regard to the operation of s 570 and the conduct of IASA in these proceedings.

469 I will hear from the parties on the question of costs.

**Proposed orders**

470 In light of the above findings, the Court would make declarations and orders to the following effect:

1. A declaration that the respondent took adverse action against Mr Puspitono in contravention of s 340(1) of the FW Act.
2. A declaration that the respondent took adverse action against Mr Puspitono in contravention of s 346(1) of the FW Act.
3. An order that, pursuant to s 545 of the FW Act, the respondent pay compensation to Mr Puspitono for loss suffered by him because of the contraventions, together with prejudgment interest to be calculated.
4. An order that the respondent pay pecuniary penalties under s 546 of the FW Act for the contraventions of ss 340 and 346 of the FW Act, such pecuniary penalties to be assessed and paid to the applicant.

471 The Court will now hear from the parties in relation to the calculation of prejudgment interest, quantum of pecuniary penalties, and costs of the proceedings.

472 When these matters are finally determined, I will invite the applicant to bring forward a minute of final orders.

*Orders accordingly*

Solicitors for the applicant: *Maurice Blackburn Lawyers*.

Solicitors for the respondent: *Butcher Paull & Calder*.

RODEN PRITCHARD