TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
COMMISSIONER BISSETT

C2023/2498

s.604 - Appeal of decisions

Ventia Australia Pty Ltd v Martin Pelly
(C2023/2498)

Melbourne

2.00 PM, FRIDAY, 9 JUNE 2023

PN1

VICE PRESIDENT ASBURY: Good afternoon. Could I just start by taking the appearances, please.

PN2

MR C O'GRADY: Yes. Good afternoon, Vice President. My name is O'Grady, initial C. I seek permission to appear along with Mr Avallone and Mr Avallone's reader, Ms (indistinct) for the appellant.

PN3

VICE PRESIDENT ASBURY: Thank you.

PN4

MR J McKENNA: If the Full Bench pleases, McKenna, initial J, seeking permission to appear on behalf of the respondent.

PN5

VICE PRESIDENT ASBURY: I think this is matter that permission is not in issue and we're satisfied on the basis of the submissions of the parties and the material before us that the matter is one of sufficient complexity that allowing both parties permission to be legally represented would allow the matter to be dealt with more efficiently. Thank you. Are there any preliminary matters we need to deal with?

PN6

MR O'GRADY: Not from our part, Vice President.

PN7

MR McKENNA: Thank you, Vice President. Not for the respondent.

PN8

VICE PRESIDENT ASBURY: Thank you. We can indicate that we've read the very comprehensive written submissions that have been filed by the parties, so Mr O'Grady, if you'd like to speak to yours, thank you.

PN9

MR O'GRADY: Thank you, Vice President. As the Full Bench would appreciate, there are a number of issues raised by the appeal. Firstly, there is the approach to out-of-work conduct and it would appear to be common ground as to what that approach should be. The issue between the parties from our part is whether or not the Commission actually applied that approach as opposed to referring to relevant authorities that set it out.

PN10

There is also the issue of the approach to differential treatment and whether the focus of assessing differential treatment should be on the process adopted by the decision- maker or whether it's a matter for the Commission to determine, based upon the information before it. And this we understand the respondent's submissions, the parties are at odd on that issue and They would also appear to be at odds as to what approach was actually applied by the Commissioner to that

issue. And then lastly there is a question of significant errors of fact and whether or not in respect of a number of findings the commissioner made findings that were not open on the evidence or were against the effect of the evidence.

PN11

What I was proposing to do this afternoon if it pleases the Full Bench is before going to those issues, perhaps just to provide a brief overview of the material in the appeal book. I'm conscious of the fact that it is a voluminous appeal book. We've sought to reduce that to some extent by not duplicating material that was in various witness statements, but given the bulk of it, I thought it might be of assistance if I briefly went through that with a view to explaining the nature of my client and the concerns it had with Mr Pelly's conduct.

PN12

The starting point in respect of that is what appears in Mr Anderson's witness statement. Mr Anderson's witness statement is at appeal book page 511 and the Full Bench will appreciate that the appeal book has, in effect, two sets of numberings. There is some red numbering on the pages. That was the numbering of the initial Commission book and then there is the large black numbering which is the numbering for the appeal book. The reason for us maintain that second set of numbering is that the transcript, of course, refers t the numbering in the Commission book that was before the Commission.

PN13

And you will see at appeal book page 512, commencing at paragraph 5, Mr Anderson explains the nature of my client's business, which is to provide services in several industries including fire and rescue services, in respect of aviation, structural and bushfire response and hazard reduction services under a contract with the Department of Defence. And he goes on to elaborate as to the nature of that service.

PN14

You will see, in particular, at paragraph 7 he notes that the fire and rescue service at the HMAS Albatross defence base, which is in Nowra, which is where Mr Pelly was engaged is a 24-hour per day, seven days per week service and in effect that service is provided by four platoons; A platoon to D platoon with six firefighters in each platoon and there is also watch-room facilities and the like.

PN15

You will note in paragraph 14 of his statement, Mr Anderson notes there is currently one female firefighter working at HMAS Albatross, and the fire and rescue service line has approximately 15 female employees. There is a number of points which seek to emphasise flowing from that part of the evidence. Firstly this is an unusual workplace, in that it is a 24/7 workplace. So even when Mr Pelly is off duty, there is a certainty that some of his co-workers will be on duty.

PN16

Secondly, the nature of the work performed by the firefighters engaged by my client involves them working closely as a tight knit team in a situation that may

involve an emergency. And we say that's a relevant consideration in assessing the matters raised by this proceeding.

PN17

And then lastly there is a number of female employees working in that environment and the evidence before the Commission was that there was a desire on the part of my client to increase the number female employees it had working for it. The Full Bench might have noted that in the authorities that we have provided, we've also attached two public reports into fire services.

PN18

Now, they are not reports into my client. They're relevantly items 10 and 11 in the bundle of authorities. One concerns the Victorian Fire Services and one concerns the South Australian Fire Services. And you will see that we've referred to some parts of those reports, but what is apparent from those reports is that at least in respect of those services there is a perceived problem with the acceptable of women firefighters. And that is something that has been noted in two quite extensive reports undertaken by both the Victorian government and the South Australian government. And there is a perceived 'blokey' culture, if I can use that language and a feeling that women are marginalised, unless they adopt and/or manifest that blokey culture.

PN19

The third report we've attached is the review into the treatment of women in the Australian Defence Force and, again, we have only set out the recommendations in that review, because it's quite an extensive report, but the Full Bench will note when it has regard to it that in the course of that review there was a recommendation made about the need to respect and ensure the progression of women within the Australian Defence Forces. And, again, in circumstances where my client is providing firefighting services to the defence force, that is a matter that we would submit is part of the broader factual matrix that needs to be taken into account in assessing the material before the Commission. Relevantly, I think it's recommendation 18 that deals with sexual misconduct prevention and the like. Principle 5, which is at the bundle of authorities, pages 404 touches on that issue.

PN20

Mr Thompson also goes on to explain the various policies and training that my client has. The Full Bench will find at appeal book page 536 a bullying and harassment policy which is expressed in unexceptional terms for such a policy and puts in place appropriate principles in respect of engagement with other employees. And in line with my client's commitment to diversity and inclusion.

PN21

There is also, relevantly , a code of conduct which commences at page 543, but at appeal book page 552, there is again a commitment to promoting workplace equality and diversity. Now, Mr Anderson also refers to other qualities that we have, but I don't need to burden the Full Bench by going through all of them. They are in terms that one would expect of a large modern organisation that has an emphasis on diversity and equality of treatment.

PN22

The next matter I would like to take the Full Bench to is Mr Anderson's statement. He explains at paragraph 28 through to 30 how we became aware of the various posts that give rise to the misconduct on behalf of Mr Pelly and another employee, Mr Thompson who was dealt with at the same time by the Commissioner. You will see that there as an employee by the name of Hayley Dun who was the subject of an investigation and in response she provided a letter which contained a number of attachments and that letter and the attachments commence at appeal book page 871.

PN23

I apologise to the Full Bench in that we have page numbering for the letter and then thereafter there are the various posts, but the posts themselves don't have individual page numbering, but I can take the Full Bench to the relevant parts of it. So it's at page 871 and you'll find the letter headed (indistinct) Ventia. And it's a response to the allegations against her, but also raises the posts that she had accessed from her father's participation in this group and if one then turns post the letter, we then have a list of the members of the group and one of the members of the group is Keithy George and that is the name by which Mr Pelly identified himself.

PN24

The Full Bench will recall that the evidence was that all bar three of the members of this group are employees of my client and there were some 11 persons who were current employees of my client who were members of this group. And then turning into the post, the post that appears on the page, I think it's page 879 it's the top right-hand corner above the battery and it seems to have been imposed on the exhibit number itself. You will see there that there is a post of a push bike with some fire extinguishers attached . So that's the Panther S post that the Full Bench will recall is referred to by the Commissioner. This was a post made by Mr Pelly and it referred to efforts made to obtain new fire equipment.

PN25

Then if one turn over the page, we have a photo of a man with his thumbs up. The Full Bench will recall that that was a photo taken by Mr Pelly of a person who had been on extended leave. The issue in respect of that photo was that it was taken on defence premises and there was a clear policy that photos were not to be taken on defence policies without permission from defence.

PN26

And then if one turns over the page again one will see a page that has in the top left-hand side, 'Matthew forwarded an image', and then there's comments by Adam, 'Soft as butter. Call him powder puff.' And then Adam makes a another post 'Fucking C platoon soft cocks. First Gibbo, now Evans. I hope you're harder than these pussies, Timmy.' And then there is a post with an individual wearing a shirt that's got 'Typical' on it.

PN27

Again, that was a post by Keithy, which is a reference to Mr Pelly and as you will have seen from the submissions that we filed, the appellant maintains that the effect of that post was an endorsement of the comments that immediately

preceded it and the effect of those comments was to denigrate individuals who had left the group by referring to them as powder puffs, soft cocks and the like. And also to, we would submit, intimidate a remaining member of the group, namely Timmy, not to do what Gibbo and Evans had done; namely, not to leave the group.

PN28

And then if one turns two pages on and I'm reminded by my learned junior that if one turns over the page, one has, if you like, an enlargement of the text that is difficult to read in the middle of the page that I've just taken the Full Bench to, which again includes as the last substantive post, 'I knew you were soft, but not that soft. Soft like Gibbo. You, Doc, Gibbo, Mitch must be the name.' And that's Mr Thompson posting that, but again Mr Pelly's post with the shirt of 'Typical', we would submit is an endorsement of those comments being directed to various other employees and, indeed, current employees of my client working in the environment that I sought to describe earlier.

PN29

And then if one turns over the page again, there is on the bottom page of the page that has 'Sickos Video Sharing Group' at the top and 1631 at the top, we have a post by Keith and, again, that's a reference to Mr Pelly where you will see there are three female bodies naked showing their buttocks, and the comment made is 'Difference between new, used and worn shock absorbers.' I'm reminded that's appeal book 887.

PN30

And then if one flips over the page again to a page that has CA29, so it's a page that is in a direction. So it's in effect landscape. It's got CA29, 'Sickos Video Sharing Group', and you will see Stuart forwarded an image and Stuart's image is, 'Call a girl beautiful 1000 times and she won't notice. Call her fat once and she'll never forget. That's because elephants never forget.' And the Full Bench will recall that that is a reference to Mr Gregory, and the Commission appears to have made a finding that that was a far more offensive post than the post that Mr Pelly made in respect of the shock absorbers comment.

PN31

And you will see that that is a reference to Stuart having forwarded that and it was common ground that Stuart is a reference to Mr Gregory. I'm sorry to do this, but if I could ask the Commission to go back some four or five pages to a page that has 1527, 'Sickos Video Sharing Group', 'Stuart forwarded a video', with 058 at the top of the page. So if one goes back to 880, you will see that there is a female in a tight shirt and her underwear.

PN32

VICE PRESIDENT ASBURY: Sorry to interrupt. Is that the one with the image in the car park on the bottom of it?

PN33

MR O'GRADY: Yes, it is. That's right, Vice President.

PN34

VICE PRESIDENT ASBURY: Thank you.

PN35

MR O'GRADY: That's correct. But you might recall, Vice President that there is reference in the decision to a comparison between the post that Mr Pelly made of the OnlyFans video and a post that Mr Gregory had posted. Now, that is a screenshot of the post and one thing that is, perhaps, important to recall with all of this is that my client wasn't provided with actual access to the group. Rather, what it received as a result of the letter that was sent by Ms Dun is various screenshots she had taken. And that is the screenshot that we received and in respect of that, my client had no way of determining what the content of that particular screenshot was whereas - and that could be contrasted with the OnlyFans video that Mr Pelly posted, which is at - I will find the page in due course, but the Commission will recall that in respect of the OnlyFans video, it's at page 880, Mr Pelly admitted that it was a video that went for some four minutes and 12 seconds and involved sexual activity. Sorry, 914 I'm told. So it's on the last page of the photos and screenshots, just before the amended timesheet and you will see that there is a reference to Keithy having forwarded a video. Now, that of course is only a screenshot, but what my client was able to do is to ascertain that that was an OnlyFans video. That perhaps was put the Mr Pelly in the hearing and he admitted it was an OnlyFans video and he admitted that it was a video that was pornographic in nature and involved sexual acts that went for some four minutes and 12 seconds or thereabouts.

PN36

Now on that, if I could ask then the Full Bench to go to the transcript and relevantly at appeal book page 1474, this is the cross-examination of Mr Pelly, and you will see that the shock absorbers post is dealt with at PN155 and following. And at 156 it says:

PN37

Keithy forwarded an image. Keithy is you isn't it?---That's correct. Yes.

PN38

And when you forwarded the image of three women's naked rear ends, those are the words, the difference between new and used shock absorbers, that's right, isn't it?---Yes.

PN39

At the top of the next page, 1476,:

PN40

Would you agree that that's a post that's disrespectful towards women?---Yes.

PN41

It objectifies women?---What, sorry?

PN42

It objectifies them and treats them like objects?---Yes.

PN43

Would you it agree it denigrates women?---Yes.

PN44

And then at 1476 there are admissions made by Mr Pelly in respect of the nature of the group and the numbers of the group and the numbers of them that are employed by them at relevantly PN170 through to 175. And in particular at PN174 and 175 Mr Pelly acknowledges:

PN45

And the way Ventia provides service, it provides coverage firefighting services 24 hours a day, seven days a week?---Yes.

PN46

So at anyone time the likelihood is that of those 11 plus members who are Ventia employees some of them will have been at work?---Yes.

PN47

And then he was asked,

PN48

Do you consider it appropriate to send to your workmates when they're at work a post that has three women's naked behinds and the words, 'The difference between new and used shock absorbers'?

PN49

Initially, Mr Pelly said yes, but when perhaps it was brought to his attention what he'd said, he then said, 'No, it's probably inappropriate.' And then he did accept that it as inappropriate. And then at 180 he was asked about the OnlyFans site and he knows what it is. And at 184 he accepts that it's primarily used by sex workers to producer pornography for their subscribers and he acknowledges at 187 that he forwarded the video that I've just taken the Full Bench to.

PN50

And then at AB1478, PN203 and following, Mr Pelly makes a number of admissions in respect of that video that lasts four minutes and 12 seconds and that he posted it to the group, at PN207, that it's a video of a woman engaged in sexual acts at PN208:

PN51

So what you posted is a video?---Yes.

PN52

That's a video of a woman engaged in sexual acts. That's right?---Yes.

PN53

And there's four minutes of sexual acts performed by her?---Yes.

PN54

And it's something that you forwarded to the 11-plus Ventia employees who are members of the group?---Yes.

PN55

And at AB1479, PN211 to 213 he accepts that it's inappropriate. He accepts that he doesn't need any training to know that it's inappropriate and that it's obvious that it's inappropriate.

PN56

And then at AB1484, at PN278 and following, Mr Pelly acknowledged that he knew from training or elsewhere that one of the code of conduct principles was to promote equality and diversity and he understood that was appropriate and he accepted that participating on online chat with at least 11 of your fellow Ventia employees sharing the type of material we've looked at is a failure to promote workplace equality and he says, 'I do now. Yes.' And it was only blokes in the group, and he acknowledged that that was the case.

PN57

And then at AB1486, PN302 and following, he accepted that the kind of material that was being shared promoted disrespect, 'Yes.' At 304:

PN58

That's the very Opposite of promoting workplace equality?---Yes.

PN59

And at 305:

PN60

And you knew again, whether from formal training or otherwise that Ventia does not tolerate bullying or harassment of any kind?---Yes.

PN61

And then at PN1488 he was taken to the post regarding the 'Typical' t-shirt and the Thompson post that had preceded it at PN327 to 344. And he acknowledged at 332 that:

PN62

The effect of Mr Thompson's post was to encourage Timmy to be 'harder than those pussies'?---Yes.

PN63

It's encouraging Mr Thistleton not to leave the Sickos Sharing Group?---And he says, 'Yes, I suppose yes.'

PN64

And then line of cross-examination continued on to AB1489 and you will see that at PN341:

PN65

It might put pressure on other members of the group who might be thinking of leaving not to leave, because they might get called a pussy and a soft cock?---Yes.

PN66

you accept that that's a form of bullying of these people?---Yes.

PN67

That was all I intended to do by way of overview. Could I then turn to the substantive issues that I flagged at the outset? And the first of those is the appropriate test to be applied in respect of out-of-hours conduct and the starting point in respect of that issue as the Full Bench would be aware is the decision in Rose v Telstra. That is number 5 in the authorities that we've filed and it commences at page 111 of the bundle of authorities. That bundle of authorities, if you're using the electronic version should be hyperlinked, but it's page 111 on any hard copy and the facts - and unfortunately given the time in which this decision was handed down, I don't have paragraph numbers so I will have to refer you to parts on a page. The facts in Rose v Telstra are summarised at page 111 through to 113, and also at 115 through to 116. But as the Full Bench will recall this was a case where a Telstra employee was travelling for work. In town was a person who he had previously lived with. He was offered by that person (indistinct) there were no incidents for the first few days, but on the third or fourth day they went out and they had a drinking session. Someone made a comment that the other one found offensive. They then, in effect, went back to the hotel room. Things escalated and ultimately there was a violent altercation, including the smashing of windows and the like. The police were called and subsequently Mr Mitchell who was the other employee was charged with offences and was given four months gaol as a result of what took place.

PN68

It's apparent from what appears at pages 113 to 114 that Mr Mitchell had behavioural issues that contributed to the escalation of the altercation and it would also appear that the primary concern of Telstra was reputational damage. That two of its employees had gotten themselves into a blue that had required police attendance and actually the charging of an employee, namely Mr Mitchell in the Local Court.

PN69

The reasoning of his Honour appears at page 128 at about point 4 of the page. And what his Honour says in the third substantive paragraph is

PN70

In my view the applicant's conduct on 14 November 1997 lacked the requisite connection to his employment and therefore did not provide a valid reason for his termination.

PN71

The incident in question took place outside of working hours. At the relevant time neither Mr Rose nor Mr Mitchell were in their Telstra uniforms. Nor were they 'on-call'. The incident did not take place in what could be regarded as a public place but rather inside the Hotel room that the applicant shared with Mr Mitchell.

PN72

According to Mr Lambert the applicant's conduct tarnished the public perception of Telstra employees and discredited the Company. In my view there is simply no evidence of any substance to support such a conclusion.

PN73

I do not think that there was a reasonable basis for concluding that Mr Rose's conduct had damaged his employer's interests. The evidence of any publicity as a result of the incident is scant. A court listing in respect of the criminal charges against Mr Mitchell appeared in the local paper but it was not suggested that the notice identified the accused as a Telstra employee. None of the witnesses were aware of anything else appearing in the local paper. The owner of the St Kilda Hotel was aware that Messrs Rose and Mitchell were Telstra employees. But the hotel owner was not called to give evidence. It is not known if he holds Telstra responsible in any way for the conduct of Messrs Rose and Mitchell or if he thinks any less of Telstra as a result.

PN74

And then in this third-last paragraph on the page,

PN75

Further I do not accept that the applicant's conduct viewed objectively, was likely to cause serious damage to his relationship with his employer. In this regard I note that during the course of his evidence Mr Warhurst acknowledged that Mr Rose had been a good employee and that he had no concerns with his conduct as an employee.

PN76

And it was on that basis that the President determined that there was not a sufficient connection between the employment and the incident for the incident to constitute a valid reason for the termination.

PN77

It's apparent in my respectful submission that it's a factual scenario that is fundamentally different to the one concerned here. This is not an incident that had any, if you like, direct relating back to the workplace. Mr Rose and Mr Mitchell had shared accommodation previously, so they were longstanding friends and it was, in my respectful submission, perfectly understandable that the President would find that there was not a sufficient nexus to warrant that conduct constituting a valid reason for termination.

PN78

The next authority I'd seek to take the Full Bench to is the decision of Sydney Trains. That appears at page 150 of the bundle of authorities. It's number 7 in the bundle. And the facts in that case appear at page 151, paragraphs 4 and 5. Here we have a train driver who has, it would appear a problem with alcohol. He had been off duty or during a break, a period of time when he was off duty, and he had again been picked up for a high level of drink driving, .206. And he had attended for work and drove a train without having informed Sydney Trains of him having been picked up for drink driving. He did subsequently inform the Sydney Trains and there was an investigation that was conducted.

PN79

At paragraphs 20 to 21, the Full Bench described the reasoning of the Deputy President at first instance and you will see at the foot of paragraph 20 the effect of that reasoning was that there was a lack of lack of a requisite connection to the

respondent's employment, because it took place outside of working hours. The respondent was not on call and was not due to report for his next shift until the following morning. And it was also found at paragraph 21 by the Deputy President that the respondent's conduct viewed objectively was not likely to cause serious damage to his relationship with the appellant.

PN80

At paragraph 112, and this is at page 181, the Full Bench expressed the view that the Deputy President misapplied the principles relating to a valid reason and out-of-hours conduct and importantly in our submission that had two consequences. The first was that misapplication was an error in the House v The King sense, but secondly it meant that the findings that there was no valid reason was a significant error of fact satisfying the test set out in section 400(2). And the Full Bench will appreciate from the submissions that we've filed that we rely on both of those limbs in what we say is a similar failure to correctly apply the principles in respect of valid reason and out of hours conduct.

PN81

At page 189, the Full Bench commenced their discussion as to the approach to be taken in relation to out of hours conduct and importantly at paragraph 141 they reject the proposition that the out of hours conduct must be conduct that is a repudiation of the employment contract. They say that that's not the effect of Rose v Telstra and at paragraph 142 they set out what we understand to be the test, namely that the conduct must touch the employment and in determining whether or not it does so, it is necessary to consider the entire factual matrix.

PN82

> *This will include matters such as: the nature of the out of hours conduct and what it involved; where the out of hours conduct occurred; the circumstances in which the out of hours conduct occurred; the nature of the employment; the role and duties of the employee concerned; the principal purpose of the employee's employment; the nature of the employer's business; express and implied terms of the contract of employment; the effect of the conduct on the employer's business; and the effect of the conduct on other employees of the employer.*

PN83

And at paragraph 148 they express the principle in these terms; a relevant connection between the conduct outside of working hours and the employment may also be found where the employee concerned in conduct out of hours which materially damages the employer's interest in respect of its relationships with its clients and staff. In that context in our submission it is not necessary that there be actual damage for these principles to apply. In our submission is it sufficient that there is the potential for such damage.

PN84

And indeed in the Sydney Trains case, it wouldn't be necessary for the applicant to have actually crashed the train or behaved inappropriately whilst he was driving the train, because of the alcohol he consumed on a weekend. It is sufficient that there is a potential for that to occur and in our submission that's the effect of the reasoning that was applied by the Full Bench in Sydney Trains.

PN85

And at paragraph 149, the Full Bench go on to note that:

PN86

> *Conduct engaged with an employee which involved a harassment of a co-worker outside of working hours was a valid reason for dismissal because of the effect on the victim of the harassment at work.*

PN87

And again, in our submission we submit that it's not necessary for there to be an actual effect. It is sufficient that there be the potential, that the conduct is of a nature that gives rise to a potential likelihood of such an injury to an employee. And in circumstances where you've got employees of my client working together in close-knit teams, including female employees, in my submission, or the dissemination of content that is disparaging of individual women or women as a class, or individual members who have had the temerity to leave the video sharing group clearly has that potential.

PN88

At paragraph 150, the Full Bench again reject the suggestion that the express or implied terms of the contract are determinative of whether there is a requisite connection. As we read this part of the reasoning, it's clearly a relevant consideration, but in our submission not a determinative one. And they note at paragraph 156 that the Deputy President in analysis failed to engage with the entire factual matrix.

PN89

And in due course, when I come to the reasoning of the Commissioner, that will be the submission that we put; that when one has regard to what he ultimately decided in respect of valid reason and his expressed reasons for coming to those conclusions, there was a failure to engage with the entire factual matrix such as to give rise to a misapplication of principle and therefore an error in both the House sense and the significant material error of fact sense.

PN90

The next authority I seek to take the Full Bench to is Colwell v Sydney International Container Terminals. It's bundle - it's authority 2 in our bundle and it commences at page 44. This, in our submission, is an important authority in the context of this case, because in our submission it is in some respect analogous to what has occurred here. The facts in Colwell were that Mr Colwell had been out drinking. He had received a video from a female friend that in effect showed a woman masturbating. He had decided then to on forward that to some 19 Facebook friends who were people with whom he worked.

PN91

Sydney International Container Terminals, like my client is a 24/7 operation so there were going to be people working whether Mr Colwell was rostered to be on duty or not. Sydney International Container Terminals was also a workplace where they were seeking to promote the recruitment of women, because it was perceived to have a somewhat blokey culture. That second proposition appears at

paragraph 11 of the decision. And I will find the reference to the 24/7 nature of the operation in a moment.

PN92

The actual video or what was sent is described at paragraphs 23 through to 25. And paragraph 98 makes reference to it being a 24/7 operation. The consideration of the Commissioner commences at paragraph 73 and it would appear that that issue there is the core issue that's between us in this matter, namely the question of there being a sufficient nexus between the conduct and the employment.

PN93

And at paragraph 79 the Commissioner dealt with a submission that we are also confronted with here namely that this was in effect a private Facebook friends group and that therefore there could be no such nexus. This is at page 75, Vice President, of the bundle of authorities and the Commissioner rejected that submission, because she noted that the individuals in the Facebook group were friends of Mr Colwell, they were friends because they worked with him. There was no other, if you like, explanation for the friendship. So the fact that they were friends was not a point of distinction, but they work colleagues who happened to be friends. That position is even more manifest here, because the evidence was that Mr Thompson created the relevant group and joined people to it who were predominantly people who either were current and/or former employees of my client. Absent the employment, there is no evidential basis for suspecting that Mr Pelly would have been joined to the group.

PN94

VICE PRESIDENT ASBURY: Mr O'Grady, was there some evidence about people going to someone's wedding?

PN95

MR O'GRADY: Yes. There was evidence that many of these people were friends of Mr Thompson and had gone to Mr Thompson's wedding. But as I understand the evidence, Vice President, they were friends of Mr Thompson's because they worked with Mr Thompson and they went to his wedding because of that. It's not the other way around, if you like. And my learned junior, who appeared at first instance says I'm right about that.

PN96

The assessment or the reasoning of the Commissioner commences in detail at paragraphs 86 and following and with respect to the Commissioner, her reasoning highlights, in our submission, dare I say it the complicate world in which we operate in this space, in that she has had regard to a number of lines of authority including lines of authority dealing with sexual harassment and bullying and how they, in effect, fit in with the issues of valid reason in the context of out-of-hours conduct.

PN97

And so at 86 she refers to Vergara v Ewin, which is the decision of Bromberg J which concerned sexual harassment and then there is also the decision of Bowker and then at page 82 towards the foot of 87, she refers to Rose v Telstra. And then

at paragraph 89, she puts to bed or puts to rest, to use her language, the applicant's contention that the respondent could not have a valid reason to dismiss the applicant, because the applicant use social media, in this case Messenger, to send a video 10 19 employees who were Facebook friends in his own time and not using work-related equipment. And we would respectfully submit that that's got to be right and that there were other decisions that I will take the Full Bench to in due course that make it clear that that is right with respect. And so to the extent that Mr Pelly relies upon the fact that he was using his own phone and/or that he was doing it on his own time, and therefore there was no sufficient nexus, we say that's a proposition that should be rejected. And you will see at paragraphs 90 and 91 the Commissioner sets out a number of authorities that have dealt with this issue. And then at paragraph 98, the Commissioner deals with the 24 hour operation that I've mentioned. And at 99, she also deals with the question of whether or not a strict breach of a policy is necessary. And she held that she was not satisfied that a breach of the company policy has strictly been made out, because it's not expressed to or referred to as out-of-work conduct. However, the applicant's conduct was contrary to what underpinned the respondent's policies when read in a purposive fashion and more broadly cast (indistinct) the respondent does not tolerate sexual harassment in any form.

PN98

The Full Bench will recall the Mr Pelly acknowledged that he knew that what he was doing was wrong. And he acknowledged that what he was doing was inconsistent with the obligations that had been imposed upon him to not bully or harass his fellow employees. At paragraph 101, the Commissioner was satisfied that there was a valid reason for termination.

PN99

The next decision - and they are shortened, I can promise the Full Bench. The next decision I should at least touch on is The Good Guys v O'Keefe decision, which is number 3 in our authorities and it commences at page 95. This was a comment made by Mr O'Keefe about the payroll department as appears at paragraphs 7 and 8, which was clearly a very disparaging comment. It was a comment made by him on his home computer out of work hours. And this apparent from what is at paragraph 43 of the decision, which is at the bundle of authorities, page 99.

PN100

The fact that the comments were made on the applicant's home computer, out of work hours, does not make any difference. The comments were read by work colleagues and it was not long before Ms Taylor was advised of what had occurred. The respondent has rightfully submitted, in my view, that the separation between home and work is now less pronounced than it once used to be.

PN101

VICE PRESIDENT ASBURY: Sorry you broke up for a moment there, Mr O'Grady. Could you just go back with that last sentence to the beginning?

PN102

MR O'GRADY: Of course. The comment that was posted by Mr O'Keefe was a comment that was posted out of work hours on his home computer. And that appears at paragraph 43, which is at page 99. And the Deputy President was of the view that that made no difference, because the comments were read by work colleagues and it wasn't long before Ms Taylor who was the relevant payroll manager was advised of what had occurred. And his Honour went on to say:

PN103

The respondent has rightfully submitted, in my view, that the separation between home and work is now less pronounced than it once used to be.

PN104

VICE PRESIDENT ASBURY: Her Honour.

PN105

MR O'GRADY: I apologise. Her Honour. If it assists I did try and find out this morning, but I wasn't able to find it out easily, so I apologise. My learned junior says I should blame him, so I will accept that as an option.

PN106

VICE PRESIDENT ASBURY: You mean, your learned junior couldn't find out?

PN107

MR O'GRADY: He should have been there to protect me from my own errors, Vice President. But the other point I'd seek to draw from this decision is what appears at paragraphs 40 through to 42, because at 40 there is a reference to the relevant handbook. But at 42, her Honour says, 'Even in the absence of the respondent's handbook warning employees of the respondent's views on matters such as this, common sense would dictate that one could not write and therefore publish insulting and threatening comments about another employee in the manner which occurred.

PN108

Now, I accept that there is a difference between the comment that was posted by Mr O'Keefe and what has occurred here, but in my submission as indeed was acknowledged by Mr Pelly, the common sense would dictate that it would not be appropriate to post matters disparaging of women and/or disparaging of fellow employees and/or of a pornographic nature, which could be accessed by employees whilst they were at work. And that would be the case irrespective of what policies my client had in place at the time.

PN109

Could I then turn to what the Commissioner did in respect of this part of the case? And the approach of the Commissioner was - so, the consideration of this commences from paragraph 105, which is at AB33. And the discussion of valid reason commences at paragraph 111 where the Commissioner refers to Selvachandran and then at paragraph 115 he refers to Rose v Telstra and at 116 he refers to Sydney Trains.

PN110

At paragraph 117, he notes that:

PN111

It is not in dispute that 11 of the applicant's colleagues were also members of the Group, along with three individuals who were former employees of the respondent and three individuals who were not associated with the respondent. It is not in dispute that the material posted in the group was a combination of pornographic videos, racist memes and idle chat, some of which was related to the workplace.

PN112

At paragraph 118, he notes that it is not in dispute that the applicant published a post to the group during work hours and that was the bicycle post that I took the Full Bench to a moment ago. And also not in dispute that he published other posts, namely the shock absorber's post and he describes it as the second past was a screen shot of a video of a woman in a bikini top which the applicant admitted was a pornographic video.

PN113

Now, it's not entirely clear what the Commissioner is saying there, but I think it's not in dispute that it was a pornographic video. My client was provided with a screenshot, because Ms Dun provided it with a screenshot, but the applicant acknowledged in the transcript that I took the Full Bench to that it was a video and it was a video of a pornographic nature that went for in excess of four minutes.

PN114

The Commissioner also noted in paragraph 118 that the third post was a post of Homer Simpson hiding in the bushes. And that the applicant also posted the word 'Typical' in response to a derogatory comment about C platoon and finally a photo of a colleague returning from a lengthy period of sick leave in the respondent's car park.

PN115

At paragraph 119, the Commissioner found based on the admission of the applicant that the post of the three naked women and the pornographic video were inappropriate and the applicant did not need training to know that they were inappropriate.

PN116

At paragraph 120, the Commissioner notes that the employees are entitled to an after hours private life and that the majority of the applicant's posts were conducted after hours, except for the new fire truck being a bicycle and then the photo. And he concludes, at paragraph 121 that there were two breaches of the respondent's policies, 'and I am satisfied that the respondent had a valid reason to terminate the applicant', and he's taken that into account.

PN117

So, with respect, there is no consideration under the heading of valid reason of whether or not the shock absorbers post or the pornographic video post, or the 'Typical' post were capable of constituting a valid reason. It would appear that under this heading, the only two posts that he is taking into account in ascertaining the existence or non-existence of valid reason are the bicycle post and the photo of the person returning from leave. And then at paragraph 122 and

following he deals with the other criteria in 387 and then if I can take you to paragraph 127 where he is dealing with other matters.

PN118

Now, it's not entirely clear on what basis he's dealing with these other matters, but it's clearly not in the context of valid reason, given the way in which he's dealt with valid reason in the paragraphs we've already taken the Full Bench to. But - - -

PN119

VICE PRESIDENT ASBURY: Sorry, Mr O'Grady, so do you say the - didn't the Commissioner deal with that in - wasn't the comment typical, in the context of those other comments about people leaving the group?

PN120

MR O'GRADY: It was. But is seems what the Commissioner has done, as we understand his reasons, is he hasn't dealt with that issue, under the heading of valid reason. Rather, what he's done is he's dealt with it under the heading of 'Disparate contact' or disparate treatment of employees engaged in the same conduct. Because his discussion of 'valid reason', as we read it, commences at paragraph 111 and concludes at paragraph 121.

PN121

VICE PRESIDENT ASBURY: Yes, but in that extract that you've just taken us to reference is made to the shock absorbers photograph, the bicycle with the fire extinguishers, the pornographic video, the typical, which is the end of a long list of - or a list of posts about people, so why aren't those matters dealt with under the heading of 'Valid reason'?

PN122

MR O'GRADY: Because, as we read his decision, what he has said, in paragraph 120, that he agrees with the obit in *Rose v Telstra* and Sydney Trains and employees are entitled to an after hours private life and the rest of that paragraph appears to be to the effect that the majority of the post worker conducted after hours, except for the post about the new fire truck being the told bicycle. It's because it was sent during hours, or not after hours, that post is something that the Commissioner takes into account in determining whether there has been a breach of the relevant policies. But he hasn't, as we understand his reasons, had regard to whether or not the other posts, whether they be the typical post, the shock absorbers post or the video, were a breach of the respondent's policies.

PN123

Rather, what he appears to do, in paragraph 120, is say that he's entitled to a private life, the majority of the posts were conducted after hours, except for the post about the fire truck. I agree that this post could be regarded as being disrespectful and offensive, and he then deals, at the second half of paragraph 120, with the photo and he find that that is also a breach. But there is no discussion or analysis of whether or not those other posts could constitute a breach of the respondent's policies and/or otherwise find a formal basis for termination.

PN124

If one has regard to the foot of the first part of paragraph 120, there is a clear finding that the bicycle post breaches a bullying and harassment policy. In respect of the second half of paragraph 120, there's a clear finding that the photo was a breach of the policies, regarding to taking photos. Then in 121 it's on the basis of the two breaches of policies that he's satisfied there was a valid reason.

PN125

But, with respect, it would appear that having mentioned those other matters as being a part of, if you like, the background of what's happened, the Commissioner hasn't gone on to analyse whether or not there was a sufficient nexus between those posts and his employment or whether those posts constituted a breach of any relevant policy.

PN126

VICE PRESIDENT ASBURY: So you say the analysis is confined to the fact that they weren't posted at work?

PN127

MR O'GRADY: Yes.

PN128

VICE PRESIDENT ASBURY: I understand your submission, thanks.

PN129

MR O'GRADY: Yes, that's what we say. There is support to that proposition that flows from the way in which Mr Thompson was dealt with. Mr Thompson's case is included in the bundle of authorities. It is number 8, and it commences at page 205.

PN130

Relevantly, Mr Thompson - sorry, in respect of valid reason - - -

PN131

VICE PRESIDENT ASBURY: Sorry, is it 205?

PN132

MR O'GRADY: Two-0-five is where, I think, the case in the authorities.

PN133

VICE PRESIDENT ASBURY: In the authorities, I'm sorry.

PN134

MR O'GRADY: Yes. No, it was my fault, Vice President.

PN135

VICE PRESIDENT ASBURY: No, you did mention that it's in the authorities, thank you. And I'm the only one with the non electronic version, I'm sorry.

PN136

MR O'GRADY: I'm working off papers myself, Vice President. But 205, number eight in the list, and there's an analysis, at paragraph 117 of Mr Thompson having set up the group. Then at paragraph 123 the Commissioner says:

PN137

I am satisfied that the respondent did not have a valid reason to terminate the applicant -

PN138

That is Mr Thompson:

PN139

due to his out of hours conduct. However, not all of the conduct of Mr Thompson was out of hours conduct. I am satisfied that Mr Thompson distributed pornography on 9 April, during work hours. I am satisfied there is a significant difference between an employee watching a video or movie which may be pornographic, compared to an act of actually distributing pornography. Mr Thompson is employed to be firefighter, not a distributor of pornographic video whilst on shift, and I have taken that into account.

PN140

That continues on, at paragraph 125, and at paragraph 131 the Commissioner's conclusion, in respect of valid reason, is:

PN141

As a result of the applicant's conduct at work in distributing pornographic material, I am satisfied and find that the respondent had a valid reason to terminate Mr Thompson.

PN142

So, again, the focus of the Commissioner, in our respectful submission, appears to be, 'Did it occur on shift?'. If it did occur on shift and breached a policy it is capable of constituting a valid reason, but if it doesn't occur on shift it isn't to be taken into account, in respect of valid reason, because employees are entitled to a private life.

PN143

VICE PRESIDENT ASBURY: Mr O'Grady, is that in the overall context of the case where - and, again, for my part, this is not a case where someone at work saw the material and complained, where someone in the workplace was offended by the material, or otherwise disturbed by it. It's not one of those cases where it was viewed in the workplace so that others could see it. So is the finding - I accept your point that there seems to be a focus on the fact, 'Well, it's not looked at or disseminated at work, therefore nothing else to see here'. But is it in the overall context of a case where it didn't come to light because somebody complained about it because they were upset or offended or there was a likelihood that someone would be upset or offended because the person was sitting there viewing it in the lunch room, or something, or on a work device or on a shared device or something of that nature. This is a slightly different case because of the way that it came to light, isn't it, in that there wasn't exactly a complaint?

PN144

MR O'GRADY: Yes, I accept that. And I can respond to that on a number of levels.

PN145

Firstly, the issue of the absence of a complaint was something that was dealt with by Mattison C in the Alcoa case, and I didn't take the Full Bench to that passage, but she makes the point, and we would respectfully urge that position on the Commission, that the employer's obligations to take action, in respect of these issues, can't be contingent upon whether somebody does or doesn't make a compliant.

PN146

VICE PRESIDENT ASBURY: No, but it must be also in the context of was there any likelihood of someone seeing this, in the workplace, and being offended by it? It seems that there's no evidence that has the respondent in this appeal in the workplace, looking at this material on a device so that anyone else could have seen it or - - -

PN147

MR O'GRADY: There was evidence that people could access and did access these posts whilst at work. There was evidence that there was significant, in effect, down time, because of the nature of firefighting, where you're, in effect, waiting for something to happen that people, when they weren't training and the like, or cleaning their vehicles, might access these posts and have regard to them. We accept that. There's no evidence of somebody having seen a post and saying, 'I've been offended by it'.

PN148

But the way in which we put the case, Vice President, is it's the potential impact on the people who are viewing the material, in that in circumstances where you have a small group of people working closely together, including female employees, and/or including people from a different platoon, to have this material being circulated and, in all likelihood, being read, from time to time, whilst people are at work and then, shortly thereafter, an individual may have to go and work closely with somebody who has been the subject of this disparagement. That is sufficient nexus or connection with the workplace.

PN149

But I accept, Vice President, it's not like the old cases where somebody has a centrefold on a locker room door, or something horrible like that. But there is, in my submission, the - a requisite connection if somebody is at work, perhaps sitting next to or opposite a female employee, or somebody who is the subject of this disparaging commentary, looking at these posts and then having to go and work with them shortly thereafter. Of course, there is the potential that there may be - these things may come out and then you've got the position of, well how do you then facilitate people who work closely together, when you find out that Fred, 'Who was always very nice to me when I was having a coffee with him has actually been participating in a process whereby he and a group of others, behind my back, have either been making sexist, mean or derogatory comments and/or disparaging comments, in respect of things that I've done or having done'. That's the vice we identify.

PN150

DEPUTY PRESIDENT O'NEILL: So, Mr O'Grady, I'm struggling to think through where that line is. If the same group of people had been together, physically, at Mr Pelly's house, and Mr Kelly had shown the same pornographic material, had handed round copies of a pornographic magazine and, as a gift to all of his friends. Some of those friends then took that gift the next time they attended work and watched it during their break, how is that any different to the situation here?

PN151

MR O'GRADY: Well, in my submission, Deputy President, the difference, and I accept that it's hard to draw hard and fat lines, but in my submission the difference is that Mr Pelly is sending this text, in the knowledge that at the same time he is sending it, it is capable of being read by one of his colleagues who were on duty at that point in time and who would be working, potentially, in proximity with somebody who is the subject of the post. In my submission, that is a distinction that takes it out of the situation where Mr Pelly might have a blue movie night, or something like that, or might distribute some magazines that some individual employee might then take onto the premises to view during the down time. That's a decision, really, from the individual.

PN152

But in circumstances where Mr Pelly is conscious of the fact that people can and do access the group, whilst they are on shift, it becomes, in my submission, incumbent on him not to act in a way that potentially undermines the relationship between the other employees of Ventia.

PN153

I accept it is hard to come up with clear lines because that's the nature of this space and social media. But in circumstances where, ultimately, of course, my client has a number of obligations to protect all of its employees, in my submission for Mr Pelly to be engaged in a group that is predominantly employees, and that has employees who are likely to be on shift when things are posted, the line that the Commissioner drew, with respect, is unsatisfactory, which is, 'Well, you can do whatever you like, in effect, as long as it's not while you're on shift. But if you're on shift - - -

PN154

DEPUTY PRESIDENT O'NEILL: I guess the difficulty is that in terms of the impact on Mr Pelly's colleagues who, if they were aware that such disparaging comments and objectifying comments and images were being shared would be just as great, wouldn't it, whether that knowledge came from a person seeing a post or reviewing some material that Mr Pelly has otherwise provided?

PN155

MR O'GRADY: Yes, save for and except for the proximity associated with, perhaps, people being on shift together and then having to work together immediately after a post is sent. But I accept, Deputy President, that, you know, not every disparaging comment made about a fellow employee, outside of work, would trigger these obligations. It's not uncommon, one would have thought, for people at a barbecue with friends from work, to make comments that are not

necessarily flattering of their work colleagues. I'm not suggesting that that would trigger these sort of obligations we're talking about.

PN156

But what I am submitting is that in circumstances where this is predominantly a work group where this is a post that could be read at work and Mr Pelly was aware that it might be read at work and where, shortly after receiving such a post, employees might have to get into the fire truck and attend to an emergency that is - gives rise to a sufficient nexus.

PN157

VICE PRESIDENT ASBURY: So you say the respondent in the appeal should have reasonably foreseen that an offensive post that he put in the group could be opened by a colleague at work and offend somebody else who saw it?

PN158

MR O'GRADY: Yes. And/or impact upon the attitude of the person who opened up the post. There is an element, in our submission, that if you are engaging in a pattern of behaviour that is disparaging and/or degrading of your workmates, on an ongoing basis, that that perpetuates a culture that is likely to impact upon the ability of people to work together and/or for women to integrate themselves into the workplace.

PN159

VICE PRESIDENT ASBURY: But it seems that a vast majority of the content is not directed at a particular work colleague, it's pornographic material: pictures, memes, et cetera. I accept there are some derogatory comments about workmates, but the vast majority of this is not that content that's directed at a particular person, is it, to be derogatory to a particular person. I accept it's derogatory to women, but not to particular women.

PN160

MR O'GRADY: No. The vast majority of it is of a general nature, I accept that, Vice President. The other factor, I suppose - or point I should make is that this is, of course, a group that excludes women. Now, I'm not suggesting that, necessarily, every group has to be open to every member of the workplace, but here there is a group that, as was acknowledged by Mr Thompson, that, 'It was a close-knit group', this is at appeal book page 153, 'that, in effect, excluded women'.

PN161

VICE PRESIDENT ASBURY: Mr O'Grady, again, were there any to include?

PN162

MR O'GRADY: There was only the one - - -

PN163

VICE PRESIDENT ASBURY: Yes.

PN164

MR O'GRADY: = = = at this particular workplace.

PN165

VICE PRESIDENT ASBURY: Yes. I'm not endorsing balance of gender in the workplace, I'm simply, as a practical point, it seems like there weren't that women to exclude, point 1. And point 2, why would the respondent not - why would it not be equally reasonable for the respondent to think, 'Everybody in this group knows the kind of material that's likely to be transmitted and I would just trust them not to be so stupid as to open at work, on their private devices'. If they see, 'Beng, here's a message from the Sickos, don't open it at work'. Why wouldn't it be equally reasonable for the respondent to have considered that, as well as the likelihood - if you're going to say, 'He should have reasonably considered someone would open it at work and it would affect their attitude to the woman that they might work with'. Why wouldn't it be equally reasonable for him to think, 'If they see something from the Sickos they're not going to open it at work' because they know what it's likely to involve?

PN166

MR O'GRADY: Well, all I can say, in response to that, Vice President, the evidence, as I understand it, was that Mr Pelly was aware that these thing, that people would be working and that people were accessing them whilst they were at work.

PN167

Of course there was the point that is reflected in the typical meme, there is an element, I suppose, of you're expected to participate in this group. If you don't, then you might be called a soft cock or a pussy.

PN168

I don't think I can take the point any further, Vice President. The primary point is that in respect of valid reason, there doesn't appear to have been an engagement by the Commissioner as to whether or not the other posts were capable of constituting a valid reason. The discussion and/or analysis that we've been through, in my respectful submission, is completely absent from the relevant parts of the Commissioner's decision that deal with valid reason.

PN169

That said, I should say the Commissioner does deal with the other memes, under 387H, commencing at paragraph 129, where he describes the soft cock post as just banter and a joke. You'll see, in our submissions, why we say that those findings shouldn't have been made. But then he seems to predominantly focus, in respect of these issues, on the question of disparate treatment. In that context, seems to be focussing on whether or not Mr Anderson adopted the correct test when he compared what Mr Pelly had done with Mr Gregory.

PN170

That appears at paragraph 130 through to 132. At paragraph 133 he reaches his conclusion, in respect of differential treatment, and, in effect, finds that in respect of the - that there was as similarity between what Mr Gregory had done and what Mr Pelly had done, in respect of the videos.

PN171

Now, the point we would seek to make, in respect of that, is that in respect of the video, the Commissioner had the advantage of knowing that Mr Pelly had posted a video from OnlyFans that went for some four minutes and whatever. The Commissioner didn't know, did not know, and nor did Mr Anderson know, what was the content of Mr Gregory's screenshot, or the video behind Mr Gregory's screenshot of the lady in the tight top.

PN172

Then, in respect of the shock absorbers post, the Commissioner looked at, compared that to an the elephant post, that appears at paragraph 133, and the Commissioner says that he thought that the elephant post was an outrageous slur against overweight women and he, again, was surprised that Mr Anderson would suggest that this post is not offensive towards women and says that he was of the view that Mr Gregory's post was more offensive than the applicant's.

PN173

> *The photo of nude bottoms, while some would argue is pornographic, are images that can be seen on any beach around the world, except for a thin piece of fabric, approximately 1 centimetre in width.*

PN174

He was satisfied, in those circumstances, that the post of Mr Gregory were equally offensive as those of the applicant but says that Mr Anderson couldn't reach that conclusion because he made significant errors in allocating posts incorrectly, and he's taken that into account.

PN175

But it would appear that that is the only space where there is any analysis of the shock absorbers post and the pornographic video and, in my submission, it was incumbent upon the Commissioner to undertake a proper analysis of those issues, in respect of valid reason, and that doesn't appear to have been done.

PN176

Could I then turn to the second issue, which is the approach to differential treatment. I've taken the Full Bench to the relevant parts of the Commissioner's decision, but I would seek to briefly go to some authorities dealing with the question of what is the nature of the assessment that needs to be undertaken and whether it is appropriate to do, as the Commissioner appears to have done, focus on the process applied by the decision maker, as opposed to drawing ones own assessment, based on the material adduced in the Commission.

PN177

The first authority I'd seek to take the Full Bench to is Sexton, that's at number 6 in our authorities, and it appears at page 133 of the authorities book. That's the decision of Lawler VP, and the Full Bench will have seen that Sexton was referred to by the Commissioner but, in my submission, it's apparent from the quote that the Commissioner has in his decision, but also from Sexton itself, that the Vice President was firmly of the view that it was incumbent upon the Commission to undertake its own assessment, in respect of disparate or differential treatment, and that appears at paragraphs 36 and 37.

PN178

At 26 you'll see, in the second substantive sentence, the Vice President says:

PN179

It particular it is important that the Commission be satisfied -

PN180

The Commission be satisfied:

PN181

that cases which are advanced are comparable cases in which there was no termination are, in truth, properly comparable. The Commission must ensure that it's comparing apples with apples. There must be sufficient evidence of the circumstance of the alleged comparable case to enable a proper comparison to be made.

PN182

So there are two points we'd seek to make in respect of that passage. The first is that it's the Commissioner to undertake it's own assessment, rather than focus on, as we submit the Commissioner did here, the reasoning of the decision maker. But, secondly:

PN183

There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made.

PN184

Now, here, the Commissioner had evidence of what was in Mr Pelly's video point, namely, an OnlyFans post that went for some four minutes, where people were engaged in sexual activity. The Commissioner did not have evidence of what was in Mr Gregory's post because nobody knew what was in Mr Gregory's post, other than the screenshot. Yet the Commissioner went on to find that they were, in effect, apples and applies. In my respectful submission, there was no proper basis for the Commissioner to reach that finding when he did not know what Mr Gregory had actually posted. So, for that reason, we submit that the Commissioner was in error.

PN185

As to the focus being on the decision maker, that is reinforced, in my submission, or the focus being on the Commissioner undertaking his own assessment, that is reinforced, in my submission, by what is said in paragraph 37, where reference is made to the *Hepburn v Department of Justice Office of Corrections*, a decision of his Honour Spender J, where at the foot of paragraph 37, at authorities page 146, the Vice President says:

PN186

That conclusion had already been established by other evidence. More importantly, it is clear from the reasons that Spender J had sufficient detail of the five instances to reach the conclusion of conformity, to which he referred, to was gross.

PN187

Again, in my submission, the Commissioner did not have sufficient evidence before him to form a view as to disconformity, at least as far as it concerned the issue of the video.

PN188

The next authority I'd like to go to, briefly, is Darvel, which is number 4 in our bundle. It appears at page 103 of the authorities list. This is *Darvel v Australia Post*. This is a Full Bench decision of Acton SDP, Ives DP, Smith C, as he then was. If I can simply refer the Full Bench to what appears at paragraphs 21 through to 23 where, in 21, there's an endorsement of what is said in Sexton and, in 23, there's an endorsement of similar comments - sorry, 24 endorses both what's said in Sexton, at 21, and what's aid in Daley, by Kaufman SDP, in Daley, and as to the same effect.

PN189

The same appears in *B v Australia Post*. This is a decision of a Full Bench of Lawler VP, Hamburger SDP and Cribb C. It's number 1 in our authorities and commences at page 3 of the bundle.

PN190

President VP and Cribb C constituted the majority and disparate treatment is dealt with in paragraph 109. You'll see, at the foot of that paragraph the vice, identified by the Vice President and Cribb C is that the focus of the Commissioner appeared to be whether or not the decision made by the decision maker, in respect of disparate treatment, was open and the Vice President and the Commissioner was of the view that that was erroneous, that is was for the Commission to assess the seriousness of the misconduct, in all the circumstances, and weigh the misconduct against mitigating factors.

PN191

In respect of - - -

PN192

VICE PRESIDENT ASBURY: Mr O'Grady, sorry, before you move on could you just identify, I'm sorry if I'm not recalling, but the page that the post of Mr Gregory is on and the post that you say is the Commissioner had no basis to compare apples with apples or oranges with oranges?

PN193

MR O'GRADY: You mean in the appeal book or in the decision?

PN194

VICE PRESIDENT ASBURY: Yes, in the appeal book?

PN195

MR O'GRADY: Yes, page 880, I'm told, is the Gregory post.

PN196

VICE PRESIDENT ASBURY: Just bear with me one moment.

PN197

MR O'GRADY: It's hard and - - -

PN198

VICE PRESIDENT ASBURY: That's a video with the woman in the very brief shirt.

PN199

MR O'GRADY: No. Sorry, the video of the woman in the very brief shirt was posted by Mr Gregory, but we don't know exactly what that video was, because all we had was the screenshot.

PN200

VICE PRESIDENT ASBURY: Right.

PN201

MR O'GRADY: Whereas, in respect of the video posted by Mr Pelly, which appears at page - the very last page, 914, we do know that that's a video because it was dealt with. But the posts of Mr Pelly, the shock absorbers, appears at - - -

PN202

VICE PRESIDENT ASBURY: Yes, I recall that one.

PN203

MR O'GRADY: - - - 887, I'm told.

PN204

VICE PRESIDENT ASBURY: We know the video's a pornographic video because Mr Pelly conceded that, don't we?

PN205

MR O'GRADY: We know that Mr Pelly's was a pornographic video. We don't - - -

PN206

VICE PRESIDENT ASBURY: Because he admitted it, under cross-examination.

PN207

MR O'GRADY: Yes, that's correct, Vice President, but we don't know what was the nature of Mr Stewart's video - sorry, Mr Gregory's video, because all we have, in respect of Mr Gregory's video, the woman with the tight blouse, is the screenshot.

PN208

DEPUTY PRESIDENT O'NEILL: But is the reason that there's nothing more known about Mr Gregory's material because there was no investigation conducted in relation to his conduct?

PN209

MR O'GRADY: Well, there was no investigation conducted into his conduct, that's the case. But the investigation into Mr Pelly's conduct enabled questions to

be put to him, in cross-examination, that elicited the omissions that it was a pornographic video that went for four minutes.

PN210

The point I'd seek to make, Deputy President, is simply that, in circumstances where the Commissioner just didn't know what Mr Gregory's video showed, it was, in our submission, not open for him to say that it was the same as the conduct that Mr Pelly engaged in. And that - - -

PN211

VICE PRESIDENT ASBURY: So he couldn't have hazarded an educated guess, Mr O'Grady?

PN212

MR O'GRADY: Well, if he's going to make a finding that there is disparate treatment, such as to warrant a finding that Mr Pelly's termination was harsh, unjust or unreasonable, in my submission, the warning that was issued by Lawler VP is that he needed to actually have sufficient evidence before him to make that finding. I don't think I can take that point any further.

PN213

As far as the memes are concerned, the meme, with respect to the elephant, 'Call a girl beautiful one day', appears at page - - -

PN214

VICE PRESIDENT ASBURY: Yes, I recollect that one. I just wanted to identify the videos, thank you.

PN215

MR O'GRADY: No, thank you, as long as you're fine with that. I've taken the Full Bench to the admissions, from Mr Pelly, that it was a video.

PN216

In respect of the issue of significant errors of fact, I don't intend to take the Commission beyond the analysis that is in our written submissions. You'll see that we've sought to spell that out in some detail as to why we say that there were significant errors of fact, at paragraphs 5.1 to 6.5, and it would just be repetitive for me to go through that, in the light of what I've already taken the Full Bench to.

PN217

We do, of course, maintain the submission that if the Commission finds that the Commissioner - if the Full Bench finds that the Commissioner adopted the wrong test, either in respect of - well, in respect of valid reason, then, based on the reasoning in Sydney Trains, that, in itself, would constitute a significant error of fact.

PN218

The last thing I'd seek to do is briefly (audio malfunction) the first point we would make - - -

PN219

VICE PRESIDENT ASBURY: Sorry, I lost you after, 'briefly', Mr O'Grady.

PN220

MR O'GRADY: I apologise, Vice President.

PN221

I'd like to briefly go to some of the points raised in my learned friend's submissions.

PN222

VICE PRESIDENT ASBURY: Certainly.

PN223

MR O'GRADY: The first paragraph I'd go to is paragraph 1. There seems to be a bit of airbrushing, in our submission, in respect of the nature of the group. There was no dispute that this was a group that had been named by the peso who set it up, and was known by the people how participated in it, as 'the Sickos Video Sharing Group'. To refer to it by some innocuous name, like 'Private Facebook Messenger Group', or PMG, as my learned friend seeks to do, in my submission, underplays the seriousness of what was occurring.

PN224

At paragraph 13 my learned friend says that, dealing with the fact that the Commissioner identified that 11 of Mr Pelly's colleagues were also members of the group, along with three individuals who were former employees. We accept, and I've already taken the Full Bench to the passages of the decision where that acknowledgement appears. But what there isn't, in my submission, is any analysis and/or consideration of the impact of that fact on the issue of valid reason.

PN225

So, yes, I accept that my learned friend is right when he says the Commissioner was clearly cognisant of the makeup of the group but, in my submission, consistent with the approach that was taken in Cowell(?), it then became incumbent upon him to ask whether that makeup gave rise to a sufficient connection with the employment, as per the Sydney Trains test.

PN226

At paragraph 14 my learned friend says, 'Well, they were friends of Mr Thompson and all but three had attended his wedding'. The Full Bench will recall the passage of *Cowell v International Terminals*, at paragraph 79 that I gook you to, where if the friendship has flowed from the employment, then the fact of the friendship doesn't diminish the nexus between the out of hours conduct and the employment.

PN227

At paragraph 15 my learned friend seems to be suggesting that it was open for the Commissioner not to accept the evidence of Ms Pretorius, in respect of the desire to increase the diversity of the workplace and address what was perceived to be the blokey nature of the workplace.

PN228

In my submission, it wasn't just a question of opinion evidence of Ms Pretorius, as the articles and reports I've taken the Full Bench to shows this is an ongoing issue, in respect of an industry such as firefighting and it was a matter the Commissioner was apprised of. He was directed to those reports in the submissions filed by my client, at first instance, and he does not appear to have given any consideration to that issue in determining the matter.

PN229

In paragraph 16 the point is made that the Commissioner formed the view that the dialogue between members of the group amounted to banters and jokes and therefore did not err.

PN230

The submission we seek to put in respect of that is that the evidence relied upon by the Commissioner was the evidence of Mr Pelly and Mr Thompson and, with respect to my learned friend, evidence of Mr Pakes, directed towards a different issue.

PN231

The fact that Mr Pelly and Mr Thompson might have considered that what they were engaging in was banter and jokes is not probative of the potential impact of that conduct towards those who are the subject of it, namely, the women who might have been the subject of the memes or the members of the platoon who were subject of the comments, in respect of soft cocks, and the like.

PN232

In circumstances where there was a failure to call those outside the group, to whom those disparaging comments and memes were directed, in my submission, the Commissioner could not, sorry, should not have proceeded on the basis that because Mr Pelly and Mr Thompson thought it was all right, then it was simply banter and jokes.

PN233

In respect of Mr Pakes, and I don't need to take the Full Bench to it, but Mr Pakes was asked about people taking the piss out of each other, at paragraphs 2017 to 2019. Mr Pakes was dealing with that issue, in the context of a function in Sydney where a group of employees had, in effect, gotten together for socialising, go-karting, and playing golf or those sorts of things, and it was in that context that he didn't have a problem with people, in effect, taking the piss out of each other.

PN234

In my submission, that's a very different scenario to a situation where people who are, without their knowledge, being subjected to memes and/or disparaging comments that are critical of them, either because they've left the group or because of their gender.

PN235

In paragraph 17 my learned friend says, 'Well, there's no actual damage of my client's interests, because of the conduct of Mr Pelly'. In my submission, that's not the test. The issue is whether his conduct had the potential to damage my client,

in circumstances where it is providing services to Defence, who have their own issues, with respect to issues of this type.

PN236

As the Commissioner noted, in respect of Mr Thompson, the posting of the pornographic video clearly had the impact - had the potential to impact upon my client. In my respectful submission, the conduct engaged in by Mr Pelly, similarly, had that potential.

PN237

In paragraph 18 we deal with the issue of Mr Pelly's leadership role. In my submission, that role highlighted the need for him to act in a way that would not have a tendency to undermine morale in the workforce. If somebody found out that they were the subject of these posts and/or endorsement of same, by Mr Pelly, that may impact upon their capacity to work closely with him in a fire situation where they are expected to take direction from him.

PN238

In paragraph 22 my learned friend seems to be suggesting that there was some issues about Mr Anderson's credibility and that that should be matter that be taken into account. This is one of those cases, in my submission, where Mr Anderson's credibility really could have no bearing on the proper outcome in this proceeding. It was for the Commission to determine whether there was a valid reason for termination. Mr Anderson's views, whether they be right or wrong, could not be determinative. It was an assessment that needed to be undertaken by the Commission.

PN239

What actually took place wasn't in dispute, it was recorded in the posts themselves. So to the extent to which my learned friend is raising some credit issue, in my submission, it's a point without substance.

PN240

In paragraph 23 my learned friend seems to be suggesting that there was a lack of authority for the proposition that there needs to be an objective analysis of the entirety of the evidence before the Commissioner. In my submission, Sexton, itself, which we did refer to, is authority for that proposition but the other authorities I've taken the Full Bench to are consistent with that.

PN241

In paragraph 25 my learned friend refers to Mr Pelly not having the video put to him in the course of the investigation. In my respectful submission, that, again, could have had no bearing on the outcome in this case. What could Mr Pelly have said if it had been put to him in the investigation, other than what he said when it was put to him in the course of the hearing before the Commission? It's not in dispute, what was contained in the video. Mr Pelly admitted its contents. The fact it wasn't put to him in the investigation, because at that point in time we didn't have access to it, is by the by, in my submission.

PN242

I'd refer you to what Mr Anderson says, at paragraph 37, especially paragraph 37.3, which explains the origin of those screenshots and how there were limits on what we knew about what was contained or what they reflected or was contained in them.

PN243

In paragraph 31 it's said that Mr Pelly had no control over when other employees viewed his posts. Well, that's not right, with respect, Mr Pelly had the ultimate control. He could have not posted. If he posts in circumstances where he knows that there is the capacity for people to view those posts whist at work and, indeed, that there is a likelihood that there will be people at work at the time that he is posting, in my submission, it was incumbent upon him, for the reasons I've already sought to put, not to post.

PN244

In respect of what appears in paragraph 32, if I could simply provide some additional transcript references to the impact of the soft cock posts, PN314 to 320, 329, 330 to 331 and 332, 334, 339 to 340, 341 through to 342, 358 through to 365.

PN245

In respect of what appears at paragraph 33, my learned friend seeks to view this through a *Jones v Dunkel* inference, or *Jones v Dunkel* prism, in my respectful submission, that's missing the point. We're not saying there's a *Jones v Dunkel* inference here to be drawn, we're simply saying that it was incumbent upon the Commission to assess all of the evidence before him. Where you have posts that are, on their face, designed to criticise and/or demean other employees and/or intimidate other employees from leaving the group, for the Commission to, in effect, find that they didn't have that effect, absent evidence from the people to whom the post were directed, in our respectful submission, simply wasn't open on the evidence.

PN246

In paragraph 36 my learned friend seems to be suggesting, in respect of permission, that = well, I'll rephrase it. There seemed to be an attempt to erect a straw man argument, if I can use that language. We're not suggesting that wherever an employee engages in viewing pornography or distributes pornography, therefore the termination won't be harsh, unjust or unreasonable. What we are, respectfully, submitting, is that in circumstances such as the ones that we have sought to describe, it was incumbent upon the Commission to assess whether there was a requisite connection between the conduct engaged in and the employment, in assessing whether there was a valid reason and that is something that, in our submission, the Commissioner failed to do.

PN247

In respect of what appears in paragraph 37, and if I can just deal with them in turn, the issue of training, in our respectful submission, is a matter without substance. Mr Pelly knew what he was wrong. He knew he had an obligation to act in a respectful way towards his fellow employees, and he acknowledged same.

PN248

The absence of actual damage, in my submission, for the reasons I've already put, it doesn't assist, nor does the fact that Mr Pelly didn't use any of Ventia's equipment.

PN249

In respect of the suggestion that Mr Pakes had awareness of the group, the situation was that Mr Pakes, upon being joined to the group, by Mr Thompson (audio malfunction) of what was being communicated - - -

PN250

VICE PRESIDENT ASBURY: Sorry, Mr O'Grady, lost you again. Mr Pakes, after being joined to the group by Mr Thompson, and then I missed the next bit.

PN251

MR O'GRADY: I apologise, Vice President.

PN252

Mr Thompson quit the group. He was joined and then he quit, because he didn't think it was appropriate for him to be a part of it.

PN253

VICE PRESIDENT ASBURY: Mr Pakes, you mean?

PN254

MR O'GRADY: Yes, Mr Pakes. Pakes, sorry. Pakes.

PN255

VICE PRESIDENT ASBURY: Pakes, yes.

PN256

MR O'GRADY: For those reasons we would submit that none of the - and the other factors, and Mr Pakes didn't even see the content of the group.

PN257

The other factors we accept are relevant matters but, in our submission, they don't remove the deficiencies associated with the decision and the Commissioner's failure to (a) appropriately assess valid reason and (b) appropriately assess for himself, on the material before him, the issue of disparate treatment.

PN258

VICE PRESIDENT ASBURY: Mr O'Grady, is it your submission, though, because notwithstanding you say there was a failure to assess valid reason, there was still a finding that there was a valid reason for dismissal. So is your submission that had the issues been more fully explored or more fully dealt with, under the heading of 'Valid reason' that that would have had a more significant weight in the overall assessment. Is that what you're submitting?

PN259

MR O'GRADY: It is, Vice President. In that what we submit is that it's understandable that if all the Commissioner is assessing, when one comes to harshness or disproportionality of termination, is the photograph of the bike and the photograph taken on Defence properties, and one weighs those incidents

against the impact of termination on Mr Pelly, that one would say the termination was harsh, unjust or unreasonable.

PN260

If one, however, has regard to the broader suite of matters, including the potential impact of the typical meme, the potential impact of the shock absorbers meme, and the posting of the pornographic video, then, in our submission, the balance shifts.

PN261

Whilst there is obviously going to be an impact on Mr Pelly of termination, it is not such an impact that would warrant the termination being characterised as harsh, unjust or unreasonable, when that full suite of matters are taken into account.

PN262

DEPUTY PRESIDENT O'NEILL: Mr O'Grady, just in relation to the two contraventions of policy that the Commissioner did find constituted a valid reason, in his assessment of those he essentially concludes that, for different reasons, they are at the lower end of the scale. Am I right that no issue is taken to his assessment and conclusions, in relation to those two contraventions?

PN263

MR O'GRADY: You are right, Deputy President. We accept that. Obviously we would submit that they are contraventions and these things have to be assessed cumulatively, but if that's all that is there, in the basket of valid reason, then I don't dispute what you've said, Deputy President, that they would fall at the lower end of the scale, but not necessarily meaningless or nominal, in that a breach - the disparagement of Mr Pakes is one thing, perhaps, a breach of Defence's policies, in respect of when and where you take photos on Defence grounds, clearly has a potential to impact upon our relationship with Defence.

PN264

The fact that the Commissioner thought that the photo looked a lot like the Nowra Golf Club, in our respectful submission, misses the point, with respect. It's what Defence might make of it all. Clearly that has a potential impact.

PN265

I the Full Bench would just bear with me, I just need to confirm. I think I'm finished, but if I can just have a moment.

PN266

Unless there are any further questions, those are the submissions I'd seek to put.

PN267

VICE PRESIDENT ASBURY: Thank you, Mr O'Grady.

PN268

Mr McKenna?

PN269

MR McKENNA: Full Bench pleases.

PN270

Can I just, at the outset, indicate that I reply upon the written submissions dated 5 June. I understand the Full Bench has had an opportunity to read them, I'll endeavour not to labour them.

PN271

At part A I set out some background matters and, again, without running through them seriatim, what - in my submission, what can be drawn from those points are a number of things.

PN272

Firstly, there were six posts made to the Private Messenger Group. Now, I'm quite happy to keep Mr O'Grady content, to refer to it as Sickos Video Group. In terms of the airbrushing, it was referred to as the Private Messenger Group by the employees below, but I don't believe much turns on it, I'm happy to refer to it as the Sickos Video Group. There were six posts, attributable to Mr Pelly, in evidence. Vice President, in your discussion with Mr O'Grady I understand that the appellant accepts that the findings, with respect to the carpark post and the panther S post are not the subject of this appeal.

PN273

Now, to the extent that if the Commission were to find other matters to give rise to a valid reason, it, of course, is accepted that those matters could be considered cumulatively but it is no part of the notice of appeal to challenge the finding of the Commissioner, with regard to those two posts.

PN274

There was a third post that it not challenged, and that is a post made by Mr Pelly, of Homer Simpson disappearing into a hedge, which the Commissioner below found to reflect Mr Pelly removing him from the discussion. Again, I understand, that there is no challenge to that.

PN275

If the Full Bench pleases, I note that Mr O'Grady is frozen, I just want to check that he can hear us.

PN276

VICE PRESIDENT ASBURY: Mr O'Grady, you can hear us?

PN277

MR O'GRADY: Yes, I can, thank you.

PN278

MR McKENNA: Mr O'Grady, like me, is in barrister chambers, limited chambers. When this matter was heard below it appeared that perhaps my building hadn't paid the rent and perhaps it's now Mr O'Grady's building's time to be in default. In any event, Mr O'Grady is frozen again. Look, I'll press on and Mr O'Grady can inform us if he's having difficulties.

PN279

The three posts that are subject of the appeal were a GIF meme posted by Mr Pelley. I understand, and I don't think it was in dispute below, it's of Brad Pitt, it's from Friends, and he's muttering 'Typical', and you've been taken to that. There was a post with a comment about shock absorbers and the bare bottoms of three females, and an OnlyFans video. None of those were posted whilst Mr Pelly was on shift.

PN280

As I understand the appellant's case, the challenges to the Commissioner's findings, in respect of those three posts, was put three ways.

PN281

Firstly, the Commissioner erred to find there to be a sufficient connection between the posts and the employment, such that they were capable of amounting to a valid reason. Secondly, that the Commissioner erred in finding the dismissal was not unfair because of the inconsistent treatment point. And then, thirdly, that the Commissioner erred in making significant errors of fact.

PN282

The written submissions filed by the respondent are to the effect that the first and second finding, so that is the not sufficient connection with the employment and the inconsistent treatment findings, were alternate findings. So for the appellant to succeed in having the decision below quashed, it would need to succeed on both those grounds, and I don't understand Mr O'Grady to be speaking against that proposition, so I won't pursue it further.

PN283

With respect to the significant errors of fact, of course it goes without saying they must be shown to be significant. But not only that, those errors, if established and if significant, must vitiate the findings of the Commissioner such that they would allow the Full Bench to quash the decision below.

PN284

So to all (indistinct) those are the preliminary remarks and if I can move on to the first key issue, which is whether there existed a significant connection between Mr Pelly's conduct and the employment.

PN285

The appeal grounds are put on the basis that the Commissioner failed to have regard to the entire factual matrix and/or failed to have regard, or sufficient regard, to certain matters that are particularised in appeal ground 2 and further particularised or dealt with in the submissions.

PN286

There are eight of those matters that are relied upon. The primary question for the Full Bench now is whether the Commissioner did consider the - as I understand the appellant's case, whether the Commissioner did consider the entire factual matrix, presumably having regard to those eight matters or, alternatively, whether he had significant regard to those matters.

PN287

Again, to succeed on the appeal the appellant would need to establish an error by the Commissioner below in exercising his discretion of a *House v King* type. As I understand how that it put, it is that the Commissioner failed - the reasoning of the Commissioner gave rise to an error in the exercise of his discretion because he failed to take into account some relevant consideration. Or, alternatively - sorry, I withdraw that. With respect to the failure to take into account relevant consideration, it's incumbent upon the appellant to show, firstly, that the particular factor was a material consideration and, secondly, that the Commissioner failed to take that into account.

PN288

I can indicate that it's not accepted for Mr Pelly that the eight particularised matters are relevant considerations. I'll deal with them each in a moment. But, relevantly, it's Mr Pelly's case that those matters were, in fact, taken into account by the Commissioner.

PN289

This ground is put by the appellant, particularly in its outline of submissions, in a different way, and that is that it's said that the Commissioner, in failing to have regard to the entire factual matrix, made an error or applied - acted on the wrong principle. In determining that, or in developing that submission, the appellant poses the question, and this is in the appellant's submissions at paragraph 1.2, what is the proper approach to determining whether conduct has sufficient connection with employment to warrant disciplinary action, including dismissal.

PN290

That is a question that's posed by the appellant but, in my submission, the answer to that question is not and was not ever in dispute. The Commissioner, in his reasons, identified the authority from *Rose v Telstra* and as that authority was applied by the Full Bench in *Sydney Trains v Bobrenitsky*. Those matters are set out, the authorities referred to are set out in the decision below, at paragraph 116 which is at page - sorry, I withdraw that.

PN291

If I could ask the Commission to turn to the particular test, from *Rose v Telstra* as developed in Bobrenitsky, and I'm grateful to the appellant for its slightly more sophisticated list of authorities and I will use that, if that's convenient. It's at page 181 to 182, the relevant extract from Bobrenitsky.

PN292

You'll see, at the very bottom of page 181, if the Full Bench members have that, you'll see the heading, 'Out of hours conduct, *Rose v Telstra*' and then there is a discussion of the decision of *Rose v Telstra* at paragraph 116.

PN293

If I can ask the Commission to turn forward from that, to the further discussion of this matter, this is at page 189 of the bundle of authorities, there is a heading, 'Principles in relation to out of hours conduct as a valid reason for dismissal'. What the Full Bench there, in Bobrenitsky do, is acknowledge that the principles in relation to when out of work conduct may constitute a valid reason

for dismissal can be distilled from *Rose v Telstra* and Newton, and the cases considered in those decisions.

PN294

Then the Full Bench go to set out what I'll refer to as the three limbed test, from *Rose v Telstra*, as endorsed by the Full Bench in Newton. If I read it:

PN295

> *In certain circumstances an employee's employment may be validly terminated because of out of hours conduct but such circumstances are limited. The conduct must be such that -*

PN296

This is the first limb:

PN297

> *The conduct must be such that viewed, objectively, it's likely to cause serious damage to the relationship between the employer and the employee, or the conduct damages the employers interest, or the conduct is incompatible with the employee's duty as an employee. In essence, the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.*

PN298

Now, in going to these authorities Mr O'Grady did not take the Commission to this paragraph and this, in my submission, this, as endorsed by the Full Bench in Bobrenitsky, this is the test to be applied in determining this question. It is the test that was applied by the Commissioner below.

PN299

I'll come to this point in due course, but Mr O'Grady made much of - it seems to be accepted that there is no evidence of actual damage to the employer's interest. The submission made on behalf of the appellant was that it is sufficient for there to be potential damage to the employer's interests.

PN300

Now, having regard to the second limb of the test, in *Rose v Telstra*, to insert the word 'potential' in there would amount of a very substantial expansion of this test. That is not the test that was set forth by his Honour, then Ross VP, in *Rose v Telstra*, or adopted by subsequent Full Benches.

PN301

Mr O'Grady did take the Full Bench to the following paragraph, paragraph 142. Paragraph 142 includes a reference to the fact that, 'It is necessary to consider the entire factual matrix'. If the Full Bench pleases, I say nothing against that, that is undoubtedly correct. But the reference to the requirement to consider the entire factual matrix, that does not give rise to a requirement or obligation by this Full Bench or, indeed, any Full Bench, to apply a fine tooth appellant comb to a member of the Commission's reasons below, with an eye too finely attuned to error.

PN302

The Commissioner ought give the reasons below a fair reading in determining whether there was - whether this issue was properly addressed.

PN303

The Full Bench, in Bobrenitsky go on to give consideration to a number of examples that would be capable of establishing the requisite connection. 142, 143, I won't take to them in any detail. In my submission, none of them would cover the circumstances currently before the Full Bench.

PN304

Particular reliance was placed, by Mr O'Grady, on paragraph 148, where it's said that:

PN305

> *A relevant connection between conduct outside working hours and employment may also be found where the employee concerned engages in conduct out of hours which materially damages the employer's interest, in respect of its relationships with its clients or staff.*

PN306

There was no finding to that effect by the Commissioner below and I don't understand Mr O'Grady to be suggesting that there should have been a finding of any actual damage to the relationship with Defence.

PN307

If I could ask the Full Bench to then just turn back to the reasons below, at page 35 of the appeal book, in particular paragraph 115 to 116.

PN308

VICE PRESIDENT ASBURY: Sorry, what were those paragraph numbers again?

PN309

MR McKENNA: One-one-five and 116, they're on page 35 and following of the appeal book.

PN310

In those paragraphs the Commissioner below sets out the test from *Rose v Telstra* which I've just referred the Full Bench too, as was endorsed by the Full Bench, in Bobrenitsky, and the additional passage from *Sydney Trains v Bobrenitsky*, including the reference to the requirement to have regard to the entire factual matrix.

PN311

If the Full Bench pleases, I'll move to deal, and I'll try and do it as briefly as can, with the eight sub grounds, of which it's said that the Commission below failed to consider or failed to have sufficient regard to. But in doing that, in my submission, it must be born squarely in mind that the error alleged is that there was a failure to consider those matters or a failure to have significant regard. So to the extent that the matters were considered and regard was had to them, then it

becomes extremely difficult and, in my submission, impossible for the appellant to make out its appeal ground.

PN312

The first matter relied upon by the appellant is a composition of the Messenger group, the Sickos Video Sharing Group. The Commissioner had regard to submissions about that, and I'll give the paragraph numbers, rather than taking the Full Bench to the particular references, unless it would assist to go to them. But the Commissioner had regard to submissions about the composition of the group, at paragraph 117, that's at appeal book 36; at paragraph 55, appeal book 24.

PN313

Indeed, the Commissioner made express findings about that, at paragraph 114, that is AB42. There's an error in my submissions, I think I refer to that paragraph as 114, it is 144. What is said there is it is a critical paragraph applying or having regard to the submissions about the composition of the group and the Commissioner below indicates that:

PN314

I am satisfied that the respondent has not established a nexus between the out of hours posts of the applicant and his employment. I do not accept that the occasional post about a work situation into the group where 39 per cent of its participants are non respondent employees creates sufficient connection to the workplace to sustain the respondent's argument that the group is work related. Further, the applicant had no control over when the employees in the group viewed his post. As a result, I find the respondent cannot rely on their findings, in relation to these posts.

PN315

So there can be no doubt that the Commissioner had regard to matters pertaining to the composition of the group. He made findings about that. Those findings were open to him and, in my submission, those findings were correct.

PN316

Vice President, you've referred to the fact that the group contained friends who attended Mr Thompson's wedding and if I can ask the Commission to turn to that evidence, it's page 288 of the appeal book, commencing paragraph 31. So this is Mr Thompson's evidence. As the Full Bench will recall, the matters were heard and determined together and the evidence - Mr Thompson gave evidence in support of Mr Pelly's case, and vice versa.

PN317

Mr Thompson here is describing what he did insetting up the Sickos Video Sharing Group, he wasn't challenged on this evidence. He says that the people invited to the group are all personal friends of his, all but three of the people in the group had attended his wedding previously. They were also his friends on Facebook.

PN318

At paragraph 33 he says:

PN319

The people in the private Messenger group reflected my social group and friends at the time that I set it up. The fact that it included a large number of people employed by the respondent is because of those friendships, not because it related to my employment. The PMG was not established for any reason related to work and served no purpose related to work.

PN320

Now, Mr O'Grady draws connections with other decisions and seeks to suggest that this was material shared between work friends and the connection they had between them was work. Now, in my submission, while on one level that's correct, there is a difference between work friends being colleagues who one might join as a friend on Facebook Messenger and friends who attend your wedding. These are people, the primary connection between these people, in my submission, was friendship. The secondary connection between some of them, not all of them, was that they had the same employer. To the extent that reliance is place on former employees, it's not clear to me how that establishes any deeper connection with the employer. Those people, to the extent they are no longer employed by Ventia, they are ex-employees, they are not current employees, such that it would bolster the appellant's claim of a sufficient connection.

PN321

So, in my submission, the issue of the composition of the work group was considered and it was rejected. That matter goes to appeal grounds 2(a), 2(b) and 2(d).

PN322

If the Full Bench pleases, I'll put it this way, there's reliance placed upon what I'll describe as a culture of fire fighting, and this is picked up, in particular, by appeal ground 2(c), which provides that:

PN323

The Commissioner failed to have regard or sufficient regard to the pornographic and sexist nature of a number of posts on a Sickos Video Sharing Group, in circumstances where -

PN324

And then goes on to set out a number of sub-points pertaining to what I'll describe as a culture of employment.

PN325

As to whether these matters were considered by the Commissioner below, I'd refer the Full Bench to paragraphs 43(f) and 44 and also to paragraph 58 of the decision.

PN326

The suggestion that this, again I'll call it the culture, could somehow satisfy one or other of the three limbs of the *Rose v Telstra* test, was found not to be satisfied.

PN327

Pardon, me, if you'll bear with me.

PN328

At paragraph 138, which is at page 42 of the appeal book, the Commissioner found that:

PN329

In relation to the test in Rose v Telstra, I'm satisfied that the conduct of the applicant does not cause serious or irretrievable damage to the employment relationship. The applicant's actions do not damage the respondent's interests, except for some possible minor embarrassment with Defence. I do not regard participation in a private chat amongst friends, and almost exclusively out of hours, to indicate a repudiation by the applicant of his contract of employment.

PN330

And the Commissioner took that into account.

PN331

In my submission, it is clear that these were matters that were taken into account by the Commissioner. The appellant below led evidence, and Mr O'Grady's referred to this, from Ms Pretorius, who was an HR employee. She gave opinion evidence about potential impact of this conduct on workplace conduct. A submission was made, on behalf of Mr Pelly below that that ought be given no weight. At least, from the Thompson decision, it is quite apparent - well, the Commissioner made a finding, in the Thompson decision, at paragraph 129, and that's in the appellate's list of authorities, at page 240.

PN332

The Commissioner, in that case, made a finding that:

PN333

Whilst I don't agree with the majority of the evidence of Ms Pretorius, especially in relation to the employer having any capacity or right to regulate friendships or alleged cliques of work.

PN334

The Commissioner went on to agree that the employer was entitled to expect a level of common decency.

PN335

Regard was had to those submissions and they were rejected. In my submission, having had regard to the matters, it was open for the Commissioner to reject it and, in my submission, my respectful submission, it was correct for the Commissioner to so reject that potential nexus.

PN336

The evidence from Ventia did not establish any nexus between the content of the group and Ventia's failure to recruit female employees.

PN337

As Mr O'Grady has rightly pointed out, there was one female employee employed at Albatross at the relevant time. There are 11 employees of Ventia, at Albatross,

who are members of this group, out of a total of 33. So the group was exclusive but it did not, exclusively, exclude women.

PN338

It's also relevant and there was a discussion again, with Mr O'Grady about this point, about how this material came to light. It was brought to - as Mr O'Grady indicated, it was brought to the attention of Ventia management by Ms Dun. Ms Dun is the daughter of Mr Dun, who had been a member of the group. Ms Dun was required to show cause as to why her employment shouldn't be terminated and I think the primary reason that she was required to show cause when she failed to respond to a PAN, which I understand is an emergency call, when she was the watch room operator, but one of the matters she was required to respond to was an allegation that she'd sent a penis shaped cake to a co-worker.

PN339

She raised this and provided the context of the Private Messenger Group to Ventia, on the basis that she suggested that - not to suggest that she was, in any way, offended by the material but expressly posing the question, 'Are other Ventia employees being disciplined and investigated for their conduct of a sexual nature in the workplace?'. That is why she brought it up and that is how it came to Ventia's attention.

PN340

And to that respect, it is entirely distinguishable from other cases referred upon by the appellant where employees are sending unsolicited posts to female colleagues who then express dissatisfaction about that. That particularly arose in, and I'll get the pronunciation of the case wrong, Cowell, that was a factual situation in that case.

PN341

So, again, with respect to this ground it's submitted that the Commission did have regard to the relevant facts. It made findings about that which were entirely open to it and which disclosed no error.

PN342

Much has been made, by the appellant, of the use of the chat group to disparage other employees. That's picked up by appeal ground 2(e) where it is said that that is a matter to which the Commissioner failed to have regard or sufficient regard.

PN343

Submissions made by the appellant about this below were considered by the Commissioner and were identified in the reasons for decisions and, again, I'll give the paragraph references, 43(e), 55 and 72.

PN344

The Commissioner did have particular regard to evidence about what was described as banter in the workplace. I will ask the Full Bench to turn that up, it's at page 38 of the appeal book, in particular paragraphs 127 to 128 where the Commissioner sets out evidence from Mr Pelly, at 127. There was a question put to Mr Pelly, in cross-examination, that the Commissioner suggested he hadn't answered so in the first paragraph there, under 127, the Commissioner said:

PN345

The question was along the lines of you were saying that people who were leaving the group would be described as 'soft cocks and pussies' basically, and you say it's visual.

PN346

Then in response to that, immediately above paragraph 28, the question:

PN347

What was the context of it?---The context of it, it was just banter, it was just joking with the guys like it doesn't have the value that they're putting on it.

PN348

There was a further discussion with Mr Pelly, between Mr Pelly and the Commissioner, the Commissioner noted that he was a sparky by trade and in response to the questions from the Commissioner Mr Pelly described his workplace as being:

PN349

A lot like your previous profession, Commissioner, where we are quite jovial. We spend a lot of time together, like we sleep together, it's a second family so it's like your brother. The guys are your brothers, we're tight as. You rely on people of you need a hand if you're in trouble, you've got that real comradery and there's a real bond.

PN350

Then Mr Pelly accepted the proposition that it was common to take the piss out of your work colleagues and expressed his opinion, of course only his opinion, that the colleagues here, Gilbo, Evans and Timmy, would not take offence about what was said.

PN351

It is utterly apparent that the Commissioner had regard to this matter. The Commissioner applied the test in *Rose v Telstra*. It made a finding about those matters, at paragraph 128. The Commissioner found that the use of the chat group to disparage other employees did not create a sufficient nexus between the conduct and the employment and, in my submission, it was, firstly, open for him to fid that and, secondly, my respectful submission is that the finding was correct, it discloses no error. It is supported by the evidence of Mr Pakes and Mr O'Grady made reference to this.

PN352

If I could take the Full Bench, first, to the evidence of Mr Pakes in his own witness statement, that's at paragraph - sorry, it's at appeal book page 294. Sorry, pardon me, so that is the evidence of Mr Thompson. The evidence of Mr Pakes, and I rely upon that, but I won't speak to it now, but I do rely upon the evidence - pardon me, if I could just clarify my notes.

PN353

Sorry, the cross-examination of Mr Pakes is at appeal book page 1643, commencing at paragraph 1967, which is about point 8 of the page. No, withdraw

that. I'm sorry. Paragraph 1976, page 1643. You'll see here it was put to Mr Pakes:

PN354

It's the case that, like with Mr Thompson, from time to time you and Mr Pelly would take the piss out of each other?---Yes, we were pretty much the same relationship. Martin and I would spend a considerable amount of time together going over minutes from the consulting committee, chasing issues up or concerns up so, yes, we would obviously, in a confidential setting, we'd share jokes and that sort of relationship.

PN355

So it's not limited to the matters previously referred to by my learned friend. There was, in my submission, a proper basis for the Commissioner to make a finding, based upon the evidence before him, that there was a jovial relationship between fellow employees, such that they would take the piss out of each other, such that they would not be offended by the type of comments that were included in the Messenger group the Sickos Video Sharing Group. And it's wroth bearing in mind further that the high water mark of Mr Pelly's conduct here is the posting of a GIF, meme, whatever you want to call if, of Brad Pitt muttering 'Typical', after some comments about 'powder puffs, soft cocks and pussies leaving the group'.

PN356

I was going to address the point about *Jones v Dunkel*. I understand that it not a point that's taken so I won't labour it, save to say that there is - I don't understand the appellant to be saying that a *Jones v Dunkel* inference should have been drawn.

PN357

There was, before the Commissioner, evidence, albeit it hearsay evidence, about the response of at least one of those persons, one of those employees who it is said would have taken offence to the conduct. I'll come to that in due course, when dealing with the alleged significant errors of fact.

PN358

Appeal ground 2(f) relates to the alleged failure by the Commission to have regard or sufficient regard to the potential for the posts made on the Sickos Video Sharing Group to damage the interests of the appellant. I won't repeat my previous submission, save to say that that is not the test described by *Rose v Telstra* and the Full Bench should not substitute the test that has been accepted by many previous Full Benches with one now proposed by the appellant.

PN359

There was an express finding made by the Commissioner, again at paragraph 138, that Mr Pelly's actions do not damage the respondent's interests, except for some possible minor embarrassment with Defence. In my submission, he took into account the potential for the conduct to damage Ventia's interests and made a positive finding that it did not. I don't understand the appellant, even now, to be suggesting that he did. The highest that it's put that submission is that it had a potential to damage the relationship.

PN360

Then the final point, under appeal ground 2, is what I'll describe as a failure - the alleged failure of Mr Pelly to admonish members of the group. This is picked up by appeal grounds 2(g) and 2(h).

PN361

In this respect, the Commissioner did have regards to submissions about Mr Pelly being a potential future leader. The reference in the decision below for that is paragraph 43(g). But it is important, in my submission, to be clear about Mr Pelly's role. He was a qualified leading firefighter. That is a person who's required to perform the normal firefighting duties.

PN362

The evidence was that he may, on occasion, fill in for the leading firefighter when they're absent or performing higher duties, but he was not senior leading management - it was not a senior leading management role and it was subordinate to the roles of station officer and leading firefighter on shift.

PN363

The evidence relied upon for that is the unchallenged evidence of Mr Pelly, in his witness statement, at paragraph 14, appeal book 281, and the evidence of Mr Anderson, at paragraph 10, appeal book 512.

PN364

There is no aspect of Mr Pelly's role that created a positive obligation for him to admonish other employees who were, to use the phrase referred to in the judgment, taking the piss out of other employees.

PN365

I mentioned earlier the evidence of Mr Pakes about this, I've gone to one of the cross-examination. As a matter of completeness, if I could direct the Full Bench to Mr Pakes' witness statement, appeal book 1398, paragraph 26, I hope.

PN366

I rely upon this evidence, if the Full Bench please, because a distinction can be drawn between Mr Pelly, firefighter, and Mr Pakes, the regional manager. Now, it's said that the Commissioner erred in failing to find that Mr Pelly - the connection with employment was established because Mr Pelly failed to admonish his fellow co-workers. The evidence established that Mr Pakes was aware of the group. So his own evidence is that although he wasn't certain when it was set up, this is page 1398 of the appeal book paragraph 26 of his statement, he says that Mr Thompson added him to the Sickos Video Sharing Group:

PN367

think it might have been when I was already the regional manager. I think this was the case because I recall telling Mr Thompson that he cannot go adding me to Facebook group chats because it puts me, and possibly others in the group, in a compromising position.

PN368

He goes on to say, at 27:

PN369

In hindsight, particularly now having seen the content that was shared in the Sickos Video Sharing Group, it would have been better had I investigated further, found out what the content is and possibly reported the group to Mr Anderson, when he was added and saw the group chat name.

PN370

So Mr O'Grady makes much of the name. That is something which the regional manager was aware of and the regional manager took no action.

PN371

So, if the Full Bench pleases, those are the submissions, in respect of appeal grounds 1 and 2. If I could turn then to deal with the differential treatment point. By way of outline, the respondent's position here is put in two says. Firstly, that the Commissioner had a proper basis, comparing apples with apples, to make a finding that treating objectively the conduct of Mr Gregory and Mr Pelly, that Mr Pelly received disparate treatment in circumstances where he should not have. So that's the first way it's put and I'll develop that as we go.

PN372

The second say that it is put is that there is no error, by the Commissioner, if the approach of the Commission was to look at Mr Anderson's reasons. That is a proper function, in my submission, of the authority in jurisprudence having regard to disparate treatment.

PN373

As I understand it, there's no dispute between the parties that inconsistent treatment of employees, in comparable cases, may be relevant to determining whether the sanction of dismissals, in respect of a particular employee, is unfair.

PN374

The Commissioner identified relevant authorities, and one of those was *Sexton v Pacific National*, which is relied upon in the appeal by the appellant, and clearly had regard to the need to compare apples with apples, when comparing employees.

PN375

Much of the authorities regarding disparate treatment are concerned with that matter. It may be accepted that there could be many reasons why an employer may elect to impose different sanctions upon different employees, having regard to the personal circumstances.

PN376

That is a matter that is expressly borne out by the decision in *Sexton v Pacific National* and, indeed, in the extract relied upon by the Commissioner below, that's at paragraph 132, page 40 of the court book. Sorry, 132.

PN377

In that extract, from *Sexton v Pacific National*, and I'm reading from about eight lines up, on the left-hand side the word is 'caution' but the sentence starts 'specifically'.

PN378

Specifically, the Commission must be conscious that there may be considerations subjective to the circumstances of an individual that caused an employer to take a more lenient approach in an allegedly comparable case. For example, a worker guilty of misconduct justifying termination might be shown leniency because of extreme need or stress arising from the serious illness of a close dependent.

PN379

That concern expressed by Lawler VP does not arise on these facts, cannot arise on these facts because Mr Gregory was never investigated. Ventia never got to the point of saying to Mr Gregory, 'Well what are your personal circumstances that mean that you should receive different treatment from Mr Pelly?'.

PN380

In terms of comparing apples and apples, both Mr Gregory and Mr Pelly were qualified leading firefighters, employed by Ventia at HMAS Albatross. Both were involved in the Sickos Video Sharing Group, both posted, they were active members of the group. Both of them posted. In terms of the different posts, there was a comparison of that material conducted by the Commissioner, at paragraph 133. The appellant may disagree with that. In my submission, the findings made by the Commissioner were open to him and disclose no error.

PN381

In terms of the disparate treatment, on one hand Mr Pelly was dismissed and on the other hand Mr Evans was not investigated at all.

PN382

As I said, the other way that the disparate treatment is - that the Commissioner's decision about disparate is defended by Mr Pelly is that it was entirely legitimate for him to have regard to the subjective reasoning of Mr Anderson.

PN383

The Commissioner referred to the evidence of Mr Anderson, at paragraph 130 of the decision, in that Mr Anderson made the decision to terminate Mr Pelly's employment based upon information before him at the time and he made his decision to dismiss the applicant, based upon the full list of posts attributed to the applicant, in his original witness statement. It's not understood that the appellant suggests that the Commissioner was in error in that respect.

PN384

The Commissioner, at 130, also took into account the substantial changes that Mr Anderson made to his witness statement at the start of his testimony. That included amendments to his witness statement to reduce the severity of allegations against Mr Evans and acknowledge that he had wrongly attributed conduct to Mr Pelly.

PN385

At paragraph 131 the Commissioner also sets out a reasonably lengthy passage of cross-examination of Mr Anderson, in which it was put to him that he had

changed his evidence and, in fact, crafted his evidence in a way that he believed would most assist Ventia in its conduct of the hearing.

PN386

It's accepted the Commission did not make any positive adverse findings of credit against Mr Anderson but a fair reading of this paragraph, and the only reasonable explanation for the inclusion of his paragraph is that the Commissioner bore concerns about the reliability of Mr Anderson's evidence.

PN387

Now, in terms of the findings made, at paragraphs 140 to 142, they're at appeal book 42, the Commissioner there found that the - sorry. The Commissioner made a finding that:

PN388

> *The applicant was thoroughly investigated and ultimately dismissed on inaccurate information and dealt with substantially differently than Mr Gregory, for similar misdemeanours, 'As a result I find the applicant's termination was unjust and unreasonable.*

PN389

It's significant that the Commissioner referred, particularly, to those two of the three elements of harsh, unjust and unreasonable, unjust and unreasonable.

PN390

The Commissioner did so in circumstances where the reasons for decision, at paragraph - a couple of paragraphs below it, at paragraph 148, sets out the oft quoted extract from *Byrne v Australian Airlines* and having regard to those two matters of 'unjust' and 'unreasonable'. What McHugh and Gummow JJ said there, about 'unjust dismissal' is that, I'm reading from the third line:

PN391

> *Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted.*

PN392

In my submission, that is the case here. On my submission, and this is a finding of the Commissioner, Mr Anderson, the decision maker, aced on inaccurate information. That is, on all fours, in my submission, with what's said by McHugh and Gummow JJ about the meaning of an unjust termination. Going on to refer to 'unreasonable, their honours there say that:

PN393

> *A termination may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer.*

PN394

Again, allowing the Commissioner determining harsh, unjust and unreasonable, or particularly in determining unjust and unreasonable, to have regard to the subjective reasoning of the decision maker.

PN395

That, in my submission, is consistent with what is said in Sexton. Sexton is relied upon by the applicant, as authority. I put it, as I understand the case, inconsistent treatment is dealing with the objective facts, as found by the Commissioner about the reasons.

PN396

But, in my submission, Sexton does not stand for that proposition and, in fact, at paragraph 37, and I'm sorry, I've lost the page for that, but Sexton, in the appellant's list of authorities commences at 133 and the extract of Sexton, at 37, can be found on page 146, where his Honour refers to the decision of Spender J, in *Hepburn v Department of Justice Office of Corrections* where Spender J found that:

PN397

> *A decision by the Department to terminate a prison officer who had established a relationship with a prisoner was not based on genuine consideration of the circumstances of her case and a penalty appropriate to those circumstances but rather to avoid the embarrassment the Department had experienced in another case.*

PN398

Again, in my submission, having regard to the subjective reasoning of the decision maker.

PN399

Now, I accept that the decision of *BCD v Australia Post*, the decision of the majority, in *BCD v Australia Post*, at 109, does go some way to supporting the contention put by the appellant. But in light of the other authorities and, in particular, in light of *Byrne v Australian Airlines* it is my submission that the concept of inconsistent treatment should not be limited to a consideration of the objective - the comparison of the objective facts, as found by the Commission. It can include inconsistent treatment, by the decision maker, in their subjective reasoning process.

PN400

The only final point I'll make - no, I withdraw that.

PN401

Turning then to the grounds dealing with significant errors of fact. The overarching submission I'd make about those appeal ground is a (audio malfunction). The grounds do not relate to errors or alleged errors of fact but, rather, the Commission's assessment of matters, especially the Commissioner's assessment of posts is made. Nothing in that ground suggests that the Commissioner palpably misused his advantage or acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable. It is more that the appellant disagrees with the findings made by the Commissioner below.

PN402

Dealing with the first of those, relating to Mr Pelly's post on, I think it's described by the appellant as the nude shock absorbers post. It's said, by the appellant, that the Commissioner's finding, at 133, about the gravity of this post manifested a significant error of fact. That finding - and there's a reference to paragraph 133 of the decisions below.

PN403

That finding, at paragraph 133, was, firstly, made in the context of consideration of differential treatment. So the Commissioner there was having regard to the differential treatment handed out between the applicant and Mr Gregory, Mr Gregory not being the subject of investigation and so forth.

PN404

Secondly, that appeal ground proceeds on the basis that the requisite connection between the post and the employment exists. This is to come back to a primary point of Mr O'Grady, where it is said that there was a failure to give proper consideration to whether these posts amounted to a valid reason for termination.

PN405

The Commissioner found, on the application of the test in *Rose v Telstra* that the conduct of the applicant did not cause serious and irretrievable damage, so I won't repeat it, but found that there was not the requisite connection between those three posts and the employment.

PN406

In those circumstances, that requisite connection not existing, those posts cannot, could not form a valid reason for dismissal. An employer can engage in whatever misconduct they desire that is unconnected - if it's not connected with the employment it cannot be a valid reason for dismissal.

PN407

So in those circumstances, in light of the finding made about the absence of the requisite connection, there is no error in a failure to consider these points. Furthermore, there is no significant error of fact that the appellant disagrees with the Commissioner's assessment of these points. The assessment was open to the Commissioner - in my respectful submission it was correct but the Full Bench doesn't need to put it that highly. The question is, was there error in the approach taken by the Commissioner below. In my respectful submission there was not. There was no significant error of fact that did or could have vitiated the findings of the Commissioner below.

PN408

Reliance is also placed on the Commissioner's treatment of what was a post by Mr Pelly of a video from OnlyFans. Again, it's submitted if that did not satisfy the test in *Rose v Telstra* it can't be a valid reason for dismissal. So if there was a significant error of fact, it would not, could not vitiate the findings. But in any event, a fair reading of the reasons below made it clear that the Commissioner was under no apprehension about the nature of that post.

PN409

The Commissioner had in evidence, and I don't think this is in issue and Mr O'Grady has referred to this, the Commissioner had, in evidence, a screenshot of a video that was posted by Mr Pelly to the group. That is in evidence from Mr Anderson. Mr Pelly was cross-examined about that. Under cross-examination he accepted that it was a video and that it was a pornographic video and that it was posted by him. Again, that video itself was not in evidence. All that the Commission had in evidence was a screenshot of the video.

PN410

At paragraph 118, starting on appeal book 36, and this is one of the three paragraphs relied upon by the appellant to make good his error, the bottom of the page you'll see there it's not in dispute that the applicant published a post into the group to dealing, first, with the bicycle post, and then the nude shock absorbers post and then, at the very bottom of the page, the last sentence you can see there starting on the page.

PN411

The second post was a screenshot of a video of a woman in a bikini top, which the applicant admitted was a pornographic video. So this relied upon, by the appellant, to suggest that the Commissioner made a significant error of fact. There can be no doubt, from what the Commissioner says here, that the Commissioner knew that there was a video. There was no misapprehension.

PN412

The appellant also relies upon the reference, in the following paragraph, to the - in the second sentence, at paragraph 199, the applicant also accepting that the posting of the screenshot of the pornographic video was also inappropriate and he did not need training to know, and so on and so forth.

PN413

Again, there is nothing, on a fair reading of that paragraph, that suggested the Commissioner was under any misapprehension about what it was that Mr Pelly posted.

PN414

The final paragraph relied upon by the appellant is paragraph 133, which is on page 40 of the appeal book. Sorry, it is on the very bottom of page 40, where the Commissioner is dealing with the issue of inconsistent treatment. He says:

PN415

I have taken into account the differential treatment handed out between the Applicant and Mr Gregory.

PN416

He is considering the inconsistent treatment by Mr Gregory and what Mr Gregory had before him - sorry, by Mr Anderson and what Mr Gregory had before him, with respect to the applicant and Mr Gregory.

PN417

Then, over the page, on page 41, three lines down:

PN418

Mr Gregory posted a video of a scantily clothed woman with large breasts, a very tight shirt and panties, compared to the Applicant's post of a video of a woman in a bikini top.

PN419

Again, there is no suggestion that the Commissioner misunderstood what it was that Mr Pelly posted.

PN420

It's also said that the Commissioner made a significant error of fact in finding that Mr Pelly had no control over when the posts were viewed by others.

PN421

Now, Mr O'Grady, in submissions today, says that the had ultimate control, he could have - Mr Pelly could have chosen not to post that, so much is accepted.

PN422

Once they were posted it is utterly uncontroversial that the recipients of that post would view those posts where and when they chose. There is, in my submission, no error of fact, certainly not a significant error of fact that would vitiate the findings of the Commission below.

PN423

With respect to the alleged significant error of fact and the Commissioner's failure to draw an inference, that references two other employees being 'soft cocks and pussies', that may have influenced them to stay and remain in the group. It's not clear, in my submission, how - again, now this could amount to a significant error of fact or a vitiating error.

PN424

The primary comments were not made by Mr Pelly. As I indicated earlier, the high water mark of Mr Pelly's conduct was posting the 'typical' meme. I've made previous submissions about the use of the group chat to disparage employees, I won't repeat them, I'll rely upon those submissions here.

PN425

The Commissioner had before him evidence about a workplace culture of banter, from Mr Pelly, Mr Thompson and Mr Pakes, and the opinion of Mr Pelly was that, in the context of this workplace, these posts would not have been offensive to those persons. That is as is set out by the Commissioner, in paragraph 128 of the decision below.

PN426

Now, I referred earlier to the evidence of Mr Evans. Again, I flagged that the evidence - the Commissioner did not have direct evidence from Mr Evans, or any of the other employees, as to the nature of the posts. There was hearsay evidence from Mitch Evans, which was adduced in two ways.

PN427

Firstly, from Mr Murphy, who was the union representative involved in an interview with Mr Evans. The notes of that meeting were put into evidence, they're JM1, at appeal book 470, if I could ask the Commission to turn that up briefly. This is an email from Mr Murphy to Mr Evans, and Mr Murphy put this in evidence as being his contemporaneous record of the meeting and, relevantly, if you turn to page - pardon me. In terms of - you'll see, the second question that's recorded there, 'Tell me about the group Sickos XX, what is this? What types of things are posted?'. 'It's just a group where mates post silly stuff really, it's just meant to be a laugh, just mates having a laugh, I guess'.

PN428

Over the page, the question was recorded by Mr Murphy, being put to Mr Evans, 'Are you aware of any bullying that has occurred in relation to the group?', he answered 'No, and I wasn't bullied'.

PN429

As I said, there were other notes of this meeting put into evidence by the respondent, they're at appeal book 1450, exhibit 16. I believe they were the notes of Ms Alnoss(?), and on page 1451, she elicits a question:

PN430

Please confirm what Sickos Video Sharing Group, which I will refer as to Facebook Group 1, and Punters Events Only, which I will refer as to Facebook Group 2, is?

PN431

It was, from my recollection and memory, a social muck around sending stupid stuff. I subsequently left.

PN432

Then if one scrolls down to page 1453, question:

PN433

Is there any bullying, harassment, intimidation or unwanted attention that was taking place on site, in relation to these posts?

PN434

No, not from my knowledge.

PN435

So hearsay that there was evidence that - further evidence, beyond that of Mr Pelly, Mr Thompson and, indeed, Mr Pakes, that supported the Commissioner's findings.

PN436

Can I turn then to the question of permission to appeal? The Commission's been taken to a number of decisions which apply the test in *Rose v Telstra* which lead to varying decisions and varying findings about whether conduct will or will not have the sufficient nexus to employment, such that it's capable to give rise to a valid reason.

PN437

Those authorities, in my submission, make clear that there's no dispute as to the principles to be applied. They are extracted from *Rose v Telstra* and, of course each case must turn on its own facts. So much is made expressly clear by the Commissioner, in *BCD v Australia Post* and the relevant passage that I'll take the Full Bench to is paragraph 31.

PN438

Mr O'Grady, in his submission, said that it is hard to come up with hard and fast lines when determining where the line is to be drawn about whether there is sufficient connection with employment. For the respondent I would embrace that. It is hard. The task of the Commission, though, is to apply the test in *Rose v Telstra*. That is precisely what the Commissioner did here.

PN439

The outcome of the two different decisions, in my respectful submission, is a good example of how the same test can be applied to similar circumstances to yield different results.

PN440

On one hand we have Mr Thompson, whose conduct - who was involved in the same Messenger group. He set it up, but that was not a determinative factor for the Commission below, but he did post material, he did post pornographic material whilst on shift.

PN441

Applying the test in *Rose v Telstra*, the Commissioner below found that to give rise to a valid reason. Applying the test in *Rose v Telstra* to the facts of Mr Pelly's case, the Commissioner found that it did not. One can spend as much time as one wants looking through previous decisions and my learned friend did spend some time looking at particular facts of decisions, they are clearly distinguishable and, as acknowledged in *BCD v Australia Post*, each case must turn on its own facts.

PN442

For those reasons, the public interest here is not - the test is not reached. Even if the Commission were to find that there were errors, this is not a case where the sorts of principles described by the Full Bench in GlaxoSmithKline are met. It is an application, by the Commissioner, of *Rose v Telstra* to the facts to make a finding that, in my submission, disclosed no error and, in my respectful submission, was correct.

PN443

Finally, then, in terms of if the decision were quashed, if there is to be a rehearing, in my submission, there is no reason why that couldn't be done by the Commissioner below. There are a broad range of factors to which the decision maker would be required to have regard. In particular I would rely upon the submissions made by Mr Pelly below, dated 16 December, they're at appeal book page 69 and following. The reply submissions, on behalf of Mr Thompson and Mr Pelly of 1 February 2023, appeal book 102 and following, and the oral closing submissions, at paragraph 2460 to 2619, appeal book 1688 to 1707.

PN444

I've identified, in the written submissions a number of factors, particular factors if a decision is to be made of fresh matters that must be taken into account. They include the fact that Mr Pelly had no training on social media policies and, in that respect, this case is a world away from the decision in *Queensland Rail v Wake*.

PN445

There is no evidence of damage to Ventia's interests. It was not below - I'll start again.

PN446

How it was alleged, the particulars of the alleged contraventions of the policies were not put to Mr Pelly, in the investigation process, they were not put to him below and they have not been identified on appeal. What Ventia did, both in the investigation process and in the hearing below, was simply to refer, in bald terms, to parts of policies. It has never been clearly articulated how it is said that the conduct of Mr Pelly amounted to breaches of policies.

PN447

It was found by the Commissioner, at paragraph 129, that Mr Pelly had been a model employee who had been fast-tracked through the classification structure, due to his exceptional work ethic and the training that he had undertaken and paid for himself.

PN448

There was unchallenged evidence, from Mr Pelly, about his personal circumstances, including the fact that he relocated from Melbourne to Nowra to take this job. He was employed there for five years and, if terminated, he would not be able to find suitable other employment within the area and would likely be required to relocate again.

PN449

So if the Full Bench pleases, unless there are any questions, they're the submissions of Mr Pelly, the respondent to the appeal.

PN450

VICE PRESIDENT ASBURY: Thanks, Mr McKenna, no questions from me.

PN451

MR McKENNA: Commission pleases.

PN452

VICE PRESIDENT ASBURY: O'Neill DP and Bissett C?

PN453

DEPUTY PRESIDENT O'NEILL: No thanks.

PN454

COMMISSIONER BISSETT: No, thank you.

PN455

VICE PRESIDENT ASBURY: Thanks. Mr O'Grady, do you have anything in reply?

PN456

MR O'GRADY: Yes, if I may, briefly, Vice President, and I'm conscious of the time, but I'll be as short as I can.

PN457

Can I start with the first point, in respect of the suggestion that we need to get up in respect of both the first and second and the third and fourth grounds of appeal to succeed. In my respectful submission that's a misreading of the position.

PN458

Clearly the issue of disparate treatment is going to be impacted upon by what were said to be the valid reasons for termination. If we succeed in respect of valid reason for termination, then even if we weren't successful, in respect of disparate treatment, a different balancing exercise would need to be undertaken, along the lines that I was suggesting to the Deputy President earlier.

PN459

So, in my respectful submission, it's not a case of we need to win on both of the topics, because there is an interrelation between them. If we're successful in respect of either valid reason or disparate treatment then, in my submission, that would be a basis for the matter to be subject to further determination.

PN460

In respect of that, in my submission, the matters identified by my learned friend, in paragraph 37 of his submissions, are all matters that the Full Bench, or a member of the Full Bench, are as in good a position to assess as the Commissioner. There is no dispute about what happened here, there is no issue of credit. They are matters that could be dealt with, in my submission, by way of written submissions filed, pursuant to directions issued by the Full Bench.

PN461

In respect of the issue of actual damage and the suggestion that unless there is actual damage there is no capacity to take into account out of work conduct. In my submission, that's a misreading of what is said in paragraphs 140 through to 150 of the Full Bench decision in Sydney Trains.

PN462

In my submission, the touchstone of the test applied by the Full Bench in that case was that the conduct must touch the employment. Clearly that is - that is at authorities book, page 189. That is, in effect, a holistic test that needs to take into account the entire factual matrix.

PN463

It may be that what is said in the second bullet point in the passage from *Rose v Telstra* and what is said in paragraph 142 of Sydney Trains is reconciled by the fact that damaging the employer's interest is a phrase of wide import, in that one could imagine that it could be said that my client's interests were damaged if its

position, in respect of its relationship with the Department of Defence, was potentially put at risk.

PN464

It is not necessary for my client to, in effect, lose it's contract with the Defence Department for there to be damage of the type that is contemplated by that second bullet point. And as the facts in Sydney Trains themselves establish, it wasn't necessary for there to be any collision or accident by the applicant in that case, for his out of hours conduct to be taken into account.

PN465

In respect of - and to the extent that my learned friend suggests that there needs to be a repudiation of the contract, or the conduct needs to constitute a repudiation of the contract, as indeed the Commissioner appears to have suggested there needed to be, that, in my submission, is clearly inconsistent with what is said in Sydney Trains, at both paragraph 141 and 150.

PN466

In respect of the nature of the group and the joking and banter, can I simply refer the Commission to paragraph 2167, where Pakes explains what he means by 'taking the piss'. In my submission, it could not sensibly be said to extend to the conduct that Mr Pelly engaged in and/or endorsed, in respect of the 'soft cocks' messages sent by Mr Thompson.

PN467

In respect of the evidence concerning Mr Evans that my learned friend referred to, can I direct the Full Bench to paragraph 97 of Mr Anderson's statement, which appears at appeal book page 530 where, at paragraph 97.3 Mr Evans explained that he'd left the Sickos Video Sharing Group, which he was bullied for doing, because he was uncomfortable with the content of the material being shared within the group.

PN468

Now, my learned friend says, well, he relies upon what Mr Murphy said in his note, but it's important to remember that Mr Evans was not aware of the posts that were made, in respect of 'soft cocks and pussies', because he'd left it before those posts were made. That appears at paragraph 357 through to 363 of the transcript.

PN469

In respect of the point of differential treatment, we rely upon what I said previously, in respect of both the analysis undertaken by the Commissioner and the nature of the test. In respect of the analysis undertaken by the Commissioner, as I understand my learned friend, he accepts that. The issue of the memes, the shock absorbers meme, and the video, was only dealt with in the context of differential treatment, it wasn't dealt with in the context of valid reason which, of course, is something that we complain about, in respect of grounds 1 and 2.

PN470

In respect of my learned friend's submission that's now put, that relies upon the passage in Byrne referred to by the Commissioner at paragraph 148, in my submission there I nothing in that passage that suggests that the Commission

should depart form the well accepted approach that the existence of valid reason is to be determined by the Commission, on the material before it, as opposed to an assessment of whether or not the decision made by the employer was an honest belief based on reasonable grounds.

PN471

It is not a passage that is directed to the issue of differential treatment at all and, in my submission, it is no basis for departing from the line of authority that I took the Full Bench to earlier, flowing from Sexton through to Darvel, through to *B v Australia Post*.

PN472

In respect of the issue of permission, we accept, and I don't resolve from the proposition that it's hard to form hard and fast lines, but one hard and fast line that, in our submission, can and should be drawn by the Full Bench in this appeal is that the criteria for determining whether here is a sufficient connection is not whether or not the post was sent while you were on shift. That is the approach that the Commissioner adopted, both in respect of Mr Pelly's case and in respect of Mr Thompson's case.

PN473

VICE PRESIDENT ASBURY: Is it only one of the matters, though, that the Commissioner adopted? Do you say that's determinative of the whole thing or isn't it just one of the considerations that the Commissioner took into account. It is relevant, on the authorities, where the location at which the conduct - - -

PN474

MR O'GRADY: I - sorry, Vice President.

PN475

VICE PRESIDENT ASBURY: Go on, sorry.

PN476

MR O'GRADY: I accept it's relevant but, in my submission, for the reasons I tried to explain earlier, when you come to the analysis that the Commissioner undertook, in respect of valid reason, both in respect of Mr Pelly and in respect of Mr Thompson, that appears to be the approach he's adopted, that is it wasn't sent whilst you were on shift it cannot constitute valid reason. There is no consideration of the factors that might lead to a post that it sent off shift that were before him, and my learned friend has referred to the submissions that were made to him on some of these things, which the Commissioner noted, but there's no consideration of those submissions in respect of valid reason. That's the vice that we complain about and that is why we say this is a matter that warrants permission to appeal.

PN477

VICE PRESIDENT ASBURY: I understand, thank you.

PN478

MR O'GRADY: If you just bear with me. Indeed, even at paragraph 138 of the decision, where the Commissioner mentions *Rose v Telstra*, again, there is no

mention of the third limb of that, it's really simply a reference to the test, without, in our respectful submission, sufficient analysis of the matters that were put before him.

PN479

Unless there's anything further, those are the submissions I'd seek to put in reply.

PN480

VICE PRESIDENT ASBURY: Thanks.

PN481

Thank you to both counsel for your comprehensive submissions. I'll indicate that we will reserve our decision and issue it in due course. Good evening, we're adjourned.

ADJOURNED INDEFINITELY **[5.19 PM]**