FEDERAL CIRCUIT COURT OF AUSTRALIA

McNamara v Era Pacific Pty Ltd [2021] FCCA 1689

File number(s):	BRG 465 of 2020
Judgment of:	**JUDGE TONKIN**
Date of judgment:	23 July 2021
Catchwords:	**INDUSTRIAL LAW –** general protections – whether employee exercised workplace right under subsection 341 (1) of the *Fair Work Act 2009* (Cth) – whether adverse action taken because employee exercised a workplace right – whether employer discharged presumption imposed by subsection 361 (a) of the *Fair Work Act 2009* (Cth) – whether employer contravened section 340 of the *Fair Work Act 2009* (Cth). **INDUSTRIAL LAW –** remedies – adverse action – compensation awarded to applicant pursuant to section 545 of *Fair Work Act 2009* (Cth) – pecuniary penalties awarded and ordered to be paid to the applicant pursuant to section 546 of the *Fair Work Act 2009* (Cth)
Legislation:	*Crimes Act* 1914, s.4AA *Fair Work Act* 2009 (Cth), 12,14, 117, 340, 340(1), 341(1), 360, 361(1), 539(2), 545(1), 545(2)(b), 546(1), 546(3)(c), 546(5), 547(1), 547(3), 550 *Federal Court of Australia Act 1975* (Cth), ss. 51A, 52 *Federal Court Rules 2011* (Cth), r.39.06 *Work Health and Safety Act* 2011 (Qld), s84
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 *Construction Forestry Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 2)* [2017] FCA 1046 *Ingersole v Castle Hill Country Club Limited* [2014] FCCA 450 *Roohizadegan v TechnologyOne Limited* (No 2) [2020] FCA 1407 *Tran v Kodari Securities Pty Ltd* [2019] FCA 968
Number of paragraphs:	137
Date of hearing:	20 April 2021

Place:	Brisbane
Counsel for the Applicant:	Ms Riedel
Solicitor for the Applicant:	W W C Lawyers
Solicitor for the Respondents:	The Respondent appeared on his own behalf

ORDERS

BRG 465 of 2020

BETWEEN:	**MICHAEL MCNAMARA** Applicant
AND:	**ERA PACIFIC PTY LTD** First Respondent
	MACLOLM LIGHTFOOT Second Respondent

ORDER MADE BY: **JUDGE TONKIN**

DATE OF ORDER: **23 JULY 2021**

THE COURT DECLARES THAT:

1. The First Respondent ERA Pacific Pty Ltd contravened subsection 340 (1) of the *Fair Work Act* 2009 (Cth) on 18 June 2020 in taking adverse action against the applicant Michael McNamara when the First Respondent terminated the applicant's employment because he exercised a workplace right.

2. The Second Respondent Malcolm Lightfoot was involved within the meaning of section 550 of the *Fair Work Act* 2009 (Cth) on 18 June 2020 in the contravention of subsection 340 (1) of the *Fair Work Act* 2009 (Cth) by the First Respondent taking adverse action against the applicant Michael McNamara when the Second Respondent acting on behalf of the First Respondent terminated the applicant's employment because he exercised a workplace right.

THE COURT ORDERS:

3. Pursuant to section 545 (2) (b) of the *Fair Work Act* 2009 (Cth) within 60 days the First and Second Respondents shall pay compensation to the applicant in the amount of $19,463.55.

4. Pursuant to subsection 547 (1) of the *Fair Work Act 2009* (Cth) the First and Second Respondents shall pay interest with respect to Order 3 in the amount of $740.95 within 60 days.

5. The First Respondent shall pay to the superannuation fund nominated by the applicant the sum of $1372.04.

6. Pursuant to section 546 of the *Fair Work Act* 2009 (Cth) within 60 days the First Respondent shall pay a penalty of $6600 for the contravention set out in the declaration.

7. Pursuant to section 546 of the *Fair Work Act* 2009 (Cth) within 60 days the Second Respondent shall pay a penalty of $1320 for the contravention set out in the declaration.

8. The First and Second Respondents be jointly and severally liable to pay the amounts set out above.

9. Any amount paid personally by the Second Respondent in respect of the liability for the penalty of the First Respondent under Order (6) hereof is to be credited against the Second Respondent's liability in Order 7.

10. Pursuant to subsections 546 (3) of the *Fair Work Act* 2009 (Cth) with respect to the penalties referred to in Orders (6) and (7) an amount of $1320 shall be paid by the Respondents directly to the applicant with the remaining balance to be paid to the Consolidated Revenue Fund of the Commonwealth within 60 days of the date of this order.

11. The applicant has liberty to apply on seven days' notice in the event that there is a failure to comply with any of the preceding orders.

REASONS FOR JUDGMENT

JUDGE TONKIN:

INTRODUCTION

1 Between 2012 and 18 June 2020 the applicant Michael McNamara worked for ERA Pacific Pty Ltd ("ERA). The applicant alleges that his employer took adverse action against him in contravention of section 340 of the *Fair Work Act* 2009 (Cth) ("FWA"). He contends that his dismissal was in contravention of a number of general protections provided for under the FWA and alleges that he was dismissed from his employment because he exercised a *workplace right*. In particular he alleges that he was dismissed because he exercised a workplace right to refuse to perform work that would expose him to a safety risk. He sought orders for compensation and the imposition of a pecuniary penalty for alleged breaches of the FWA.

AGREED FACTS

2 The applicant commenced employment with the first respondent ERA PACIFIC PTY LTD ("ERA") as a casual scaffolder in or around 2012 (employment contract).

3 His employment contract was varied on or about 1 January 2019 when the applicant's employment with ERA was converted to a permanent full time role as a truck driver and scaffolder.

4 The applicant was a national system employee of the first respondent at all times between 2012 and 18 June 2020 as that term is defined in section 13 of the FWA.

5 The applicant was entitled to the benefit of the National Employment Standards as contained within Part 2 -2 of the FWA at all times between 2012 and 18 June 2020.

6 At all relevant times ERA PACIFIC PTY LTD:

(a) is and was a "*constitutional corporation*" within the meaning of section 12 of the FWA;

(b) is a corporation duly incorporated in accordance with law, capable of suing and being sued and has been since 16 June 2004;

(c) is a national system employer as that term is defined in section 14 of the FWA;

(d) operated at the relevant time and continues to operate a business in the scaffolding industry trading as "Pacific Scaffolding" with its registered office located at 72 Junction Road, Morningside in the State of Queensland; and

(e) employed and continues to employ individuals.

7 The second respondent (Malcolm Lightfoot) was at the relevant time and is:

(a) the sole director of ERA;

(b) a person responsible for the operation and management of ERA since 24 August 2010; and

(c) a person responsible for ensuring that ERA complied with its legal obligations.

8 At all relevant times Ashley Thezise was and has been a shareholder of ERA. He was the applicant's supervisor.

9 In about April 2020 the applicant was directed by the second respondent to collect from the Port of Brisbane a steel beam and deliver it to the client's premises being a residential block at 86 Oxford Street Bulimba.

10 Upon arrival at the client's premises the applicant observed that the site was a steep, narrow, sloping block and performance of the task would be difficult.

11 The applicant contacted Mr Trezise for advice about performing the task and Mr Trezise attended the client's premises and assisted the applicant perform the task.

12 The applicant and Mr Trezise discussed performance of the task after it had been completed and they agreed that performance had been difficult.

13 On 18 June 2020 the applicant was directed to collect a steel beam from the Port of Brisbane and deliver the steel beam to the client's premises ("new task").

14 Mr Trezise was away from work on long service leave on 18 June 2020.

15 The applicant spoke to the second respondent about performance of the new task on 18 June 2020.

16 The applicant told the second respondent that performance of the task was unsafe and he was reluctant to perform the new task, he did not think he could do the new task by himself and he required assistance. He requested the second respondent assist him to perform the new task.

17 On 18 June 2020:

(a) The Mr Lightfoot became upset during the discussion with the applicant about performance of the new task;

(b) Mr Lightfoot threatened to terminate the applicant's employment as a result of the applicant refusing to pick up the steel beam from the supplier; and

(c) Mr Lightfoot terminated the applicant's employment with the first respondent.

18 In terminating the applicant's employment with the first respondent Mr Lightfoot acted in his role as the sole director of the first respondent and acted on behalf of the first respondent.

19 At all times material to this proceeding, the applicant was entitled to the general protections provided by Part 3 -1 of the FWA.

20 At all material times between 2012 and 18 June 2020 the WHSA was a workplace law within the meaning of section 341 (1) of the FWA. The applicant was able to initiate or participate in a process or proceeding under the workplace law and able to make a complaint or inquiry. The applicant had a right within the meaning of section 341 (1) of the FWA.

21 At all material times pursuant to section 84 of the *Work Health and Safety Act* 2011 (Qld) ("WHSA") the applicant had a right to cease or refuse to carry out work if he had a reasonable concern that to carry out the work would expose him to a serious risk to his health or safety emanating from an immediate or imminent exposure to a hazard.

22 Section 340 (1) of the FWA is a civil remedy provision.

DOCUMENTS RELIED ON

23 The applicant relied on the Amended Statement of Claim filed on 20 April 2021 and affidavit filed on 14 January 2021. The second respondent relied on his response filed on 9 October 2020, Points of Defence filed on 11 November 2020, his affidavit filed on 12 February 2021 and the affidavit of Keith Hopper filed on 12 February 2021. Both parties filed an outline of argument.

ISSUES IN DISPUTE

24 The matter was heard on 20 April 2021. The applicant was represented by Counsel and the second respondent appeared on his own behalf. Counsel for the applicant sought to rely on an amended statement of claim filed on 20 April 2021 discussed at length and not opposed by the second respondent. On 6 April 2020 the Court received a document signed by both parties identifying the following issues:

(a) Whether the task performed by the applicant in April 2020 to the client's premises required the applicant to manoeuvre close to overhead electrical power lines and was dangerous and involved safety risks;

(b) Whether the applicant and Mr Trezise discussed the delivery of the steel beam in April 2020 to the client's premises and agreed that the performance of the task involved risks to their health and safety which were unacceptable and whether the performance of the task took a prolonged period of time and whether the performance of the task was not profitable and the respondents would not make any further deliveries to the client's premises because of safety issues;

(c) Whether the applicant and Mr Trezise made a decision not to make further deliveries to the client's premises and whether that was communicated to the respondents;

(d) Whether performance of the task or one similar (delivering the steel beam to the client's premises and unloading it from the applicant's truck) gave rise to a concern on the applicant's behalf that to carry out the task (or similar task) would expose him to a serious risk to his health and safety emanating from an immediate or imminent exposure to a hazard in accordance with section 84 of the WHSA;

(e) Whether the applicant was told he had to deliver the steel beam to the client's premises on 18 June 2020;

(f) Whether the applicant was entitled to voice his concern and reluctance to deliver the steel beam to the client's premises on 18 June 2020;

(g) Whether the applicant exercised a workplace right and whether the complaint or inquiry in relation to the applicant's employment was made to Mr Lightfoot and involved the applicant initiating or participating in a process under a workplace law;

(h) Whether the applicant's employment was terminated in response to the complaint or refusing to pick up the steel beam;

(i) Whether the respondents contravened section 340 of the FWA.

EVIDENCE

Michael McNamara

25 In his affidavit Mr McNamara deposed that he previously held licences for intermediate scaffolding work and high risk work including a confined spaces certificate. He worked as a

scaffolder for most of his working life. In early 2000 he commenced work as a scaffolder for Skyhook Scaffolding then worked at Redjak removing asbestos.

26 On 19 June 2013 he commenced work with ERA initially employed as a scaffolder. He worked on both commercial and residential sites in Brisbane, the Gold Coast and Toowoomba.

27 In June 2018 his position with ERA changed from scaffolder to heavy rigid crane truck driver. He was then employed as a permanent full time employee working 38 hours per week. He drove an Iveco heavy rigid crane truck owned by ERA and was required to transport scaffolding equipment to job sites. The truck measured about 11 metres long and was 3.8 to 4 metres wide. He was one of two people with a licence to drive that truck.

28 In April 2020 Mr Trezise directed Mr McNamara to pick up a 10 metre steel beam from the Port of Brisbane and deliver it to the client's premises at 86 Oxford Street Bulimba. This was an unusual task and a task Mr McNamara had not performed before. His usual task was to drive the Iveco truck to and from sites to collect and deliver scaffolding equipment. The truck was not used as a general delivery service vehicle to residential sites.

29 In April 2020 he collected the 10 metre steel beam from the Port of Brisbane and took it to the client's premises. At the Port of Brisbane the steel beam was placed on the back of the Iveco truck by an employee of the supplier using a fork lift and three steel pallets. Due to its length it had to be positioned on the back of the truck in a way that obscured the operation of the crane. [1] The length of the steel beam extended beyond the length of the Iveco truck.

30 He deposed that "*when I arrived at the site I became extremely concerned about my ability to deliver the 10 metre steel beam safely particularly given that I did not have extensive experience or training as a heavy rigid crane truck driver*".

31 He had the following concerns:

- The driveway up from the road to the house on the client's premises was steep and narrow;
- There were power lines overhead;
- The steel beam had to be removed from the Iveco truck, placed on the ground and then manipulated under the house using slings;

[1] Affidavit of Mr McNamara filed 14 January 2021 at [24]

- The steel beam was 10 metres long and extremely heavy;
- He could not complete the task alone;
- The client was home but was unable to assist;
- He had no experience completing the task;
- Whenever he delivered scaffolding equipment to the site, scaffolders were present to assist;
- In addition to the weight of the steel beam and the manner where it had to be placed under the house, he was required to drive the truck up the driveway;
- The driveway was steep and at a sharp angle up from the road to the house;
- Given the steep, sloping driveway and the fact that he had to drive the Iveco truck up the driveway he was concerned that he would hit the overhanging power lines when using the crane to move the steel beam from the truck;
- He was concerned that the steel beam would slide off the back of the truck once the tension was released on the steel beam;
- He was concerned that should the steel beam slide off the back of the truck it was likely to fall onto the road immediately below and hit a car or a pedestrian.

32 As a result he was concerned that the task could not be performed safely and would expose him to a serious safety risk emanating from imminent exposure to the hazards including the risk of the crane hitting overhead power lines, the potential for the steel beam to slide off the truck and the risk of injury in removing the steel beam from the truck using slings. There was also the potential risk to other persons and damage to property. He telephoned Mr Trezise and sought his assistance. Mr Trezise attended the client's premises and helped Mr McNamara complete the job. The task took 2.5 hours.

33 On 18 June 2020 Mr McNamara was working delivering scaffolding equipment for ERA to job sites. At 10 a.m. he returned to the yard and was asked to perform a new task. He spoke with Mr Lightfoot who told him to "*collect another 10 metre steel beam from the Port of Brisbane and deliver it to the client's premises*"[2]. Mr Trezise was on holiday at the time. Mr McNamara told Mr Lightfoot "*As Ashley said, I am not doing the job because it is dangerous and not profitable*".

[2] Affidavit of Mr McNamara filed 14 January 2021 at [35]

34 Mr McNamara said Mr Lightfoot was angry in response and began to yell and scream at him. He said "*you're a truck driver and it's your job. I don't give a fuck*". A heated discussion ensued. Mr McNamara told Mr Lightfoot that when the delivery was first performed in April 2020 the length of the steel beam had covered the crane and obstructed its use. This required Mr Trezise to manipulate the crane slowly and by hand while directing Mr McNamara where to move the crane. According to Mr McNamara Mr Lightfoot told him this could be obviated by driving the truck with the crane at full extension. He declined to drive the truck in that manner advising Mr Lightfoot that it was not safe to drive with the crane "*flapping around*" rather than being strapped down and locked away. Mr McNamara and Mr Lightfoot continued to argue about a safe method for transporting the steel beam from the Port of Brisbane. Mr Lightfoot suggested Mr McNamara could "*get around it*" by "*removing the crane from its cradle and placing it onto the tray safely, tie it to the tray and leave it there until it was required to be used*".

35 Mr McNamara asked Mr Lightfoot to come with him to the Port and help him pick up and deliver the steel beam to the client's premises. He said he did not want to be responsible if something went wrong. Mr Lightfoot refused and said he was not employed as a truck driver and he did not care how *"I got the job done. I just had to do it*". Mr McNamara said the argument between them continued for about 20 minutes and Keith Hopper was present in the work yard during the argument.

36 Mr McNamara said Mr Lightfoot threatened that "*if I did not perform the work my employment with ERA would be terminated.*" In response Mr McNamara told Mr Lightfoot he was a single father who could not afford to lose his job. Despite this Mr Lightfoot "*terminated my employment with immediate effect saying "if you can't do the fucking job fuck off*".

37 After being terminated Mr Hopper drove him from the yard. Sometime later a person named John telephoned him and offered him his job back "*conditional upon me accepting a formal written warning and agreeing to a six month probationary period*". He did not accept the offer as he was concerned Mr Lightfoot could fire him whilst he was on probation.

38 Mr McNamara claimed that he suffered loss as a result of being terminated on 18 June 2020. He was unemployed until 22 October 2020. During his period of unemployment he received social security benefits of $10,933.25. He argued that it was not easy to find a new job in the scaffolding industry. He secured work as a heavy rigid truck driver at A Wood Shed on 22 October 2020. He is employed on a casual basis at $30 for ordinary hours. He does not receive

annual leave, sick leave or holiday pay. The termination of his employment caused him to suffer a financial disadvantage.

39 Mr McNamara said he raised serious and legitimate concerns regarding the task he was directed to perform including that it was dangerous and a potential risk to his safety and the safety of other people and property. In his opinion he did the right thing refusing to do a job that was a serious risk to his safety and exposed him to imminent hazard risks. He claimed the loss employment exacerbated "*my pre-existing anxiety, caused me to become stressed and to lose sleep because he is a single parent with three children*". His anxiety subsided when he found employment in October 2020. He would have remained with ERA for at least another 12 months. He enjoyed the work he performed at ERA and had been employed with ERA since 2013. He had never received any complaints, reprimands or warning about his conduct. Had he remained with ERA he would have received the benefit of being paid for public holidays, annual leave, sick leave and carer's leave.

40 Mr Lightfoot cross examined Mr McNamara and asked him how work was allocated. He said "he received instructions verbally about the task he was required to perform. It was usually daily, sometimes he had an idea what he had to do but at other times he had no notice." On this occasion he was told at about 10 a.m. on 18 June 2020 that he had to deliver a steel beam to the client's premises in Bulimba[3] where he had previously delivered a steel beam. He agreed that he had delivered a steel beam to that place previously with the assistance of Mr Trezise.[4]

41 Regarding the first time Mr McNamara delivered the steel beam to the client's premises he was asked "*whether there were any dangers, hazards, anything reported against the pick up from the manufacturer and driving the beam to the site?*" Mr McNamara replied "*there was no reporting of it. Everything was verbal*". He was then asked "*Do you agree in your amended statement of claim between 8 and 9 there's nothing showing any danger, hazard, or incident?" He said "We believed there was danger that's why I've rang my boss and got him to come out to help me. Ashley Trezise*". [5]

42 Mr McNamara was asked about his statement of claim at paragraph 8 and it was suggested by Mr Lightfoot that "*you were directed to go to pick up the beam from the manufacturer and take*

[3] The client's premises were at 86 Oxford Street Bulimba
[4] Transcript 20 April 2020 at p.31
[5] Transcript 20 April 2020 at p.32 ln 32

it to the client and then deliver it onto the site? No issue of picking up the beam whatsoever". He replied "*No*"[6]. Mr Lightfoot suggested to Mr McNamara "*You have absolutely no issue with picking up the beam?*" He replied "*No, not the first time. No there wasn't. No*.[7]" He was again asked "*would that also mean that you would have no issue in picking up the beam the second time?*" He replied "*Correct*".

43 The Court sought clarification from Mr McNamara regarding his response and enquired: "*You had no issue with having been asked to pick up the steel beam on the first occasion*?" He replied:

> "On the first occasion, no. No".
>
> "And did you have any issue being asked to pick up the steel beam on the second occasion" He replied "Yes I did. Yes. Definitely."[8]
>
> "What was your issue on picking up the steel beam on the second occasion?" He replied "The way Mr Lightfoot wanted me to operate the vehicle with the crane not being correctly put away in its cradle and laying down along the tray of the truck."[9]

44 Mr Lightfoot suggested "*I asked you to pick up the beam. How you pick up the beam is – as the driver is entirely up to you?*" Mr McNamara responded: "*No, no. Because I had put to Mr Lightfoot that the first incident of us delivering the beam to the jobsite we had an issue getting the crane out. We could not get the crane out. We had to move a steel beam around Ashley and I on top of the roof of the truck on a hill and it started sliding and I said – I told Mr Lightfoot we had that issue the first time. That's when you said well we're going to put the crane down. You go and pick up the beam like that with a couple of explicit words thrown in there…*"[10]

45 Mr Lightfoot asked Mr McNamara "*But you're saying that the pickup of the beam the second time was different to the pickup of the beam the first time*?" He replied "*Due to you controlling – running – how would I say it – Due to you wanting me to drive the truck with the crane down. That was the only difference*".

46 Mr McNamara denied when asked that he was procrastinating and said "*No I was sitting here listening to you and in shock with everything that's going on. Sorry I was standing. I was in shock. Mr Lightfoot wasn't in a very good mood at that stage he was yelling and ranting and*

[6] Transcript 20 April 2020 at p.32 at ln 39 - 40
[7] Transcript 20 April 2020 at p.32 at ln 43 -44
[8] Transcript 20 April 2020 at p.33 at ln 8
[9] Transcript 20 April 2020 at p.33 at ln 8 - 14
[10] Transcript 20 April 2020 at p.33 at ln 16 - 24

carrying on like a pork chop". Both parties agreed there was a heated exchange that lasted for 20 to 30 minutes.

47 Mr McNamara was asked about the first occasion he delivered the steel beam. He agreed that on arrival at the site he asked Mr Trezise to come and assess the situation and assist him to remove the steel beam from the vehicle onto the client's premises. He said on the second occasion he asked Mr Lightfoot to assist him and he replied "*you're the effing truck driver it's not my effing job to do that. You do it*". [11] He said there were a number of occasions that Mr Lightfoot refused to help him and denied that Mr Lightfoot agreed to help him. He agreed that the only other person present during the heated exchange was Keith Hopper.

48 It was put to Mr McNamara by Mr Lightfoot "*so I refused to help you then I asked you to go pick up the beam and you refused to pick up the beam*?" He said "*I didn't refuse to pick up the beam. I refused to drive the truck in that manner with the crane in an unsafe position*[12]".

49 He was asked at what point he terminated Mr McNamara's employment. He said "*You terminated my employment on three or four occasions and I kept begging for it back. I can't pinpoint (when) …you kept saying 'you're gone, you're gone I'm saying are you sure you want to do this? You're going 'you're gone, you're gone you're effing gone, we don't need you*".

50 Mr Lightfoot suggested that he fired Mr McNamara only after Mr McNamara refused to pick up the beam. Mr McNamara disagreed. Mr Lightfoot said "*I sacked you when you refused to pick up the beam*". Mr McNamara replied "*I never refused to pick up the beam …I refused to drive the truck in an unsafe manner with the crane down. So there was no issue with me picking up the beam*."[13]

51 Mr Lightfoot suggested "*you could have driven the truck with the crane in its correct position? Put away in its cradle*". He said "*I drive it like that every day. Yes*". He was asked "*Why didn't you just say 'I will drive the truck pick up the beam as long as the crane is in its correct position?*'" Mr McNamara replied "*Due to you knowing about the issues we had being able to get the crane out on site you said 'you will be taking it like this and that's when I've refused*'". Mr Lightfoot said "*I may have suggested that? I don't believe so…But I'm not the driver? I'm not the operator. You agree as the driver and the operator it's your job to operate in a safe*

[11] Transcript 20 April 2020 at p.34 at ln 39
[12] Transcript 20 April 2020 at p.35 at ln 43 - 45
[13] Transcript 20 April 2020 at p.36 at ln 44

manner?" Mr McNamara replied "*No you were telling me and I said 'I'm not driving the truck like that and that's when you started ranting again…*'" [14]

52 Mr McNamara agreed that after his employment was terminated he received phone calls from John Grenfell who advised him "*Malcolm is willing to give you your job back under a probation period and as long as you take a written warning*". He said he found that unfair after Mr Lightfoot's irate behaviour towards him. He didn't know if he had a job the next day or not and he was scared to say yes. He was told he could have a job if he accepted a 6 month probation period and a written warning and as he had never been in trouble with the company before he didn't think that was fair. He didn't recall receiving calls over the weekend about his employment. The last time he spoke with Mr Lightfoot was when he dropped the truck key off. He told Mr Lightfoot "*Thanks for everything*" shook his hand and walked away even though he believed he had done the wrong thing "*by me*". He could not recall if Mr Lightfoot asked about his intentions about employment. He did not believe he told Mr Lightfoot he was taking his children on a three week holiday and "*would let him know when he got back*". He said it was Covid19 and he didn't think he was going anywhere. In any event he didn't take his children on holiday.

53 When re-examined Mr McNamara said he asked for help because he didn't find the job very safe nor did his boss the last time. He said "*if I couldn't do it by myself last time I needed assistance. There were power lines and the angle of the driveway where I had to put it. It wasn't a one man job. It was far from it. I just needed assistance. I needed help. He was in fear of hurting someone or damaging their house and Mr Lightfoot was the only person around at the time he could ask for help and he didn't want to be held accountable for hurting someone or hurting myself or damaging the house*. He said Mr Lightfoot said *it's not my effing job to help you.* He then terminated me "*because I didn't drop the beam off there. I wasn't doing the job that he wanted me to do under certain conditions*".

Malcolm Lightfoot

54 Mr Lightfoot was and remains the sole director of ERA. He said he did not receive any wages or salary as director. He relied on the company profit at the end of the financial year. His role was to give advice to Mr Trezise (the Manager) on the day to day running of the business and

[14] Transcript 20 April 2020 at p.37 at ln 10 - 13

to make financial decisions. He took over Mr Trezise's role when Mr Trezise commenced long service leave on 8 June 2020 and liaised with the supervisor Mr John Grenfell.

55 Mr Lightfoot agreed that Mr McNamara was employed as a permanent full time heavy rigid crane truck driver and yardman with ERA. His employment involved overtime as he was the only fulltime heavy rigid crane truck driver.

56 Mr Lightfoot said on Friday 12 June 2020 Mr McNamara failed to pick up stock from a client as directed. The client needed the driveway clear for the following Monday. Following a discussion with Mr McNamara about failing to complete a task Mr Lightfoot accepted there had been a miscommunication. Mr McNamara told him he did not recall being directed to do the pickup. According to Mr Lightfoot "*he didn't want to receive a written warning*"[15] and Mr Lightfoot agreed not to give him a warning on condition that there had to be better communication between them regarding a commitment from Mr McNamara to do the jobs he was asked to do.

57 On 18 June 2020 Mr Lightfoot said the applicant arrived back at the yard from his first pick up to offload items and then do his second task of the day, being the pick - up and delivery of a steel beam for the client premises at Bulimba. He said Mr Lightfoot had done that task previously and without incident. Mr Lightfoot not been to the client's premises, had not observed the site and did not know anything about the job. He said Keith Hopper had been allocating jobs in conjunction with Mr Lightfoot and Mr Grenfell and Mr Hopper approached Mr Lightfoot telling him that Mr McNamara didn't want to do the job and the job was difficult.

58 Mr Lightfoot said he spoke with Mr McNamara and told him that the client had taken the day off work and expected the job would be done and "*he should have voiced his concern before this point as we had agreed the previous week*". Mr McNamara responded that he would only do the job "*if I assisted him as Mr Trezise had done previously*". He said he agreed but "*only he could drive the truck to pick up the beam*". Mr Lightfoot said Mr McNamara started to procrastinate further and eventually said he was not going to do the pick - up of the steel beam. Mr Lightfoot said as a consequence he was unable to fulfil the contract and he would have to advise the client.

[15] Affidavit of Mr Lightfoot filed 12 February 2021 at [2]

59 Mr Lightfoot agreed there was a heated argument. He told Mr McNamara he was "*sick of him deciding which jobs he wanted to do and which he didn't. At this point I fired the applicant for refusing to do the job he was paid for. I returned to the office and later sat with Mr Hopper and Mr Grenfell to discuss the situatio*n". They agreed to offer Mr McNamara his job back conditional on Mr McNamara receiving a written warning and being employed for a period on probation.

60 On 24 June 2020 Mr McNamara returned the yard key and the fuel card. When Mr Lightfoot asked him about his intention regarding returning to work for ERA according to Mr Lightfoot Mr McNamara replied that he was getting so much money from Centrelink that he was taking the children on a holiday for three weeks and would make a decision when he returned.

61 When cross examined Mr Lightfoot agreed Mr McNamara was directed on 18 June 2020 to pick up a 10 metre steel beam from the manufacturer at the port of Brisbane and transport it to the client's premises which was a residential address in Bulimba. He agreed the task "*was difficult*" on the basis that the applicant told him that during a heated discussion. He had never visited the site but understood it was a residential block on a steep, sloping site. He accepted there were power lines above and said if the driveway was narrow it was within Brisbane City Council regulations.

62 Mr Lightfoot agreed that when the applicant performed the original task in April 2020 using the heavy rigid truck with the crane he obtained assistance from Mr Trezise. He said Mr McNamara refused to pick up the beam from the manufacturer on 18 June 2020 and told him "*he didn't want to do it because it was dangerous*". He said "*That's the words he told me. Yes*"[16].

63 Counsel suggested that Mr McNamara said he didn't want to do it "*because he was concerned about his safety and the safety of those around him?*" Mr Lightfoot replied "*I think that was more directed at offloading of the beam at the premises*". Mr Lightfoot said the applicant was sacked for refusing to pick up the beam from the manufacturer. He said "*he outright refused to pick up the beam*" otherwise "*everything in his affidavit is what he told me*"[17].

64 Counsel suggested that Mr McNamara "told you he didn't want to pick up the beam because in April 2020 the length of it obscured the operation of the crane?" He replied "*that was his*

[16] Transcript 20 April 2020 at p.48 at ln 5 -6
[17] Transcript 20 April 2020 at p.48 at ln 45

determination. Yes". He said there were discussions about how they could get around it and he agreed he suggested to "*remove the crane from its cradle and place it onto the tray safely tie it to the tray and leave it there until it was required to be use*d." [18] He said "*but that was the only suggestion made as to how this task could be completed in a way that enabled the crane to be used? It was the way I suggested he may overcome the difficulty. It was not an order demand or reason for his dismissal*". He said driving the vehicle was Mr McNamara's sole responsibility.

65 Mr Lightfoot agreed that Mr McNamara told him it would be unsafe to drive the truck around with the crane lying on the tray of the truck. He said "*In his opinion it was. But it wasn't an order it was a suggestion*". Counsel suggested "*In any event it was insisted that he go to the port and pick up the beam?*" He replied "*In the same way he had done it the previous time without any hazard, danger or incident*". It was put to Mr Lightfoot that Mr McNamara told him "*the previous time that he collected the beam that created difficulties in actually using the crane to unload or offload the beam because it was obstructed by the presence of the beam didn't he?*" Mr Lightfoot replied "*If it created difficulties they obviously overcame it with the assistance of himself and Mr Trezise to find a safe method to put the crane in position put the beam in position without danger, reports of danger, reports of hazard as to the contrary*."

66 Counsel suggested to Mr Lightfoot "*Taking the beam off the truck at the residential premises Mr McNamara said he was concerned about doing that component of the task because that was unsafe as well didn't he?*" He said "*After the heated argument when we finally got down to his concerns he informed me that previously Mr Trezise had assisted him in offloading the beam at the client's premise*s". He agreed that Mr McNamara told him he was concerned about offloading the beam at the client's premises because it was unsafe and he raised the possibility of the beam slipping off the truck. He said "*he mentioned that that was a risk to the safety of himself and those around him? He said all those things*"[19].

67 Mr Lightfoot agreed Mr McNamara told him he was concerned about the power lines above him and perhaps hitting those with the crane when he was offloading the beam from the truck. He said "*every private building has power lines and there's always a risk to the safety of power lines and that risk is mitigated by using the crane in the correct and portable manner and making sure that you keep the required distance from those power lines. And obviously they*

[18] Transcript 20 April 2020 at p.49 at ln 5 - 11
[19] Transcript 20 April 2020 at p.50 at ln 19 - 24

had worked out a system in the initial delivery that mitigated any risk, hazard or possible injury but that was only known to Mr Trezise and the applicant".

68 Mr Lightfoot agreed that Mr McNamara was refusing to deliver the beam to the premises in Bulimba because he was concerned that it was unsafe to do so on his own and when Mr Trezise who assisted him on the previous occasion was unavailable.

69 Mr Lightfoot said he joined the conversation between Mr Hopper and Mr McNamara halfway through it and told Mr McNamara that the client was waiting for the job to be done. He agreed Mr McNamara told him the job was difficult and unsafe and he asked Mr Lightfoot for help. In response to this question Mr Lightfoot said "*he needed evidence that it was unsafe*". In his opinion Mr McNamara had performed the task before without risk or harm or damage the first time and in his opinion the job could not suddenly become unsafe the second time. He said the new task "*would be the exact copy of the first*". Counsel suggested that Mr Trezise had assisted Mr McNamara on the first occasion and Mr Lightfoot refused to assist him deliver the beam to the client's premises on this occasion. He responded "*why would I do that*?" He then said that he did offer assistance.

70 Mr Lightfoot agreed that he fired Mr McNamara on 18 June 2020 and he was terminated immediately. He said he fired him because he refused to pick up the 10 metre steel beam. It was suggested that he refused to pick up the beam because he thought it was unsafe to drive the truck. Mr Lightfoot replied "*there is no evidence to prove it was unsafe to pick up the beam…this was based on Mr McNamara's belief that it was unsafe….did he give any indication that it was dangerous difficult or a problem to pick up the beam the first time?*"

71 Mr Lightfoot denied when asked that Mr McNamara was entitled to 4 weeks' notice in lieu but agreed he was not paid that amount. He agreed Mr McNamara earned gross income of $1154.40 per week and that ERA would have continued to employ him until they could no longer afford to do so. He agreed that Mr McNamara's main job was to pick up or deliver or drop off scaffolding to and from the work site. Counsel suggested that general pick - up and delivery service of items like the steel beam was not Mr McNamara's usual job. Mr Lightfoot said "*We're requested by clients and this was a request from a local homeowner. Normally we wouldn't take on a job like that but I wasn't involved in taking on the job. I was only informed of the second job. He said it's not an unusual job for a truck driver with a crane. Although it was not the usual job for ERA he said they had their own beams and had to deliver those to site they were 6 or 8 metres long. He agreed that when the 10 metre beam was delivered to the*

residential premises there wasn't a team of construction personnel as is usual when scaffolding and other items are delivered to work sites. He said the client who requested the job was at the house".

72 Mr Lightfoot did not recall Mr Trezise discussing the job he performed with Mr McNamara at the client's premises in April 2020. He was aware the job had been done but denied Mr Trezise told him that the job to the client's premises was difficult, unsafe, it took a long time, and was not profitable.

73 Mr Lightfoot was asked that if one of the scaffolders told him a job was dangerous whether he would tell them to still do it? He said "*No they would have discussions and he would discuss how we could mitigate the risk and dangers*". He agreed that he would investigate their concerns.[20] He said he would listen to their concerns and was asked why he didn't listen to the applicant on this occasion? He said "*I told you after the initial 'I'm not doing that job' I was brought into the situation and then we spoke and Mr McNamara said the reason why he didn't want to do the job is because previously he had done the job and he thought it was going to be difficult and unsafe and non – profitable and he didn't want to do the job. He asked how they could solve the problem and Mr McNamara said Mr Trezise had helped him the last time and he needed me to come and help me and I told him yes I will come and help you*".

74 Counsel suggested that Mr Lightfoot didn't make the offer to help and at that point Mr McNamara refused to do the job because it was unsafe. He was then fired. Mr Lightfoot disagreed but said he told Mr McNamara that his employment was terminated after he said he wouldn't pick up the steel beam and wouldn't deliver it to the premises because it was unsafe to do so. He said "*the second part is true*". Mr Lightfoot added that Mr McNamara "*couldn't give me a valid reason for not picking up the beam*". He said he was told "*it would make it difficult to operate the crane on the delivery with the methodology they had previously used. Not impossible*". He agreed Mr McNamara told him he would not pick up the steel beam because he was concerned about driving the truck with the crane on the tray. Mr Lightfoot denied that Mr McNamara was terminated because he refused to do the job because it was unsafe. He said previously when Mr McNamara was employed he refused to do a job because he had not been told to do the job. He said we agreed to disagree on that occasion. He agreed

[20] Transcript 20 April 2020 at p.59 at ln 45

this was the first time Mr McNamara had refused to do something because it was unsafe. He said "*on delivering the beam yes on picking up the beam no*".

Keith Hopper

75 Mr Hopper gave evidence that he was employed by Access Scaffolding as the logistics manager. On 18 June 2020 Mr McNamara was directed to do a pick –up of equipment from a site and return to the yard, offload and then pick – up a steel beam from the manufacturer and deliver it to the client's premises a task he had done previously. On his return to the yard Mr McNamara informed Mr Hopper that "*he didn't want to do the delivery as it was too difficult*". Mr Hopper said that Mr Lightfoot joined the conversation and Mr McNamara said "*he would need help as Mr Trezise had assisted him the last time*". He said Mr Lightfoot agreed to assist him and urged him to hurry up as they were already late. Mr McNamara continued to complain and procrastinate for a couple of minutes and then said "*he didn't want to pick up the beam as it was too dangerous*"[21]. Mr Hopper said at this point Mr Lightfoot told Mr McNamara he was fired. He repeated that he was fired and told Mr Hopper to drive Mr McNamara home. Mr Hopper said when he returned to the yard he discussed with Mr Lightfoot giving the applicant his job back with a written warning. He said Mr McNamara was offered his job back on condition that he accepted a written warning and a period of probation. He received no reply from Mr McNamara following that offer.

76 Mr Hopper said when cross examined that he had worked for Access Scaffolding for 8 years and had lots of dealings with Mr McNamara and Mr Trezise. He agreed that Access Scaffolding worked out of the same office as ERA. He agreed that the applicant's role as a heavy rigid truck driver typically involved transporting scaffolding equipment to and from sites and his role did not usually involve picking up a steel beam and delivering it to a residential address. He agreed that was an unusual task.

77 He said Mr McNamara's task was to pick up a 10 metre steel beam from the Port of Brisbane the manufacturer and take it to the client's premises at 86 Oxford Street Bulimba. On the evening before Mr Hopper told Mr Grenfell that the task had to be completed. He didn't tell Mr McNamara about the job.

78 He said he works with Mr Trezise and would talk to him daily when in the office. They would discuss the work they were doing. He was aware a steel beam had been delivered to the client's

[21] Affidavit of Mr Hopper filed 12 February 2021 at [p.2]

premises in April 2020. He said he knew it was a difficult job, Mr Trezise had told him that but didn't go into "*exact reasonings with it*". He said "*I'm not sure if he said it was unsafe. I can't recall exactly why it became a difficult job. I hadn't been to the job site*". It was possible that Mr Trezise said the job had the potential to be unsafe. He was aware the job took longer than expected but did not accept that Mr Trezise said the job was not profitable. He said it was done at an hourly rate. He recalled Mr Trezise told him "*I hope we don't have to do that job again or I wouldn't like to do it again I'm not sure of his exact words*[22]."

79 Regarding the allocation of work he said staff are usually told about jobs the day before. On this occasion Mr Grenfell "*would have told the applicant about the job*". He believed Mr McNamara would have found about the job when he returned to the yard after completing his first job. He said he didn't tell Mr McNamara to do the job "*it was on the board to be done*".

80 When Mr McNamara returned to the yard from his first job that day he told Mr Hopper he needed assistance performing this pick - up and delivery task of the 10 metre steel beam. Mr Hopper said he wasn't aware the applicant needed assistance for the job. He did not know the circumstances why Mr Trezise went out there. He agreed that Mr McNamara raised this as an issue as soon as he returned from his first job and before having to go out and pick up the beam. When the applicant first arrived back he told Mr Hopper he didn't want to do the job because it was unsafe. Mr Hopper said he then went to see Mr Lightfoot with Mr McNamara's concerns and "*to see if they could resolve it*" to get the job done.

81 He said he didn't know if Mr McNamara had spoken to Mr Grenfell about the job however Mr McNamara told Mr Hopper that he didn't want to pick up the steel beam and that "*he didn't want to do that because the task was difficult? Yes and he said the task was dangerous? He said I'm not sure if dangerous was used but I kind of figured that out*". He said "*I didn't know the job that's why I went to Mr Lightfoot because it wasn't my decision to turn around and say 'you need to go do that you need to make the decision on it*'".

82 Mr Hopper said "*I could tell he didn't want to go do the job…*" Mr McNamara said he didn't want to do the job alone in the presence of Mr Lightfoot. Mr Hopper said "*I'm sure that was the start of the conversation between them*". He said it was unsafe and he needed assistance. In his affidavit Mr Hopper deposed that "*Mr McNamara continued to complain and procrastinate for a couple of minutes and said he didn't want to pick up the beam as it was too dangerous*".

[22] Transcript 20 April 2020 at p.71 at ln 19 - 24

This was half an hour after Mr McNamara had arrived and "*there was backward and forward conversation between him and Mr Lightfoot about the complete job*". He said Mr Lightfoot asked him to go pick up the beam. Mr McNamara then had to try and get pallets that he required to put the beam on to.

83 According to Mr Hopper Mr Lightfoot agreed to assist Mr McNamara after their conversation backward and forward and he heard Mr Lightfoot say "*alright then go get the beam and I will have to meet you there*". He said "*I'm not saying Mr Lightfoot was happy about doing it. But eventually that's what happened. Go get the beam and I will meet you onsite. That was after quite a discussion between the pair*".

84 Mr Hopper said he didn't know if there was a discussion about getting the beam. He was not aware whether the applicant said putting the 10 metre steel beam on the back of the truck obscured or obstructed the movement of the crane. He wasn't there the whole time he was in and out but he did hear Mr Lightfoot say "*Okay go pick up the beam and I will meet you there*" and then within 5 minutes I was told to contact the client and tell him we were unable to do the job and to drive Mr McNamara home. According to Mr Hopper the heated argument about the job lasted for about 20 minutes or a half hour.

85 He agreed that Mr Lightfoot told the applicant that his employment was at an end following the heated discussion and after Mr McNamara had told Mr Lightfoot that he believed the job was unsafe. He agreed there were two parts to the incident. He said "*the first argument was about the entire job and then the second was after you said go pick up the beam and I will meet you onsite*".

Legal Principles

86 The applicant contends that the respondents have breached section 340 of the FWA. Subsection 340(1) of the FWA is a civil penalty provision for the purposes of subsection 545(1). If proved the Court may make any order it considers appropriate if satisfied that a person has contravened a civil remedy provision of the FWA.

87 The orders the Court might make if it is satisfied that the provision relied upon by Mr McNamara has been contravened include an order for compensation for the loss suffered by the applicant because of the contravention (see subsection 545 (2) (b) of the FWA).

88 In addition pursuant to subsection 546 (1) of the FWA the Court may order a person to pay a pecuniary penalty that the Court considers appropriate if the Court is satisfied that the person

has contravened a civil remedy provision. In the case of a body corporate, the pecuniary penalty must not be more than 5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2) of the FWA. A penalty unit is currently set at $110.00 (see section 4AA of the *Crimes Act* 1914). The maximum penalty for a person is $6600 and for a corporation $33,000.

89 The Court may order that the pecuniary penalty, or a part of the penalty, be paid to the applicant under subsection 546 (3) (c) of the FWA. Subsection 546 (5) of the FWA provides that the Court may award compensation and order the payment of a pecuniary penalty. Pursuant to subsection 547 (1) of the FWA in making an order (other than a pecuniary penalty order) the Court must, on application, include an amount of interest unless good cause is shown to the contrary. The Court must take into account the period between the day the relevant cause of action arose and the day the order is made when fixing the amount for interest (see subsection 547 (3) of the FWA).

90 Subsection 340(1) of the FWA provides:

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

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

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

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

This subsection is a civil remedy provision (see Part 4 -1)

(2) ……

91 *Workplace Right* is defined in s.341 of the FWA, which relevantly provides:

Section 341 Meaning of workplace right

Meaning of workplace right

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

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

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

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

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

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

92 Under subsection 342(1) of the FWA adverse action is taken by an employer against an employee in specified circumstances, relevantly if the employer:

(a) dismisses the employee; or

(b) injures the employee in his or her employment; or

(c) alters the position of the employee to the employee's prejudice; or

(d) discriminates between the employee other employees of the employer.

93 Section 360 of the Act provides that "*a person takes action for a particular reason if the reasons for the action include that reason*".

94 Subsection 361(1) of the FWA provides:

Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

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

95 In *Ingersole v Castle Hill Country Club Limited* [2014] FCCA 450 (11 March 2014) Judge Barnes discussed the approach to claims of adverse action at [127] - [129] and said as follows:

> "[127] Section 340 is in Part 3.1 of the Act. It proscribes taking action against a person "*because*" that person has or had a workplace right or for one of the other specified reasons associated with the exercise or proposed exercise of a workplace right by that person. An object of this Part of the Act is to protect workplace rights and to provide *"effective"* relief to those adversely affected by reason of holding or

exercising such rights (see s.336). The Applicant must establish objectively that she had the asserted workplace right and that adverse action was taken against her (see *Wolfe v Australia and New Zealand Banking Group Limited* [2013] FMCA 65 at [72]). It is then presumed, unless the Respondent proves otherwise, that the alleged adverse action was taken for the asserted prohibited reason (see ss.360 and 361).

[128[The requirement that the applicant establish matters objectively means that she must first:

> "...prove the existence of objective facts which are said to provide a basis for the alleged adverse action, before the onus shifts to the employer in respect of the prohibited reason...It is not sufficient for [the Applicant] to simply allege that she had a workplace right and that she was the subject of adverse action – rather on the assumption that [the Applicant] is able to prove these allegations, the burden is then cast on to [the Respondent] to prove that adverse action was not taken against [the Applicant] because of her workplace right for the purposes of s340 and s361 of the Act: *Jones v Queensland Tertiary Admissions Centre Ltd* (No.2) (2010) 186 FCR 22; [2010] FCA 399 at [10] per Collier J).

[129] While the contraventions alleged are civil contraventions, the proceedings are penal in nature (see *Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuit Ltd* (2010) 188 FCR 221; (2010) 198 IR 143; [2010] FCA 770). As Logan J pointed out in *Arnotts* at [13], subject to the operation of ss.360 and 361, the Applicant carries the burden of proving the alleged contraventions on the balance of probabilities with due regard being given to the matters in s.140(2) of the *Evidence Act 1995* (Cth)."

Consideration

96 In this matter Mr McNamara claims that adverse action was taken against him by his employer. It is not disputed that Mr Lightfoot terminated Mr McNamara's employment while acting on behalf of his employer ERA as its sole director. Dismissal from employment is recognised as a form of adverse action.

97 Pursuant to section 84 of the *Work Health and Safety Act 2011* (Qld) ("WHSA") the applicant had a right to cease or refuse to carry out work if he had a reasonable concern that to carry out the work would expose him to a serious risk to his health or safety emanating from an immediate or imminent exposure to a hazard. That such a right existed is not disputed by the respondents [23] nor is it disputed that the WHSA was a workplace law within the meaning of subsection 341 (1) of the FWA.

98 Pursuant to section 12 of the FWA "*workplace law*" means:

(a) this Act;

[23] Points of Defence [13] [21]

(b) the Registered Organisations Act; or

(c) the Independent Contractors Act 2006; or

(d) any other law of the Commonwealth, a State or Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters). Work, health and safety laws have long been considered to fall within the definition of "*workplace law*" as reflected in the authorities.[24]

99 Mr McNamara had a workplace right because he was entitled to the benefit of safeguards afforded by the WHSA to cease or refuse to carry out work if he believed it to be unsafe (which the respondents admit).[25] In addition he had the right to a safe workplace and work environment and the utilisation of safe systems of work.[26]

100 I am satisfied that Mr McNamara exercised a workplace right when he refused to perform the task he was directed to perform on 18 June 2020 to collect the steel beam from the Port of Brisbane using the heavy rigid crane truck and deliver the steel beam to the client's premises in Bulimba without assistance. I accept Mr McNamara's evidence that during a heated discussion with Mr Lightfoot Mr McNamara refused to collect the steel beam from the Port of Brisbane because the length of the steel beam was likely to obscure the operation of the crane. This had occurred previously in April 2020 when Mr McNamara had collected the steel beam from the Port of Brisbane and loaded it onto the vehicle. I accept Mr McNamara's evidence that driving the truck with the steel beam extending beyond the length of the truck obscured the operation of the crane and made the task of unloading the steel beam unsafe on arrival at the client's premises. Mr McNamara did not accept Mr Lightfoot's suggestion that the steel beam could be loaded on the truck by removing the crane from its cradle and placing the crane on the tray. He rejected that this was a safe method for driving the truck nor was it safe to drive the truck with the crane at full extension. Mr Lightfoot agreed that driving the truck in a safe manner was Mr McNamara's sole responsibility. Mr Lightfoot agreed that he insisted Mr McNamara go to the Port and pick up the steel beam "*in the same way he had done it the previous time without any hazard, danger or incident*". I am satisfied that Mr McNamara refused to pick up the steel beam because he had a reasonable concern that to carry out that

[24] *Australian Building and Construction Commissioner v Auimatagi* [2017] FCCA 1722 [31] – [40]; *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191; *Celand v Skycity Adelaide Pty Ltd* [2016] FCCA 399 [189] and *Celand v Skycity Adelaide Pty Ltd* [2017] FCAFC 222 [25]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd* [2011] FCA 1001, [56] – [57]

[25] Statement of Claim [13] Points of Defence [13]

[26] Work Health and Safety Act 2011 (Qld) ss3 and 19

task would expose him to a serious risk to his safety emanating from an immediate exposure to a hazard. Mr McNamara considered it was unsafe to drive the truck with the crane unsecured and/or in the manner suggested by Mr Lightfoot. I accept McNamara's evidence that he requested Mr Lightfoot accompany him to collect and deliver the steel beam and at no time did Mr Lightfoot agree to accompany Mr McNamara to the port to collect the steel beam. I reject Mr Lightfoot's evidence that he agreed to meet Mr McNamara at the client's premises prior to telling Mr McNamara that his employment was terminated.

101 I am satisfied that Mr McNamara considered on reasonable grounds that it was unsafe to unload the steel beam from the truck at the client's premises given the topological nature of the site and the fact that in performing that task the crane was obstructed by the steel beam. There was no dispute that the client's premises was a steep, sloping residential block off a main thoroughfare (Oxford Street Bulimba). The use of the crane at the site would expose Mr McNamara and other persons to imminent hazards in the form of overhanging power lines and there was a real risk that the steel beam would slide off the truck once the tension securing the beam was released. I am satisfied that the task of unloading the steel beam from the truck could not be safely performed by Mr McNamara alone (at all) or without assistance. I am satisfied that Mr Lightfoot did not agree to meet Mr McNamara on site to assist him to unload the steel beam prior to terminating his employment.

102 I am satisfied that Mr McNamara's refusal to perform the task requested of him on 18 June 2020 constituted the making of a complaint under subsection 341 (1) (c) of the FWA and the complaint was made directly to Mr Lightfoot.

Was the adverse action taken by Mr Lightfoot against the applicant because he sought to exercise or because he exercised a workplace right?

103 The respondents deny that Mr McNamara exercised a workplace right in refusing to perform the task he was directed to perform on 18 June 2020.[27] That assertion is contradicted by the respondents' admissions as follows:

(a) That the WHSA is a workplace law within the meaning of subsection 341 (1) of the FWA and Mr McNamara is entitled to the benefit of the WHSA;[28]

[27] Points of Defence [23]
[28] Points of Defence [21]

(b) Pursuant to section 84 of the WHSA Mr McNamara had a right to cease or refuse to carry out work if he had a reasonable concern that to carry out the work would expose him to a serious risk to his health or safety emanating from an immediate or imminent exposure to a hazard.[29]

(c) Mr McNamara exercised his workplace right when he told Mr Lightfoot that it was too dangerous to pick up the beam from the supplier and he did not want to do it.[30]

104 I am satisfied that Mr McNamara exercised a workplace right in refusing to perform the task he was directed to perform on 18 June 2020.[31]

105 I am satisfied that adverse action was taken by Mr Lightfoot on 18 June 2020 when he dismissed Mr McNamara from employment with ERA.

Statutory presumption

106 Regarding the statutory presumption under section 361 (1) of the FWA in *Roohizadegan v TechnologyOne Limited* (No 2) [2020] FCA 1407 (2 October 2020) Kerr J said:

> "[64] In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; 248 CLR 500 (Barclay) at [50] French CJ and Crennan J - while acknowledging that Mason J's remarks had been directed to an earlier expression of the statutory presumption - adopted as applicable to its current expression his Honour's observation in *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 (Bowling) at 617 that:
>
> > "the plain purpose of the provision [is to throw] on to the defendant the onus of proving that which lies peculiarly within his own knowledge."
>
> ……
>
> …….
>
> [69] If "adverse action" is taken as a result of a decision that has been made by an individual within a corporation, the identification of the reasons for the corporation taking the adverse action requires an inquiry focussed on the actual mental processes of the relevant individual who made that decision: *Barclay* at [140] (Heydon J); *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; 253 CLR 243 (*BHP Coal*) at [7] (French CJ and Kiefel J), [85] (Gageler J).

107 Further in *Roohizadegan v Technology One Limited* (No 2) (supra) the Court said:

> "[71] Section 361 however requires the Court to conclude that the reason the employee has alleged was his or her employer's reason for taking adverse action

[29] Points of Defence [13]
[30] Points of Defence [18]
[31] Points of Defence [23]

> against him or her was in fact the reason for that action, unless the employer can establish that the adverse action was not taken for that alleged prohibited reason. Proof in that regard is on the balance of probabilities: *Barclay* at [56] per French CJ and Crennan J, citing Gibbs J in *Bowling* at 239."

108 The key principles relevant to the determination of the reason for taking adverse action were set out succinctly by Wigney J in *Construction Forestry Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 2)*[32] as follows:

> "[297] First the question is one of fact: *Barclay* at [41], [45], [101]; *BHP Coal* at [7];
>
> [298] Second the question is why the adverse action was taken*: Barclay* at [5], [44]. The focus of the inquiry is the reason or reasons of the relevant decision – maker: *Barclay* at [101], [127], [140], [146]; *BHP Coal* at [7], [19], [85]. More particularly the question is whether the alleged prohibition reason was a substantial and operative reason for taking adverse action: *Barclay* at [56] – [59], [104], [127] or an operative or immediate reason: *Barclay* at [140];
>
> [299] Third the test does not involve any objective element: *Barclay* at [107], [121], [129]; *BHP Coal* at [9]. To speak of objectively obtained reasons risks the substitution by the Court of its view rather than making a finding of fact as to the true reasons of the decision – maker: *Barclay* at [121]; *BHP Coal* at [9];
>
> [300] Fourth, the inquiry is not concerned with mere causation in the sense that it is not sufficient that there is factual or temporal connection between the relevant protected workplace rights and the adverse action: *BHP Coal* at [18] – [20]. Any such connection however may necessitate some consideration as to the true motivation or reasons of the decision – maker: *BHP Coal* at [22];
>
> [301] Fifth the question must be answered having regard to all the relevant facts and circumstances and the inferences available from them: *Barclay* at [45], [127]; *BHP Coal* at [7];
>
> [302] Sixth direct testimony from the decision – maker as to why the adverse action was taken is capable of discharging the burden imposed by section 361: *Barclay* at [45], [71]; *BHP Coal* at [38]. However declarations that the action was taken for an innocent reason may not discharge the onus if contrary inferences are available on the facts: *Barclay* at [54], [79], [141]. The reliability and weight to be given to such evidence must be assessed having regard to the overall facts and circumstances: *Barclay* at [127];
>
> [303] Seventh it is not necessary for the decision – maker to establish that the reason for adverse action was entirely dissociated from the relevant protected workplace right: *Barclay* at [62]."

109 The applicant's evidence is largely undisputed by Mr Lightfoot. Mr Lightfoot agreed that the applicant told him that he could not perform the task on 18 June 2020 without assistance because he considered it to be unsafe.[33] It is not disputed that the Mr McNamara requested Mr Lightfoot assist him to collect the steel beam from the Port of Brisbane and deliver the steel

[32] [2017] FCA 1046 at [296] – [303] cited in *Salama v Sydney Trains* [2021] FCA 251 [88]
[33] Affidavit of Mr Lightfoot filed 12 February 2021 at [3]

beam to the client's premises in Bulimba. It is not disputed that Mr McNamara told Mr Lightfoot that he would not collect the steel beam from the Port of Brisbane because it was too dangerous to pick up the steel beam from the supplier and that he did not want to do it. Further it is not disputed that Mr McNamara told Mr Lightfoot that unloading the steel beam at the client's premises was unsafe and he believed it was a task that could not be performed without assistance.

110 Both parties agree that the Mr Lightfoot became upset as a consequence of Mr McNamara's refusal to perform the work. I am satisfied that Mr Lightfoot threatened to terminate Mr McNamara's employment if he did not perform the task. Mr Lightfoot's evidence was he was "*sick of the applicant deciding which jobs he wanted to do and which he didn't*". The Respondents do not suggest that the dismissal was not the taking of "*adverse action*". Mr Lightfoot contends that the dismissal was for different reasons to those alleged by the applicant and had nothing to do with his having exercised any workplace right. Mr Lightfoot contends that Mr McNamara simply refused to complete the task "*because he did not want to do it*." He did not accept Mr McNamara's complaint that performance of the work which included collecting the steel beam from the Port of Brisbane and unloading the beam at the client's premises was unsafe and exposed Mr McNamara and other persons to imminent hazards or risk of injury or damage. When cross examined about these issues he replied "*that was his (Mr McNamara's) determination*". Mr Lightfoot claimed that Mr McNamara did not prove to him that performance of the task to collect and deliver the beam was unsafe and exposed Mr McNamara to immediate hazards. He based this on the fact that the task had been performed previously without incident.

111 Mr Lightfoot had not been to the Port of Brisbane to collect the steel beam nor had he been to the client's premises to investigate the site and the claims by Mr McNamara that performance of the work was unsafe. When asked in cross examination whether he would investigate the matter if another worker raised a safety issue about performing a task he said he would do so. He did not investigate Mr McNamara's concerns about safety on this occasion and provided no explanation why he did not do so. I infer that he simply dismissed Mr McNamara's complaint that the task he was directed to do was unsafe without investigating his concerns. He had decided that Mr McNamara had simply chosen not to perform the task "*he was paid to do*".

112 Following the heated discussion between the two men, Mr Lightfoot terminated Mr McNamara for refusing to perform the task he had been directed to perform to collect the steel beam from

the Port of Brisbane and deliver it to the client's premises. There is no dispute that the Mr McNamara's employment with ERA was terminated by Mr Lightfoot with immediate effect. I reject Mr Lightfoot's assertion that he agreed to meet Mr McNamara on site to assist with unloading the steel beam.

113 I am satisfied that Mr McNamara's employment was terminated because he exercised a workplace right to refuse to perform work he considered on reasonable grounds would expose him to a serious health or safety risk. I am satisfied that this was the substantial and operative reason that Mr Lightfoot terminated Mr McNamara's employment. No other reason is advanced by the respondents for dismissing Mr McNamara from employment.

114 I am satisfied that on 18 June 2020 ERA Pacific Pty Ltd contravened subsection 340 (1) of the *Fair Work Act* 2009 (Cth) in taking adverse action against Mr McNamara when ERA terminated Mr McNamara's employment because he exercised a workplace right and refused to perform work to collect and deliver a steel beam to residential premises in Bulimba.

115 I am satisfied that Mr Lightfoot was a person involved in the contravention by ERA of subsection 340 (1) of the FWA when Mr Lightfoot terminated Mr McNamara's employment and did so while acting on behalf of ERA as its sole director.[34] Mr Lightfoot procured the contravention by personally terminating Mr McNamara's employment and was directly knowingly concerned in the contravention.

Penalties and compensation

116 The applicant seeks compensation pursuant to subsection 545 (2) (b) of the FWA for both economic and non - economic loss and the imposition of a pecuniary penalty under subsection 546 of the FWA.

117 In *Tran v Kodari Securities Pty Ltd* [2019] FCA 968[35] Bromwich J at [73] observed that civil penalty determination principles were succinctly summarised in Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 113; 254 FCR 68 (Queensland Children's Hospital case) (at [98], [100]-[107]) as follows:

> "General principles

[34] Points of Defence [19]

Whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance: *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152; *Commonwealth v Director, FWBII* at [55] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ). The principal object of a pecuniary penalty is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene; both specific and general deterrence are important: *Chemeq* at [90]; *Ponzio* at [93]. A pecuniary penalty for a contravention of the law must be fixed with a view to ensuring that the penalty is not to be regarded by the offender or others as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 (*TPG Internet*) at [66]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [62]- [63]. In relation to general deterrence, it is important to send a message that contraventions of the sort under consideration are serious and not acceptable: *Australian Securities and Investments Commission v Southcorp Ltd (No 2)* [2003] FCA 1369; (2003) 130 FCR 406 at [32]

…….

The fixing of a pecuniary penalty involves the identification and balancing of all the factors relevant to the contravention and the circumstances of the defendant, and making a value judgment as to what is the appropriate penalty in light of the protective and deterrent purpose of a pecuniary penalty. While there may be differences between the criminal sentencing process and the process of fixing a pecuniary penalty (cf. *Commonwealth v Director, FWBII* at [56]-[57]), the fixing of a pecuniary penalty may to an extent be likened to the "instinctive synthesis" involved in criminal sentencing: *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 190; (2012) 210 FCR 277 at 294. Instinctive synthesis is the "*method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case*": *Markarian v The Queen* (2005) 228 CLR 357 (*Markarian*) at [51] (per McHugh J). Or, as the plurality put it in *Markarian* (at [37], per Gleeson CJ, Gummow, Hayne and Callinan JJ) "*the sentence is called on to reach a single sentence which ... balances many different and conflicting features*". Like the exercise of imposing a sentence for an offence, the process of fixing an appropriate pecuniary penalty should not be approached as a mathematical exercise involving increments to or decrements from a predetermined range of sentences: *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [74]- [76].

In fixing the amount of a civil penalty, reference is frequently made to the lists of factors or considerations identified by Santow J in *Australian Securities and Investments Commission v Adler (No 5)* [2002] NSWSC 483; [2002] NSWSC 483; (2002) 42 ACSR 80 at [126] and French J in *Chemeq* at [99]. Those lists of relevant considerations, which have been approved and elaborated on by many subsequent decisions of this Court, were not, and plainly were not intended to be, exhaustive. Nor was it suggested that each of the factors referred to in the respective lists was necessarily relevant or important in every case. These lists of factors should not be treated as a rigid catalogue or checklist of matters to be applied in each case; the overriding principle is that the Court should weigh all relevant circumstances: *Australian Securities and Investments Commission v GE Capital Finance Australia* [2015] ASC 155-203 at [72].

In general terms, the factors that may be relevant when fixing a pecuniary penalty may conveniently be categorised according to whether they relate to the objective nature

and seriousness of the offending conduct, or concern the particular circumstances of the defendant in question.

The factors relating to the objective seriousness of the contravention include: the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness; whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time; if the defendant is a corporation, the seniority of the officers responsible for the contravention; the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation; the impact or consequences of the contravention on the market or innocent third parties; and the extent of any profit or benefit derived as a result of the contravention.

The factors that concern the particular circumstances of the defendant, particularly where the defendant is a corporation, generally include: the size and financial position of the contravening company; whether the company has been found to have engaged in similar conduct in the past; whether the company has improved or modified its compliance systems since the contravention; whether the company (through its senior officers) has demonstrated contrition and remorse; whether the company had disgorged any profit or benefit received as a result of the contravention, or made reparation; whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law.

Where the defendant is a body corporate, the size of the body does not of itself justify a higher penalty than might otherwise be imposed: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330;] [2015] FCA 330; (2015) 327 ALR 540 at [89]- [92]. The size of the corporation may, however, be particularly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent. The sum required to achieve that object will generally be larger where the company has vast resources: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265; (2005) 215 ALR 301 at [39]; *Australian Competition and Consumer Commission v Apple Pty Limited* [2012] FCA 646; [2012] ATPR 42-404 at [38].

Careful attention must also be given to the maximum penalty for the contravention. That is so for at least three reasons: first, because the legislature has legislated for the maximum penalty and it is therefore an expression of the legislature's policy concerning the seriousness of the prescribed conduct; second, because it permits comparison between the worst possible case and the case that the Court is being asked to address; and third, because the maximum penalty provides a "yardstick" which should be taken and balanced with all the other relevant factors: Markarian at [31] (per Gleeson CJ, Gummow, Hayne and Callinan JJ).

Even where the maximum penalty for the contravention is high, and the amount necessary to provide effective deterrence is large, the amount of the penalty should be proportionate to the contravention and should not be so high as to be oppressive: Stihl Chainsaws at 17,896; NW Frozen Foods at 293.

118 As a result of the adverse action taken by the respondents in terminating Mr McNamara's employment Mr McNamara was unemployed between 18 June 2020 and 22 October 2020 a period of 18 weeks. He subsequently secured employment as a heavy rigid crane truck driver with A Wood Shed. But for the contravention of section 340 (1) of the FWA it is more likely

than not that Mr McNamara's employment with ERA would have continued. Mr Lightfoot conceded that to be the case.

119 Mr McNamara's pay slips issued by ERA indicate his average weekly earnings were $1154.40 gross or $860.00 net. During the period he was unemployed his gross loss of income amounts to $20,779.20 gross. Whilst unemployed Mr McNamara received unemployment benefits of $10,933.25 gross. Thus his net loss of income was $9,845.95 gross. Between 18 June 2020 and 22 October 2020 Mr McNamara would have been paid superannuation at 9.5% resulting in a loss of superannuation entitlements of $933.37.

120 Pursuant to section 117 of the FWA Mr McNamara was entitled to a minimum notice period of four weeks. He was not paid in *lieu* though he was terminated on 18 June 2020 with immediate effect. I accept that Mr McNamara was entitled to receive a further $4617.60 gross in loss of income entitlements and superannuation of $438.67. Mr McNamara's total economic loss amounts to $15,837.59.

121 Mr McNamara claims $25,000[36] for non - economic loss. He contends that he suffered financial disadvantage, reputational disadvantage, had his employment prospects diminished, felt he had been victimised for raising what he considered to be a serious and legitimate concern, suffered stress, sleep loss and exacerbation of pre-existing mental health issues and damage by way of distress, disappointment, hurt and humiliation. He contends that he lost various benefits which he received in his employment with ERA in being paid for working on public holidays, receiving annual leave and personal/ carer's leave entitlements, a travel allowance and rostered days off.

122 I accept Mr McNamara's evidence that he believed he was treated unfairly by Mr Lightfoot and was subjected to verbal abuse during their heated discussion. He described Mr Lightfoot's conduct as irate. He said after his employment was terminated he received phone calls from John Grenfell who advised him that Mr Lightfoot was willing to give him his job back "*under a probation period and as long as you take a written warning*" however he found that unfair. He had never been in trouble before with the company. He was scared to say yes and he was unsure whether he would again be terminated during his probation period. He did not recall receiving calls over the weekend about his employment.

[36] Statement of claim [31]

123 I accept his evidence that it was difficult to find work in the scaffolding industry which is a small network of qualified workers who all know each other. I accept that he suffered some reputational damage in being sacked. He managed to secure work as a heavy rigid truck driver at A Wood Shed on 22 October 2020. He is employed on a casual basis at $30 for ordinary hours. I accept that his new employment does not offer him the same financial benefits as his previous employment in the form of permanency, annual leave, sick leave, carer's leave, holiday pay and rostered days off.

124 I accept that Mr McNamara suffered a level of hurt, humiliation and distress when sacked. I am unable to be satisfied on the evidence that the loss of his employment exacerbated any pre-existing anxiety. There is no evidence to support that contention other than Mr McNamara's assertion. I accept however that Mr McNamara became stressed when unemployed because of his financial commitments as a single parent with three children. I accept that he suffered stress until he obtained employment on 22 October 2020.

125 I do not accept the respondents mitigated Mr McNamara's loss by offering him employment. It is not disputed that an offer of employment was made to Mr McNamara on the basis of Mr McNamara being employed on probation for a 6 month period and having to accept a written warning. Those terms were inferior to his employment conditions when he was terminated with immediate effect. He was a permanent employee and had been so for a period of 2 years. He had secure employment and had been employed by ERA since 2013 and enjoyed working for the company. The terms and conditions offered after his dismissal were far less favourable than his previous employment conditions where he was employed on a permanent basis and was entitled to benefits which included paid holiday leave, sick leave, carer's leave and paid rostered days off. I determine that an award of $5000 should be made with respect to the hurt, distress and humiliation caused to Mr McNamara when his employer took adverse action in dismissing him from employment with immediate effect.

Interest

126 Mr McNamara claims interest on the compensation awarded. Under subsection 547 (1) of the FWA the Court is required to include an amount in interest unless good cause is shown to the contrary. When fixing that amount the Court is required to take into account the period between the day the relevant cause of action arose and the day the order is made.

127 In *Fair Work Ombudsman v Windaroo Medical Surgery Pty Ltd & Ors* [2016] FCCA 2505 (28 September 2016) Judge Jarrett observed at [86] to [87] when discussing the approach to be taken regarding the payment of interest said:

> "[88] The Practice Note refers to biannual periods "in any year" and applies "the cash rate last published by the Reserve Bank of Australia before that period commenced" (my emphasis). This suggests that the current Reserve Bank interest rate of 2% cannot be applied retrospectively. The Court must apply the Reserve Bank interest rates prescribed for the periods over which interest is to be calculated. This interpretation is consistent with the schedule published on the Federal Court website…."

128 The Interest on Judgments Practice Note (GPN-INT) provides guidance in regard to interest on judgments arising under sections 51A and 52 of the *Federal Court of Australia Act 1976* (Cth) and rule 39.06 of the *Federal Court Rules 2011* (Cth). It also provides guidance in regard to interest up to judgment arising under s 547 of the *Fair Work Act 2009* (Cth). Subsection 547 (2) of the FWA provides that in determining the amount of interest the court must take into account the period between the day the relevant cause of action arose and the day the order is made.

129 The applicant is entitled to interest on the sum of $19,463.55 from the date the proceedings were issued on 19 August 2020. The interest is calculated as follows:

Daily from	Daily to	Days in period	Interest rate	Daily interest rate	Simple interest
19/8/20	31/12/20	134	4.25%	0.25%	$303.68
1/1/21	30/6/20	180	4.10%	0.10%	$393.54
1/7/21	21/7/21	20	4.10%	0.10%	$43.73
Total					$740.95

The total interest owed is therefore $740.95.

Penalties

130 Regarding the imposition of appropriate penalties I take into account the nature and extent of the respondents conduct and the circumstances in which that took place. I have assessed the loss or damage sustained by Mr McNamara as a result of the contravention. I take into account the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and the need for general and specific deterrence.

131 I am satisfied that the contravention by the respondents was deliberate but not pre-planned. Mr McNamara raised what he considered to be legitimate safety concerns in performing the task he was directed to perform. He was entitled to exercise his workplace rights to refuse to carry out work which exposed him to safety risks. Mr Lightfoot did not investigate Mr McNamara's concerns about the safety issues he raised. Instead Mr Lightfoot and Mr McNamara became involved in a heated argument that lasted 20 to 30 minutes where Mr McNamara was verbally abused for refusing to perform work he considered on reasonable grounds to be unsafe. In my view the contravention was serious and there is a need for general deterrence to ensure the workplace rights of employees are protected.

132 I infer from Mr Lightfoot's conduct shortly following the dismissal of Mr McNamara that he considered he had over – reacted (in fact he acknowledged that during cross examination). He convened a meeting with Mr Hopper and Mr Grenfell where they discussed re-employing Mr McNamara. The offer to re-employ Mr McNamara was on terms significantly less advantageous to Mr McNamara given that he was offered employment on probation for 6 months conditional upon accepting a written warning.

133 I am satisfied that the contravention by the respondents occurred on a single occasion and there had not been any prior contraventions by the respondents. The respondents continue to operate the scaffolding business. In my view there is a need for specific deterrence given the ongoing employer role and the importance of respecting workplace rights. Mr Lightfoot acknowledged during cross examination that he would have investigated safety concerns raised by other employees. He provided no explanation why he did not do so on this occasion other than in his view he did not consider the performance of the work to be performed by Mr McNamara to be unsafe.

134 I am satisfied that the adverse action was serious as Mr McNamara was terminated by reason of exercising a workplace right in refusing to perform work he considered on reasonable grounds to be unsafe. Mr Lightfoot did not express any contrition or remorse.

135 Save that Mr Lightfoot asserted that he was not paid any salary in his role as sole director for ERA but relied on the company making a profit there was no direct evidence of ERA's financial position. No submission was made with respect to any undue hardship that may be incurred following the imposition of a penalty.

136 I am satisfied that it is appropriate to impose a penalty on the second respondent in the amount of $1320 and a penalty on the first respondent in the amount of $6600. I order that the penalties imposed be paid to the applicant within 60 days.

DETERMINATION

137 I make the following declarations and orders:

(1) On 18 June 2020 the First Respondent ERA Pacific Pty Ltd contravened subsection 340 (1) of the Fair Work Act 2009 (Cth) in taking adverse action against the applicant Michael McNamara when the First Respondent terminated the applicant's employment because he exercised a workplace right.

(2) On 18 June 2020 the Second Respondent Malcolm Lightfoot was involved within the meaning of section 550 of the Fair Work Act 2009 (Cth) in the contravention of subsection 340 (1) of the Fair Work Act 2009 (Cth) by the First Respondent taking adverse action against the applicant Michael McNamara when the Second Respondent acting on behalf of the First Respondent terminated the applicant's employment because he exercised a workplace right.

(3) Pursuant to section 545 (2) (b) of the Fair Work Act 2009 (Cth) within 60 days the First and Second Respondents shall pay compensation to the applicant in the amount of $19,463.55.

(4) Pursuant to subsection 547 (1) of the Fair Work Act 2009 (Cth) the First and Second Respondents shall pay interest with respect to Order 3 in the amount of $740.95 within 60 days.

(5) The First Respondent shall pay to the superannuation fund nominated by the applicant the sum of $1372.04.

(6) Pursuant to section 546 of the *Fair Work Act* 2009 (Cth) within 60 days the First Respondent shall pay a penalty of $6600 for the contravention set out in the declaration.

(7) Pursuant to section 546 of the *Fair Work Act* 2009 (Cth) within 60 days the Second Respondent shall pay a penalty of $1320 for the contravention set out in the declaration.

(8) The First and Second Respondents be jointly and severally liable to pay the amounts set out above.

(9) Any amount paid personally by the Second Respondent in respect of the liability for the penalty of the First Respondent under Order (6) hereof is to be credited against the Second Respondent's liability in Order 7.

(10) Pursuant to subsections 546 (3) of the *Fair Work Act* 2009 (Cth) with respect to the penalties referred to in Orders (6) and (7) an amount of $1320 shall be paid by the Respondents directly to the applicant with the remaining balance to be paid to the Consolidated Revenue Fund of the Commonwealth within 60 days of the date of this order.

(11) The applicant has liberty to apply on seven days' notice in the event that there is a failure to comply with any of the preceding orders.

I certify that the preceding one hundred and thirty-seven (137) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Tonkin.

Dated: 23 July 2021