46/11; [2011] VSC 597

SUPREME COURT OF VICTORIA

PATRICK STEVEDORING PTY LTD v CHASSER (VICTORIAN WORKCOVER AUTHORITY)

Osborn J

7-8, 23 November 2011

INDUSTRIAL LAW – OCCUPATIONAL HEALTH AND SAFETY – OFFENCES – DISCRIMINATION AGAINST AN EMPLOYEE BECAUSE EMPLOYEE RAISED A CONCERN ABOUT HEALTH OR SAFETY – MAGISTRATE FOUND CHARGES PROVED – WHETHER MAGISTRATE FAILED TO APPLY SUBJECTIVE TEST TO DEFENDANT'S MOTIVE – ONUS ON DEFENDANT TO ESTABLISH DOMINANT REASON FOR CONDUCT – WHETHER MAGISTRATE'S CONCLUSION AS TO RELEVANT FACTORS OPEN – WHETHER EMPLOYEE SUFFERED INJURY IN CIRCUMSTANCES WHERE NO ACTUAL LOSS OF PAY – MAGISTRATE'S CONCLUSIONS AS TO DOMINANT REASON OPEN – WHETHER MAGISTRATE FAILED TO GIVE ADEQUATE REASONS FOR SENTENCE – LIMITATIONS ON APPEAL ON QUESTIONS OF LAW RAISING ISSUES OF FACT RELEVANT TO SENTENCE – WHETHER MANIFEST EXCESS RAISES QUESTION OF LAW – WHETHER SENTENCE MANIFESTLY EXCESSIVE –WHETHER CURRENT SENTENCING PRACTICE FOR RELEVANT OFFENCES EXISTS – WHETHER AGGREGATE SENTENCE DISCLOSED ERROR IN SENTENCING – MAGISTRATE'S REASONS FOR SENTENCE DISCLOSED NO ERROR – APPEAL DISMISSED: *OCCUPATIONAL HEALTH AND SAFETY ACT* 2004, SS76, 77.

PSPL were found guilty of three charges pursuant to the *Occupational Health and Safety Act* 2004 ('OHS Act'). The facts were that an employee of PSPL raised a health or safety concern in relation to the use of basket lifting in vessels. The employee was threatened with sacking by a senior employee of PSPL, stood down without pay and sent a warning letter as to his conduct. The charges alleged that PSPL had caused injury to the employee, altered the employee's position to his detriment and threatened to dismiss the employee for the dominant reason that he raised a health or safety concern. After a hearing in the Magistrates' Court, the three charges were found proved and the company convicted and fined an aggregate amount of $180,000 plus 80% of the informant's costs. Upon appeal—

HELD: Appeal dismissed.

1. It is an offence pursuant to s76 of the OHS Act to dismiss, injure or alter an employee's position to his or her detriment or threaten to do so, for the dominant reason that the employee raised an issue or concern about health or safety to his or her employer or exercised a power as a health and safety representative. Under s77, if all the facts constituting the offence other than the reason are proved, the accused bears the onus of proving that the reason alleged in the charge was not the dominant reason for the conduct. This onus falls to be discharged on the balance of probabilities.

2. The Magistrate's conclusions with respect to the elements of the charges and as to motive were open on the evidence. The Magistrate was entitled to find that PSPL had not discharged the onus of disproving that the raising of a safety issue was not the dominant reason for the letter to the employee.

3. In relation to the submission that the evidence did not establish injury as particularised in the charge, the standing down of the employee itself constituted injury despite there being no loss of pay or that his entitlement to pay was subsequently restored. Further, the injury was to be assessed as at the date it was inflicted, not be referenced to subsequent consequences. The evidence justified the Magistrate's conclusion that the employee suffered injury because the standing down went on his file and was a black mark against his name.

***Squires v Flight Stewards Association of Australia* (1982) 2 IR 155, applied.**

4. In relation to the question of sentencing, the Magistrate was under a duty to provide reasons for her sentencing decision. The reasons of a sentencing judge should cover all the important considerations so as to be sufficient to meet both the offender's right to know why he or she has received the particular sentence and the public's right to understand the process of sentencing. However, reasons for sentence need not be full and detailed in every case. A sentencing judge is not obliged to state in his or her reasons for judgment every single matter that he or she has taken into account, nor to give reasons for every step he or she takes.

5. The Magistrate's Reasons for Sentence disclosed the critical considerations which her Honour

took into account in sentencing and they also disclosed a logical process of reasoning. The Reasons for Sentence referred to the critical matters upon which PSPL placed reliance, namely the interrelated nature of the charges, the absence of prior convictions, the potential adverse effects of recording a conviction, the fact that the case was not of the worst kind in which an employer required a worker to adopt a demonstrably unsafe practice, the fact that the employee was not fired and did not actually lose pay, the senior officers' belief that the lifting technique was safe, the undertaking of harassment training, the asserted relatively low significance of special deterrence and liability for associated costs of the hearing. Accordingly, the Magistrate did not err in failing to give any or any adequate reasons for the quantum of penalty imposed.

6. In relation to the submission that the Magistrate failed to take into account current sentencing practices for occupational health and safety offences, only one previous relevant sentence was cited to the Magistrate and this could not be said to establish current sentencing practice in any relevant sense.

7. It must also be recognised that comparison of fines is not to be equated with comparison of terms of imprisonment. Section 50 of the *Sentencing Act* 1991 requires the sentencer to take account as far as practicable of the financial circumstances of the offender and the nature of the burden that a fine will impose. Section 50(5)(b) further enables a court to have regard to the value of any benefit derived by the offender as a result of the offence. These commercial considerations materially detract from the sense in which a particular fine can necessarily be seen as objectively reflecting the gravity of an offence.

8. Insofar as PSPL sought to rely on sentences for other offences under the OHS Act, it was not accepted that sentences in respect of different offences constituted relevant sentencing practice. Likewise, it was not accepted that sentences imposed in respect of analogous offences in a different State were relevant.

9. In relation to the imposition of a conviction, it was plainly within the discretion of the Court to impose a conviction. PSPL raised aspects of the circumstances of the case which favoured a lower rather than a higher penalty, but there were others which favoured both conviction and a substantial penalty. The Magistrate could not be said to be bound as a matter of law not to convict. The course she took in this regard was plainly open to her and it was the only course properly open to her.

10. In relation to the submission that the penalty was manifestly excessive, manifest excess cannot be justified simply by comparison with other sentences. Nor is it to be treated as something recognised on a fundamentally intuitive basis. What must be considered is all of the matters that are relevant to fixing the sentence. Having regard to the Magistrate's Reasons for sentence, there was no basis to infer from those Reasons that she had regard to erroneous principles.

11. The penalties imposed by the Magistrate were not manifestly excessive in the relevant sense, having regard in particular to the deliberate nature of the discriminatory conduct, the relationship within which it occurred, the nature of the safety issue, the impact upon the employee and the significance of s76 in the scheme of the OHS Act.

12. In relation to the question of proportionate sentencing, the total sentence must be proportionate to the totality of the offending. It is a basic principle of sentencing law that a sentence should never exceed that which can be justified as proportionate to the gravity of the crime committed in the light of its subjective circumstances. That principle is reflected in the *Sentencing Act* 1991.

13. The Magistrate expressly addressed the relationship between the three offences in issue and her Reasons did not disclose any error of principle. Nor could it be positively inferred from the aggregate sentence imposed that she misapplied sentencing principles including the principle of totality. Accordingly, the appeal was dismissed.

OSBORN J:

1. On 3 February 2010, Carlin M found the appellant ('Patricks') guilty of three charges pursuant to the *Occupational Health and Safety Act* 2004 ('OHS Act'), namely:

> Charge 1: causing injury to an employee for the dominant reason that he raised a health or safety concern;
>
> Charge 2: altering the position of an employee to his detriment for the dominant reason that he raised a health or safety concern; and
>
> Charge 5: threatening to dismiss an employee for the dominant reason that he raised a health or safety concern.

2. Patricks now appeals on questions of law, which address three underlying issues.

3. The first issue is whether the Magistrate erred in law in reaching the conclusion that she could not be satisfied on the balance of probabilities that the fact that the employee Carroll had raised a health and safety concern was not the dominant reason for the conduct of Byers, one of Patricks' managers, in sequentially:

> (a) threatening to dismiss Carroll on 1 October 2007 (charge 5);
>
> (b) standing Carroll down without pay on 1 October 2007 (charge 1); and
>
> (c) sending a formal and final warning letter to Carroll on 11 October 2007 (charge 2).

This issue is addressed in different ways by the first three grounds of appeal.

4. The second issue is whether the standing down of Carroll was capable of being regarded as an 'injury' in the sense required to sustain charge 1. This issue is raised by grounds 4 and 5 of the notice of appeal.

5. The third issue is whether the Magistrate erred in imposing the sentence which she did by reason of the failure to give adequate reasons, a failure to take into account current sentencing practices, imposing a conviction at all and/or by imposing a sentence which was manifestly excessive. This issue is raised by grounds 6, 7, 8 and 9 of appeal.

6. It is an offence pursuant to s76 of the OHS Act to dismiss, injure or alter an employee's position to his or her detriment or threaten to do so, for the dominant reason that the employee raised an issue or concern about health or safety to his or her employer or exercised a power as a health and safety representative. Under s77, if all the facts constituting the offence other than the reason are proved, the accused bears the onus of proving that the reason alleged in the charge was not the dominant reason for the conduct. This onus falls to be discharged on the balance of probabilities.

7. After referring to the decision in *General Motors Holden Pty Ltd v Bowling*,[1] in which the High Court examined provisions using analogous terminology contained in s5 of the *Conciliation and Arbitration Act* 1904, the Magistrate identified the elements of the charges before her as follows.

> Thus, in relation to each charge the prosecution must prove beyond reasonable doubt that:
> 1. The Accused employed Mr Carroll
> 2. Mr Carroll raised a concern about health or safety (charges 1, 2 and 5) or exercised a power as a health and safety representative (charges 3 and 4)[2]
> 3. Mr Byers discriminated against Mr Carroll within the meaning of section 76 (the conduct element)
> 4. The dominant reason for that discrimination was the fact Mr Carroll raised a health or safety concern or exercised a power as a health and safety representative (*the motive element*).
>
> If elements 1, 2 and 3 are established, element 4 is presumed unless the Accused can disprove it on the balance of probabilities. I accept that what needs to be established is the subjective state of mind of the Accused.
>
> I also accept that in assessing whether the reason alleged was the dominant reason, I should apply the meaning advocated by the prosecution, namely 'the ruling, prevailing or most influential purpose'.
>
> I think there is a danger in equating this to a 'but for' test and I do not do so.[3]

8. There was no attack upon this statement of the elements of the charges.

The first issue – motive

9. The first issue in this case relates to the Magistrate's findings in respect of what she called 'the motive element'. Her summary of the elements of the charges makes clear the sense in which she subsequently referred to 'motive'.

10. It is also plain that, at the outset of her judgment, her Honour accepted that what needed to be established was the subjective state of mind of the accused.

11. In this respect, it was accepted by both parties that the actuating mind of Patricks was

that of Mr Alan Byers. Byers commenced working for Patricks as the Business Unit Manager of Geelong and Portland in around June 2007. As such, he was the most senior person in charge of the operations in Geelong and Portland. Byers had a number of qualifications, including rigging and an Associate Diploma in Occupational Health and Safety. He had extensive experience in rigging, about five years prior experience in the stevedoring industry and 18 months as an Occupational Health Safety Training Officer in the late 1980s.

12. Ultimately, the Magistrate was not persuaded Byers acted as he did for the reasons which Patricks contended. It is plain that the evidence did not require her to be so persuaded, and it is conceded that her conclusions as to motive were open to her on the evidence. Nevertheless, it is submitted that the Magistrate's Reasons demonstrate that she misdirected herself in the course of determining the charges before her and both failed to have regard to relevant factors and had regard to irrelevant factors.

The evidence

13. It is useful to set out the evidence with respect to Byers' state of mind on 1 October 2007 at the time of the conduct forming the basis of charges 1 and 5.

14. Counsel for Patricks directed my attention in particular to:
(a) the minutes of the meeting at which the statements in issue were made;
(b) Byers' evidence; and
(c) the terms of the letter written by Byers on 11 October 2007 forming the basis of charge 2.

15. The minutes are as follows:

> Minutes of meeting Monday 1st October 10am.
>
> Present, Alan Byers, Tim O'Leary, Adam Sheridan, Frank Carroll.
>
> Alan spoke openly of his concerns about the OH and S committee, and the elections that are currently taking place. His plan was to dissolve the committee and start again. Adam then stated that he would be willing to seek the appropriate people with the experience that is needed to have a committee. Alan agreed to this, and that is currently underway.
>
> Alan then spoke of the importance of communication between Management and employees. This was agreed that it needs to improve, so as to the general morale of the workforce.
>
> Alan expressed his disappointment in Frank regarding a pin notice that Frank issued on the Company in relation to appliances being out of the tested dates. Frank agreed he could have handled that issue better and will discuss these types of issues with Alan in the future.
>
> Alan also expressed his concerns that he had issued a lawful instruction to Frank to do a basket lift on the Jacamar Arrow, and that Frank had not followed his instruction. Frank argued that we have procedures in place and those procedures do not allow for basket lifting, only double wrapping. Alan told Frank he was extremely disappointed in him.
>
> Alan raised the issue of basket lifting. He wants to put a new procedure in place that allows this to happen on square sided hatches on the Gearbulk vessels. Frank and Adam voiced their concerns about this, with Frank going into some detail about the risks that are associated with this method and where it stood in relation to Worksafe guidelines. The procedure that is current, allows for the double wrapping of all structural steel. Frank was not willing to do a procedure without Worksafe allowing it in the suggested methods of unloading steel. Alan then put a question to Frank about whether or not Frank would follow an instruction by Alan to use basket lifting on the next steel vessel. He also advised Frank to consider his answer, as it may put his job in jeopardy. Adam spoke on behalf of Frank at this point, saying that both Adam and Frank were not comfortable with the way the meeting was heading, and requested a further meeting with State officials of the M.U.A. Alan agreed, and then he informed Frank he was being stood down, off pay as of today.
> Meeting closed 1130am.

16. I note the following matters:

> (1) The minutes record an expression of concern by Byers that Carroll had not followed Byers' instructions when Byers issued a lawful instruction to Carroll to do a basket lift on the Jacamar Arrow ('Jacamar').

(2) Carroll responded to this by stating that the procedures in place did not allow for basket lifting.

(3) Byers then told Carroll that he was extremely disappointed in him. He did not, at that point, threaten or otherwise discipline him.

(4) Byers then addressed the issue of basket lifting and said he wanted to put a new procedure in place. To my mind, the fact that what followed occurred in the context of a discussion about a new procedure is significant. It can be seen the discussion about new procedure was responsive to the previous discussion, which included Carroll's direct reference to, and reliance upon, the procedures then in place. It can also be seen that what was envisaged was a procedural context other than that which was in operation when the incident on the Jacamar took place. The discussion from this point was not about the incident on the Jacamar, but rather about the implementation of a new procedure on Gearbulk vessels with square sided hatches.

(5) Both Carroll and Sheridan voiced concerns with respect to the new procedure and Carroll elaborated risks and the requirements of current Worksafe guidelines. Carroll stated he was not willing to do the new procedure without Worksafe allowing it. Again, it can be seen that this response did not foreclose the possibility that the new procedure might thereafter come into force.

(6) In direct response to these statements raising a concern about safety, Byers put a question to Carroll 'about whether or not [Carroll] would follow an instruction by [Byers] to use basket lifting on the next steel vessel.' This question cannot on its face be regarded as a direction to do work. It was a question seeking a commitment as to a future course of conduct.

(7) It was in connection with this question that Byers advised Carroll 'to consider his answer as it may put his job in jeopardy.'

(8) Sheridan then spoke on behalf of Carroll, who did not answer the question. I note it cannot be said that the minutes indicate that Carroll refused to do what Byers asked. What occurred was that Sheridan said that both he and Carroll were not comfortable with the way the meeting was heading and requested a further meeting with union representatives. The minutes do not demonstrate that Carroll refused to agree to Byers' request. The question of his future conduct remained alive.

(9) Byers agreed to a further meeting and then informed Carroll 'he was being stood down, off pay as of today.'

(10) In summary, insofar as the minutes record statements from which Byers' intention might be inferred:
(a) Byers asserted a failure by Carroll to obey lawful instructions on the Jacamar; but
(b) Byers then questioned Carroll in the context of a new basket lifting system;
(c) the question was threatening but was not formulated as a direction, did not relate to specific duties and did not receive a refusal.
(d) Carroll simply failed or refused to communicate a response.
(e) The standing down was, on the face of it, made in response to Carroll's failure to answer the question affirmatively.

(11) At one point counsel for Patricks submitted in this Court:
It was Mr Carroll's refusal to undertake the basket lift in the future which was the issue.
I accept that both the minutes and the evidence as a whole demonstrate this to be so.

17. Patricks then points to the transcript of Carroll's evidence in which he acknowledged that at the meeting in issue, Byers complained that Carroll had failed to follow a lawful instruction. I take this to confirm the accuracy of the minute concerning Byers' initial statement about the incident on the Jacamar.

18. Patricks further points to the evidence of Byers himself, in which he was taken to the minutes and initially asked leading questions (without objection) by reference to them:

You then go on to express a concern to him that he'd issued – that you had issued a lawful instruction to Frank to do a basket lift on the Jacamar Arrow and Frank had not followed this instruction. Again, is that accurate? ---Correct.
When you say you had issued a lawful instruction, what are you referring to? --- Meaning that that lifting technique is a – well, (a) I'd asked him to do something which I am allowed to do, it fitted within the scope of his work and within his training, and the lifting technique that I'd asked him to use is a lawful lifting technique.
All right. You see, it's alleged in this prosecution that you were motivated to act because he raised

the safety issue. What do you say about that? --- Not at any stage have I ever done that. Safety, as I have already said earlier, is a very strong part of my working life, and I have been very, very motivated to make sure it is. Every role you have, especially as you become more senior in the work place, there's more responsibility around safety, and you are not only legally but morally obligated to send that workforce back home in at least the same sort of state they turned up in.
All right? --- Which is what I have always attempted to do.
It seems as a result of these conversations you stood him down – told him he was stood down without pay? --- Correct.

19. The transcript further records shortly thereafter:

'Alan then put a question to Frank about whether or not Frank would follow instructions by Alan to use basket lifting on the next steel vessel.' Do recall saying that? --- I don't recall saying exactly that, but I believe I would have said something like that.
Yes. And you were asking him essentially for a commitment when the next vessel came in that he would use basket lifting, is that right? --- Correct.
What did he do? --- To my recollection Frank really wouldn't or couldn't answer that question, and that he and Adam took some time out to discuss it before we - - -
When you say they took some time out, what does that mean? --- They went aside, went away from us to talk about it.
Yes. And then what happened? --- Well, basically Adam came in, as I said, and spoke on Frank's behalf and said that Frank couldn't answer that question.
HER HONOUR: Did Frank go back in or just Adam? --- No, they both came back in.
MR NEAL: And that he could not answer that question? --- Correct.
Or more likely would not answer the question? --- Well - - -
HER HONOUR: Well - - -
MR NEAL: All right, sorry.
HER HONOUR: Whatever. What did Adam say? --- I don't recall exactly, Your Honour, but words to that effect, that Frank couldn't answer that question.
MR NEAL: Then the sentence that says: 'He also advised Frank to consider his answer as it may put his job in jeopardy.' What do you say about that? --- I certainly don't recall saying anything like that, and I don't believe I would say anything like that because I couldn't sack him anyway.
What was your state of mind about your power to hire and fire people? --- I am not allowed to hire and fire, was not then allowed to hire and fire people. I could hire casuals but not - - -
HER HONOUR: Mr Neal, I will just get you to hold on while I catch up with the notes. Yes, thanks.
MR NEAL: So if you decided that you did – someone did need to be dismissed, what process did you have to go through in order to effect a dismissal? --- I would have to go through the eastern region manager where I would – I could recommend certain things, but I would have to get his blessing before we could do anything.
All right. And who is that person? --- Greg Dougall.

20. It can be seen that the initial questioning moves from asking about the incident on the Jacamar to asking whether Byers was motivated to act because Carroll raised the safety issue. Byers squarely denied this, but did not posit an alternative motivation. Subsequently, he denied that he threatened Carroll. His evidence was not that he made the threat for a particular reason, but simply that he did not make the threat. Further, he did not state what the subjective reason for the standing down was.

21. Byers then gave evidence concerning the letter of 11 October.

22. Patricks' counsel pointed to the terms of the letter written by Byers on 11 October 2007. The letter was in the following terms: [omitting formal parts]

Re: Failure to follow instruction & Unacceptable behaviour

Over the past few months you have shown an unacceptable level of disrespect for the manner in which Patrick Bulk and General Stevedores operate their business. This relates to a number of occasions where conversations have been held with yourself by the Business Unit Manager and you have chosen to follow your own path.

As a senior member of the Geelong workforce, you have a high level of influence over other people in the work group who actively respond to your comments and actions. This is not good for either the work group or the business when by your own admission at a meeting the 1st of October 2007 you had made serious mistakes and failed to communicate with the appropriate people.

> As a result of an investigation in to the lead up and subsequent actions, plus your past record, you have clearly breached Patrick's employment policies and not adhered to expected communication levels when operating as a senior member of the stevedoring group.
>
> In addition to this at the same meeting you refused to indicate whether you were prepared to follow lawful instruction, saying you were not sure.
>
> Given the serious nature of these incidents, the company is left with no option but to serve notice that this letter is to be regarded as a formal and final written warning. The company can exercise its right to terminate your employment in the event of any future indiscretion.
>
> As an indication that Patrick wishes to continue to work with all employees in a positive manner, this warning stands for a 12 month period and will be removed from your file at the end of that time providing no further issues of a serious nature arise.
>
> If you are unclear on any aspect of this letter please contact the undersigned for clarification. Regards [signed] Alan Byers Business Unit Manager Patrick Stevedores Geelong

23. The letter complains that Carroll had 'clearly breached Patrick's employment policies and not adhered to expected communication levels when operating as a senior member of the stevedoring group' and, in addition to this, at the meeting of 1 October 2007 'you refused to indicate whether you were prepared to follow lawful instruction, saying you were not sure.'

24. It can be seen that the terms of the letter are not consistent with the minutes of the meeting, which do not record either that Carroll was asked in terms whether he was prepared to follow lawful instructions or that he responded by saying that he was not sure.

25. Further, when he gave evidence about this letter, Byers himself identified different motivations for the letter than that which Patricks' counsel now contend it evidences.

26. Byers' evidence concerning the letter of 11 October was as follows:

> It's all about communication, everything with Frank has always been about communication, where we have agreed that we will talk more, we will go backwards and forwards and we will discuss everything before we do anything. And that was a conversation we had on an extremely regular basis.
>
> All right. There's a reference in the next paragraph then to your past record. What is that referring to? --- It would have been his issue with Tim.
>
> That's the January '07 - - -? --- Yes.
>
> And then in addition at the same meeting 'you refused to indicate whether you were prepared to follow lawful instructions saying you were not sure.' That refers to? --- When we had the first meeting with Adam Sheridan which we talked about a while ago, Frank's first answer was he wasn't sure, and then after that Adam had come back and spoke for Frank.
>
> All right. Again in relation to this letter and the warning it constitutes, the prosecution alleges that you were motivated in this because Mr Carroll had raised a safety issue. What do you say about that? --- Well, not at any stage have I said anything to Frank or any of the employees, disciplined anyone in relation to a safety matter. This has purely been about communication and what Frank is seen to be doing in front of the fellow workforce considering he was a very senior person.
>
> So what was your – what was the motivation behind this letter, then? --- Well, I wanted to get Frank back in the fold, because he is a – not at any stage have I criticised Frank's workmanship or his ability to do the work, and he was a good worker, and I needed Frank to be back in there operating as I thought he should be, as one of the senior members of the permanent workforce.
>
> All right. And so what was the problem that prompted the warning then? --- The lack of communication.

27. Once again, this evidence denies that the raising of safety concerns motivated the letter, but does not assert that the failure to obey lawful instruction was its basis. Indeed, Byers asserted different concerns. First, he emphasised that he was concerned to respond to a lack of communication and, secondly, he had a desire to have Carroll work co-operatively as a senior member of the workforce. The reference to the failure to communicate is potentially understandable as responsive to Carroll's failure to answer the question asked at the 1 October 2007 meeting, if

the minutes are regarded as accurate; alternatively, it refers to the sequence described by Byers in his evidence, namely that Carroll first said he could not answer and then failed to further answer Byers' question when Sheridan spoke for him.

28. Next, Patricks points to the cross-examination of Byers, including the following question and answer:

> That was the reason – if that had not occurred, if you hadn't had that run-in with on the Jacamar Arrow on 24 September, the issue would not have been raised on 1 October, would it? The issue of basket lifting would not have been discussed at your meeting on 1 October, would it? --- Frank – he didn't follow lawful instruction.
>
> If that incident hadn't occurred on 24 September, if you hadn't been there or whatever, right? If that incident hadn't occurred, the 1 October meeting wouldn't have dealt with the question of basket lifting? --- It wouldn't have been an issue.

29. The answers referred to go to the context in which basket lifting was, from Byers' point of view, an issue at the meeting on 1 October 2007. Once again, however, they do not postulate that the refusal to basket lift on the Jacamar was the dominant reason for either the threat made to Carroll on 1 October 2007 (which, of course, Byers denies was made), or Carroll's standing down.

The Jacamar Arrow

30. Before turning to the Magistrate's Reasons, it is also convenient to record Byers' evidence directly describing the incident on the Jacamar on 24 September 2007:

> Can you describe for Her Honour what happened? --- I was aware that Patrick Ellerby was on Corio Quay berth watching the discharge of the Jacamar Arrow. I met with Patrick and we observed the discharge. Patrick was I would say not happy that the basket lifting technique wasn't being used. I entered the hold, I believe Patrick came up on to the ship but didn't go right into the hold with me, but I entered the hold and I spoke with Frank about using the basket lifting technique, and I am sure his words to me were that he wasn't comfortable using that lifting technique.
>
> Did you discuss any means of resolving any risks that he might see? --- No, we didn't.
>
> So you have asked him will he do it with a basket lift? --- I have asked him straight out to use the basket lifting technique where it was safe to do so, if the stow allowed that, and Frank basically just said he wasn't comfortable using that method.
>
> Did you have the opportunity to observe the stow in that section of the ship yourself? --- Yes, I did.
>
> What was your description of that? --- It was certainly safe to use that lifting technique for the most of the time, for what we could see. You are unaware of what's under it.
>
> As far as presented, though, to you? --- Yes, it was fine.
>
> Yes. So he said he was uncomfortable; what happened next? --- I was not going to create any sort of scene or anything; I left the hold.

31. There is, to my mind, a real issue as to whether this evidence in fact establishes that Carroll was given a direction to basket lift which he refused to obey. First, Carroll was 'asked' to use the method 'where it was safe to do so, if the stow allowed that'. He was not directed to do so and the asking was expressed in conditional terms. Secondly, when Carroll said he was not comfortable in using the method, Byers elected not to take the matter any further and left the hold. Nevertheless, Carroll himself accepted in cross-examination that he was clearly given a direction to basket lift and that he refused to do it, saying that he was uncomfortable with it, believing it was unsafe and he was following correct procedure. In turn, I accept the evidence showed that Byers believed Carroll refused to follow a direction.

32. A further complication arises from the fact that basket lifting did not accord with the appellant's standard lifting procedures for steel of the type in issue during the period in issue. Further, the Magistrate found that no Job Safety Analysis ('JSA') document was produced authorising departure from the standard procedure for the Jacamar job. These conclusions were open to her on the evidence before her (which it is unnecessary to set out in detail), but once again

they do not preclude the possibility that Byers believed such instructions as he gave to Carroll to basket lift on the Jacamar were authorised by a JSA and/or were otherwise lawful.

33. The next question which arises in this context is whether Byers understood that Carroll's refusal to basket lift on the Jacamar was based on safety concerns. The Magistrate found as a fact that it was and this conclusion was open to her. The Magistrate stated:

> Mr Byers' position was that Mr Carroll simply said that he was uncomfortable basket lifting and nothing more. He maintained that he did not know at that time that Mr Carroll meant he was uncomfortable for safety reasons; rather, Mr Carroll could have just been obstructionist. He only conceded that he later understood that Mr Carroll was referring to the safety aspect of basket lifting. I am satisfied this was obfuscation by Mr Byers. Whether or not Mr Carroll uttered the word 'unsafe', the history between the parties cannot have left Mr Byers in any doubt as to what Mr Carroll meant. Even if Mr Byers disagreed with Mr Carroll; even if he thought Mr Carroll was disingenuous; he must have understood that Mr Carroll was asserting a safety concern.[4]

34. The history to which the Magistrate refers included a meeting on 4 July 2001 of the Occupational Health and Safety Committee, at which Byers and Carroll were both present, and subsequent dispute over the safety of basket lifting. The Magistrate dealt with these matters in the following parts of her decision:

> On 4 July 2007 the Occupational Health and Safety Committee ('OHSC') met. Present were Mr Byers, Paul Cudmore (the second Geelong Operations Manager), Mr Carroll, Peter Mason and Shane Lovell. Like Mr Carroll, Mr Mason and Mr Lovell were stevedores and health and safety representatives. Mr O'Leary was absent, apparently being on holidays. Lifting techniques were discussed and Mr Lovell advised that the OHSC was intending to issue a PIN[5] to prevent basket lifting. At Mr Byers' request, Mr Lovell agreed not to issue the PIN on condition Mr Byers would organise a further meeting before the next Gearbulk vessel was unloaded. So much is uncontroversial. According to the prosecution witnesses (Mr Carroll, Mr Lovell and Mr Mason) the further meeting was supposed to involve the OHSC and it did not happen. According to Mr Byers, the further meeting was between Mr O'Leary and the relevant workers to draw up a JSA and it did happen.
>
> 29. I am satisfied that Mr Byers did promise to hold a further meeting with the OHSC to discuss basket lifting prior to the next Gearbulk Vessel. Mr Byers displayed a poor recollection of this meeting and his evidence smacked of reconstruction. He spoke in terms of normal practice and what he believed occurred, rather than actual memory. Further, whilst conscious of the need for caution in drawing any conclusions from the failure to put a proposition to a witness, it is noteworthy that Counsel for the Accused did not suggest to any of the prosecution witnesses that the further meeting was to draw up a JSA.
>
> 30. The preponderance of evidence supports the prosecution position. Mr Lovell was an impressive witness with a good recollection. The fact he was a driving force in the meeting explains his clear recall. He not only chaired the meeting, he took with him a handwritten PIN ready for issue at the end of the meeting. The only reason he did not issue it was because Mr Byers promised he would organise a meeting between the OHSC and representatives of Gearbulk before the next Gearbulk vessel to discuss basket lifting. After the meeting, according to Mr Lovell, he spoke to Mr Byers in his office and telephoned him, to remind him of the need for the meeting. Mr Byers assured him the meeting would occur. This evidence was not challenged.
>
> 31. Mr Mason also claimed to have a good recall of the meeting because it was 'an important issue facing our workforce' and they were very adversarial meetings. He took contemporaneous notes. Both these notes and the 'official' typed minutes of meeting support the prosecution version of this meeting. The typed minutes record 'further meeting be arranged between committee, Alan Byers and Tim O'Leary to discuss issues raised'. The comment 'review at next meeting' does not detract from this construction, as it appears next to every agenda item except those marked 'complete'. The evidence and minutes of Mr Mason indicate Mr Byers proposed 'Monday week' as the date for the further meeting. This coincided with Mr O'Leary's return from leave.
>
> 32. Finally, as detailed below, a PIN did issue on 2l July. Its timing and its terms support the proposition that what had been agreed on 4 July was further consultation with the OHSC before the next Gearbulk vessel. That is, the PIN was issued approximately 3 days before the next Gearbulk vessel, the Toucan, was due. It complained of a 'Failure to consult with committee on Altering procedures to gear Bulk operations (sic)'. Further, the remedial action it sought was to 'arrange a meeting with OH&S reps to discuss any changes to lifting techniques'.

33. On 21 July, it was confirmed the next Gearbulk vessel, the Toucan, would be arriving in the next few days. The promised meeting with the OHSC had not occurred. Mr Carroll called Mr Byers and advised that he would be issuing a PIN to stop basket lifting. According to Mr Carroll, Mr Byers threatened that if he issued the PIN he would do everything in his power to take him off the OHSC and to ensure he would never be a health and safety representative again. Mr Carroll then called Mr Lovell who agreed to issue the PIN instead of Mr Carroll. Mr Carroll disagreed with Counsel for the Accused, Dr Neal, that it was he who had been 'very threatening' to Mr Byers.

34. I accept Mr Carroll's account of this conversation. The fact that Mr Lovell ended up issuing the PIN instead of Mr Carroll supports Mr Carroll's evidence that he was 'persuaded' by the threats not to issue the PIN. I also accept the evidence of Mr Carroll and Mr Lovell that the decision to change who issued the PIN was only made in consequence of Mr Carroll's conversation with Mr Byers.

35. Further, I am satisfied the meeting of 4 July 2007 and the subsequent conversations between Mr Lovell and Mr Byers constituted sufficient consultation to justify the issue of the PIN on 21 July. The PIN did not purport to prohibit basket lifting absolutely. Rather, it required double wrapping pending the proposed meeting with occupational health and safety representatives.

36. Mr Byers' evidence in relation to the phone call was contradictory and evasive. In examination in chief, he denied that he had threatened Mr Carroll, saying that he had no power to remove him from the OHSC or to prevent him from sitting on other committees. In cross-examination, he prevaricated. He did not deny such threats, but could not recall making them and again asserted a lack of power. Accepting that Mr Byers had no actual power, it hardly precludes the making of such threats. He was clearly influential in the decision-making. Further, according to Mr Carroll, the threat by Mr Byers was not that he *would* remove him, but that he would *do everything in his power* to remove him, consistent with recognition by Mr Byers of a lack of actual power. When he gave his account Mr Carroll could not have known that Mr Byers was going to rely on a lack of power as support for his contention that he did not make the threat.

37. In examination in chief, Mr Byers twice described Mr Carroll as 'fairly threatening' during the conversation. When asked in cross-examination (many weeks later) to explain, he indicated he simply meant threatening in the sense that he was determined to issue the PIN no matter what. He added that he was not suggesting that Mr Carroll was abusive; he was not. On this version, there was little cause for serious complaint. Yet after this conversation, Mr Byers instigated the drafting of a disciplinary letter to Mr Carroll that alleged a serious breach of the company's code of conduct by 'using threatening behaviour', Exhibit AM.

38. The original draft of this disciplinary letter clearly contained a reference to a 'safety issue'. I am satisfied Mr Byers' superior, Mr Dougall, deleted this 'safety issue' from the draft he had been sent by Mr Byers. When cross-examined about the letter Mr Byers dissembled. He refused to concede that the safety issue referred to in the original letter was the PIN, but could not point to any other safety issue applicable at that time. There being no evidence of any other safety issue, I am satisfied the original draft did refer to the PIN. For reasons Mr Byers could not explain this letter was not sent to Mr Carroll. Nevertheless, it is illuminating as to Mr Byers' state of mind at the time. The fact it was not sent after Mr Dougall deleted the reference to the PIN supports the inference that the PIN was the real reason for the letter, not Mr Carroll's conduct.

39. At one point in cross-examination, Mr Byers said he saw the PIN as a good opportunity to get the safety of basket lifting out in the open. His later evidence that he was concerned and 'not happy' about the PIN contradicted this assertion. It is also inconsistent with his admitted attempts to dissuade Mr Carroll from issuing the PIN and his subsequent participation in drafting the disciplinary letter. Once again, I am satisfied this evidence was an attempt to downplay the significance of the PIN in his decision-making.

Mr Dougall's evidence in relation to Exhibit AM was unhelpful. He clearly had very little recall of the letter. He thought it related to the altercation between Mr Carroll and Mr O'Leary back in January. He had no recollection of Mr Carroll calling Mr Byers and threatening to issue a PIN. He was also confused about the 'safety issue', at first referring to the difficulty of proving an employee has engaged in unsafe conduct, and later, the possibility of the OHSC using safety as an industrial tool. In cross-examination, he was unable to specify the safety issue and refused to concede the original draft included reference to a safety issue or that he had deleted anything from it. He did agree that disciplining someone who was not abusive but merely insistent on issuing a PIN did not seem appropriate.[6]

35. The draft disciplinary letter referred to at [38] of the Magistrate's Reasons (Exhibit AM) contained in capital letters at its head the words written by Dougall to Byers:

ALAN SUGGEST WE STAY ON ONE (1) ISSUE – LETS GET HIM ON THE THREATENING MANNER, LATER THE SAFETY ISSUE HOWEVER I DON'T LIKE TO TACKLE SAFETY ISSUES FRONT ON!!

36. Mr Borenstein characterised this letter as amounting to a forensic 'smoking gun'. I accept that its terms were strongly supportive of the conclusion that Byers dissembled when cross-examined about the letter and that he well understood that Carroll's subsequent refusal to basket lift on the Jacamar was based on safety concerns.

37. It can be seen that the Magistrate's findings on these matters (which were plainly open to her) directly informed her conclusion to reject Byers' evidence as to his understanding of Carroll's response on the Jacamar. They also make it clear that she did not accept that Byers was a witness of truth and reliability on a series of significant matters antecedent to the events directly in issue.

38. I turn then to the Magistrate's Reasons with respect to Byers' dominant motivation. As I have stated above, the use by her of the term 'motive' is to be understood as referring to element 4 of the charges as she defined it. The Magistrate's findings as to motive were preceded by the following findings with respect to the alleged conduct and are to be understood in the context of those findings:

> 51. Charge 1 relates to the fact that Mr Carroll was stood down without pay. The Accused does not dispute that Mr Carroll was stood down without pay in this meeting, however it disputes he suffered any injury. This is because as a result of intervention by the Maritime Union of Australia Mr Carroll's pay was restored before there was any interruption to his normal pay cycle. ...
>
> 54. Charge 5 relates to the 'job in jeopardy' comment. The Accused denies that the comment was made and contends that, even if it was made, it did not constitute a threat to dismiss. I am satisfied beyond reasonable doubt that Mr Byers did say words to the effect that Mr Carroll needed to consider his answer as it may put his job in jeopardy. ...
>
> 59. The Accused accepts that Mr Carroll did raise a health or safety concern with his employer about basket lifting on 4 July, 21 July and 24 September 2007. As far as his bona fides, the Accused's position was that it did not 'pursue' that there was a lack of *bona fides*, even though, according to the Accused, there was evidence that called it into question.
>
> 60. Even without that concession, I am satisfied beyond reasonable doubt that Mr Carroll refused to basket lift because of a genuine concern as to its safety, rather than wilful disobedience or any other reason. ...
>
> 65. I am satisfied the safety of basket lifting was a matter of genuine controversy at Patrick's Geelong workplace at the time. None of Mr Carroll, Mr Lovell or Mr Mason had ever basket lifted and they were the health and safety representatives at the time. Scott Ferguson had also always double wrapped in his position as team leader and foreman. It appears that Mr Sheridan had also never basket lifted and he was clearly troubled about the prospect. On 4 July 2007, Mr Lovell's concern was that there had been attempts to change the established procedure of double wrapping on the job without proper discussion at the OHSC. Mr Mason confirmed that it was an important issue for the Geelong workforce. Even Mr Byers said that 'it was a long project to get acceptance of basket lifting right throughout'.
>
> 66. None of Patrick's Standard Operating Procedures for discharging cargo from vessels allowed for basket lifting. The production of such procedures is mandated under the OHS Act and employees are obliged to follow them. Under the OHS Act, such procedures could only be changed after proper consultation, including with a health and safety representative. A draft new procedure to allow for basket lifting on Gearbulk vessels was produced on 5 October 2007, however it was never taken to the OHSC and was never ratified. In fact, the issue of basket lifting was never resolved at OHSC level during the period relevant to the charges. Even at the end of 2009, double wrapping was the method being used on Gearbulk vessels in Geelong.
>
> 67. Basket lifting was also the subject of ongoing discussion during industry working party meetings in 2007 and 2008. The purpose of these meetings was to develop a Worksafe guide for the lifting of cargo and they culminated in the production of two Worksafe handbooks in May 2008 which clearly favoured double wrapping over basket lifting.
>
> 68. In my view, Mr Carroll was not acting perversely when he objected to basket lifting. I am satisfied beyond reasonable doubt that his concern was not frivolous or unreasonable.

To the extent it is relevant, I am also satisfied that Mr Carroll was not disobeying a lawful instruction. Mr Byers claimed his instruction to basket lift on the Jacamar Arrow was lawful because of the existence of a JSA and the fact that two industry guides to rigging referred to basket lifting. It is correct that a JSA is a mechanism of trialling a new work procedure. However, the only JSA produced in the case was Exhibit 2, dated 24 July 2007. Mr Byers' evidence that JSAs can be task specific and do not have to relate to a particular vessel is difficult to reconcile with his evidence that JSAs can only be produced once the vessel has docked and the cargo and stow is ascertained. This is particularly so given his evidence that as Geelong was generally the last port the dunnage would be crushed and the stow might not be as good. The proposition that JSAs can be general in nature is also in contrast with the evidence of Mr Lovell and Mr Dougall. In any case, I am satisfied that neither Exhibit 2 nor any other JSA for basket lifting was used on the Jacamar Arrow. Mr Carroll was working as the foreman on 24 September and if anyone knew of a JSA, one would expect it to be him. I accept his evidence that he never saw one.[7]

The Magistrate's conclusions on motive

39. The Magistrate dealt with the question of motive in respect of charges 1 and 5 as follows:

72. I turn to consider the reason for the conduct.

73. I have no doubt the reason Mr Byers threatened Mr Carroll and then stood him down in this meeting was Mr Carroll's refusal to basket lift, not lack of communication or anything else. It was when basket lifting was discussed that the meeting became heated and that is when the job in jeopardy comment was made and Mr Carroll was stood down. The refusal to basket lift does amount to a raising of a safety concern.

74. I do not accept that Mr Byers was motivated by Mr Carroll's refusal to follow lawful instructions, rather than his raising a concern about the safety of basket lifting.

75. First, Mr Byers did not posit that as his motivation. He claimed not to have a good recollection of the meeting, but later said, 'Everything about Frank has always been about communication'. He also denied that he ever acted because Mr Carroll raised a safety issue. Secondly, the distinction is artificial. The refusal to follow a direction is not severable from the reason for the refusal. Even if Mr Byers honestly believed basket lifting to be safe, I am satisfied that he knew Mr Carroll's refusal was based on a safety concern. This concern was honest and reasonable and Mr Byers was not entitled to override it. Thirdly, for reasons set out above I am not satisfied that the direction was 'lawful'. To the extent Mr Dougall sanctioned disciplinary action it was only because he believed that there was a basket lifting JSA specific to the Jacamar Arrow which had been discussed with the OHSC prior to the vessel arriving. I am satisfied this was not the case. Fourthly, to the extent it was suggested in cross-examination that Mr Carroll was being wilfully disobedient in refusing to basket lift, I do not accept it. It was understandable that he did not pursue any remedies to prevent basket lifting prior to the Jacamar Arrow arriving, as he (mistakenly) believed the PIN from 21 July was still in force.

The Accused has failed to satisfy me on the balance of probabilities that the fact Mr Carroll raised a health and safety concern was not the dominant reason for Mr Byers' conduct.[8]

40. Patricks does not contest that the Magistrate's findings in paras [73] and [76] were open to her. It focuses its attack upon the matters referred to in [75], which relate to the conclusion in [74].

Ground 1

41. Ground 1 of the appeal is:

In reaching her conclusion that [Byers] was not motivated by [Carroll's] failure to follow a lawful instruction, her Honour erred in law when she failed to apply a subjective test in relation to [Byers'] reasons for disciplining [Carroll].

42. There is a threshold difficulty with this ground. Her Honour did not reach a positive conclusion. She simply failed to accept the motivation postulated on behalf of Patricks. This is a critical distinction. When the judgment is read as a whole, it is impossible to conclude that her Honour was bound to be persuaded that Byers was motivated by Carroll's refusal to follow lawful instructions. It is sufficient to observe that the premise of ground 1 is misconceived in order to dispose of it, but I shall nevertheless deal with the detailed matters advanced in support of ground 1, for the sake of completeness.

43. Counsel for Patricks dealt in oral submission with the matters particularised under ground 1 by reference to the sequential factors mentioned in [75] of the Magistrate's Reasons. I shall adopt the same approach.

44. Before doing so, I should record that I accept Patricks' submission that the critical question was what was Byers' actual reason for the discriminatory acts. Save that Patricks bore the onus of proof on this issue, I further accept that the statement of R D Nicholson J in *MUA v Geraldton Port Authority*[9] illustrates the sense in which this question fell to be decided:

> Whether an employer was actuated by a prohibited reason or reasons which included a prohibited reason is a question of fact. It will often involve questions of judgment and the characterisation of the employer's reasons: cf *Wood v City of Melbourne.*[10] For example, if an employer made a decision to make his operation more efficient or to facilitate the provision of services to the service users at a lower cost (and for no other reason) that action is not open to the inference of having been taken for reasons which include that the employees are members of a union or have the benefit of an award. The critical question, however, is what were the actual reasons of the GPA and hence of each of its members.[11]

The first factor

45. The Magistrate first observed that Byers did not posit refusal to follow lawful instructions as his motivation in respect of the conduct in issue. The particulars under ground 1 of the notice of appeal allege that the Magistrate 'mistook the evidence when she asserted that [Byers] did not posit a failure to follow lawful directions as his reason for taking disciplinary action.' I do not accept that the factual basis for this ground has been made out, nor do I accept that her Honour's finding, in any event, demonstrates that she failed to apply a subjective test, as ground 1 alleges. To the contrary, it seems to me that consideration of what Byers posited as his motivation was directly relevant to the application of a subjective test. Even if her Honour made an error of fact in her assessment of that evidence, it would not establish the first ground of appeal. Nevertheless, when Byers' evidence is analysed as I have sought to do above, it is apparent that the Magistrate's finding was correct. First, Byers denied the making of the threat and certainly did not posit the motivation asserted for it (which is dispositive of the point in respect of charge 5). Secondly, Byers did not in terms posit the asserted motivation for the standing down (which is dispositive of the point in respect of charge 1). Thirdly, Byers expressly articulated different motives for the warning letter. Insofar as the letter itself referred to a refusal to indicate whether Carroll was prepared to follow lawful instructions, whilst I accept that the letter purports to record what occurred at the meeting in terms of a question about preparedness to follow lawful instructions, the letter does not purport to state the reason for which Byers stood Carroll down. Nor, more significantly, did Byers' evidence about the letter state the asserted motive by reference to the letter. That evidence stated that 'this has purely been about communication and what Frank is seen to be doing in front of the fellow workforce considering he was a very senior person.' (which is dispositive of the point in respect of charge 2).

46. In summary, the Magistrate was entitled to find that Byers did not in evidence posit as his motivation the reason for which Patricks now contends.

47. I interpolate that it was for this reason that it was unnecessary to consider Byers' credit on this issue. Before me, the respondent referred to and relied on the Magistrate's trenchant criticism of Byers' truth and reliability in a number of respects, but it was unnecessary for the Magistrate to go to this issue in respect of the motive asserted in submission by Patricks. That motive was simply not deposed to by Byers as his own dominant motive.

48. I should also add that Byers' evidence did not simply fail to establish the element of his motive which Patricks asserts. Even if it had demonstrated that disobedience of a lawful direction was an element in Byers' motivation, Patricks' case would necessitate that the evidence establish that this was his dominant motive. In practical terms, this was a hopeless task given the inadequacy of Byers' evidence.

49. In *General Motors Holden Pty Ltd v Bowling*,[12] Mason J dealt with a situation in which, like the present case, the direct evidence did not satisfactorily establish the motive for which the employer contended albeit in a somewhat different context:

> I would, for my part, accept the finding that the principal reason for the dismissal was that the appellant considered the respondent to be a troublemaker, to have deliberately disrupted production and thereby to be setting a bad example to others. Even so, this finding does not carry the appellant the whole distance.
>
> It is to my mind a very considerable leap forward to say that this finding in itself is a comprehensive expression of the reasons for dismissal and that they were dissociated from the circumstance that the respondent was a shop steward. No doubt this is an advance which could be made if officers of the appellant had said in evidence: "We dismissed him because he was a troublemaker, because he was deliberately disrupting production and setting a bad example and we did so without regard at all to his position as a shop steward", and that evidence had been accepted. Yet this evidence was not given and, even if it had been given, there may have been a question as to its reliability. Once it is said that the appellant dismissed him because he was deliberately disrupting production and was setting a bad example it is not easy to say without more that this had nothing to do with his being a shop steward. Although the activities in question did not fall within his responsibilities as a shop steward his office gave him a status in the work force and a capacity to lead or influence other employees, a circumstance of which the appellant could not have been unaware. It would be mere surmise or speculation, unsupported by evidence, to suppose that the appellant's management, if concerned as to the bad example he was setting, divorced that consideration from the circumstance that he was a shop steward.[13]

50. In the present case, it would have been mere surmise for the Magistrate to conclude that the disciplinary action in issue was dissociated from the safety concerns raised by Carroll.

The second factor

51. The second factor referred to by the Magistrate in her Reasons is also the subject of complaint. The particulars under ground 1 of the notice of appeal allege that the Magistrate wrongly found that the circumstances of Carroll's honest and reasonable reason for refusing to basket lift (Carroll's safety concern) could not be separated from Byers' alleged reason for taking disciplinary action (failure to follow lawful direction). Further, she wrongly found this distinction to be artificial.

52. The particulars also allege that the Magistrate wrongly failed to distinguish Byers' knowledge that Carroll had a safety concern about basket lifting from Byers' reasons for disciplining Carroll.

53. Once again, even if these complaints were made out, I would not be satisfied, having regard to the Magistrate's Reasons as a whole, that they substantiated ground 1. In my view, when her Reasons are read as a whole, it is plain that she understood that she must apply a subjective test in relation to Byers' reasons for disciplining Carroll and that she did so.

54. I do not, in any event, read the Magistrate as purporting to state in an absolute sense that there was conceptually no difference between Carroll's motive and Byers' motive. Nor do I accept that the Magistrate's Reasons simply equate knowledge of context with reason for acting. Her statement was directed to the factual situation before her and the question of whether, in that context, Byers' motive could be distinguished on the evidence from a response to Carroll raising a concern about the safety of basket lifting. In this context, it was relevant to find that she was satisfied Byers knew Carroll's refusal was based on a safety concern. The matters to which the Magistrate referred were relevant circumstances forming part of the evidentiary context in which she was not persuaded of the dominant motivation for which Patricks contended.

55. I am not persuaded that her Honour's statement of the second factor referred to in [75] of her Reasons demonstrates that she did other than consider whether she was satisfied, as a matter of fact, that the actual reasons of Byers were those submitted by Patricks.

56. For the sake of completeness, I should add that I accept the submission of the respondent that a finding of fact will only be challengeable on appeal on questions of law if there is no probative evidence to support it. After carefully considering longstanding authority, Batt J stated the relevant principles in *Roads Corporation v Dacakis*,[14] by reference to the decision of Mason CJ in *Bond*:[15]

> For the foregoing reasons, I think that I should proceed on the basis that a finding of fact will only be open to challenge as erroneous in law if there is no probative evidence to support it (and not also if it is not reasonably open on the evidence), whilst an inference will be open to challenge as being

erroneous in law if it was not reasonably open on the facts. But, as the statement of Mason CJ at 360 shows, there is virtually no difference between the tests.

Now, it is significant for present purposes that in *Bond* at 356 Mason CJ (with whom on this point Brennan, Toohey and Gaudron JJ agreed) stated:

> But it is said that '[t]here is no error of law simply in making a wrong finding of fact'. Similarly, Menzies J observed in *R v District Court; Ex parte White*:
>
> > 'Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law.'
>
> Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place. For the reasons I have given, I consider that I should take that passage as stating the law which I must apply.[16]

57. In the present case, the attack on the second factor stated in [75] of the Magistrate's Reasons is, at best, an attack on the reasoning forming part of the basis of the Magistrate's refusal to draw an inference. It could not justify setting aside the conclusion of the Magistrate on the facts when that conclusion was plainly open to her.

The third factor

58. The third factor referred to by the Magistrate is also the subject of challenge. The particulars to ground 1 of the notice of appeal assert that the Magistrate wrongly held that Byers' direction was not lawful and that he was not lawfully entitled to override Carroll's honest and reasonable belief about the safety of basket lifting. The particulars also state, in the alternative, that the Magistrate failed to consider whether Byers honestly (even if wrongly) believed his direction was lawful.

59. Once again, the first premise of these particulars is misconceived. The Magistrate did not hold in [75] that Byers' direction was not lawful. She held that she was not satisfied a lawful direction was given on the Jacamar. She was not satisfied of a matter of which Patricks sought to persuade her. Fundamentally, this was because she accepted that Patricks' entitlement to give directions as to new lifting procedures was attended by an obligation to engage in appropriate consultation. She further found that Patricks entered into a process of consultation in accordance with these obligations and that it had not been shown that the new procedure was properly authorised. In particular, Byers, having promised to hold a meeting with the OHSC to discuss basket lifting on 4 July 2007, had failed thereafter to do so. A PIN had then issued on 21 July 2007 requiring double wrapping pending the proposed meeting with the OHSC. The issue had not subsequently been resolved with the OHSC. A draft new procedure was produced on 5 October 2007 (ie after the meeting forming the subject of charge*s1* and 5), but it was never taken to the OHSC and never ratified. In addition, the Magistrate found that departure from standard procedures on the Jacamar was not authorised by a JSA. The Magistrate's conclusions in respect of these issues were founded in findings of fact which were open to her. I am not persuaded that she was bound to be satisfied that Carroll was given a lawful direction to basket lift on the Jacamar.

60. The submissions made by Patricks simply do not accept the facts as found by the Magistrate. Nevertheless, I will, for the sake of completeness, elaborate further the legal framework in which her conclusions were reached.

61. Counsel for Patricks emphasised that the employer's fundamental obligation with respect to safety was imposed by s21(1) of the OHS Act and that it was for the employer to determine how this was to be discharged.

62. At the dates of the offences, basket lifting was, as the Magistrate found, in breach of Patricks' standard procedures. In his evidence, Byers agreed that the procedures were promulgated by Patricks as part of the performance of its obligation (under s21(2)(e)) to properly instruct its employees in the safe performance of their work.

63. Evidence also showed that Byers was contractually obliged as part of his primary duties and responsibilities 'to ensure that all work is performed in a safe manner, in accordance with Patrick policies and procedures and all external legislation, regulations and requirements.' Byers accepted in evidence that both he and Patricks' employees were required to work to stipulated procedures. It was accordingly open to the Magistrate to conclude:

> None of Patrick's standard operating procedures for discharging cargo from vessels allowed for basket lifting. The production of such procedures is mandated under the OHS Act and employees are obliged to follow them.

64. Patricks submitted to the Magistrate and to this Court that the standard procedures were open to change. The Magistrate accepted this to be so and further accepted that the evidence demonstrated that a JSA was a mechanism for trialling a new work procedure.[17] Nevertheless, the power to change standard procedures was conditioned by a requirement to consult with employees reflecting the objective stated in s2(1)(d) of the OHS Act, and the principles stated in s4(3), (4) and (5) of the OHS Act, and imposed by s35(1)(f).[18] Section 36 further provides:

> **36 How employees are to be consulted**
> (1) An employer who is required to consult with employees must do so by—
> (a) sharing with the employees information about the matter on which the employer is required to consult; and
>
> (b) giving the employees a reasonable opportunity to express their views about the matter; and
> (c) taking into account those views.
>
> (2) If the employees are represented by a health and safety representative, the consultation must involve that representative (with or without the involvement of the employees directly).
>
> (3) Subject to subsections (1) and (2), if the employer and the employees have agreed to procedures for undertaking consultations, the consultation must be undertaken in accordance with those procedures.

65. The Magistrate was correct to find that the standard procedures could only be changed after proper consultation.[19] In turn, the Magistrate made findings of fact with respect to the process undertaken by Patricks to attempt to change the standard procedures. She did not accept Byers' evidence in material respects and, as I have said, found that the standard procedures had not been altered by the relevant dates; that no JSA warranting departure from standard procedures on the Jacamar had been proven before her; that Byers had failed to comply with an agreed procedure as to consultation; and that the process of consultation was still underway as at the date of the offences. The consequence of these findings was that it was open to the Magistrate to find that Byers could not simply override Carroll's expression of a safety concern relating to a change to standard procedures on the basis of Byers' own belief as to the safety of the proposed new procedure. In turn, it was open to the Magistrate to find that Byers overrode Carroll's concerns by threatening and intimidating behaviour, rather than following the proper procedure.

66. Once again, I accept that the Magistrate's conclusions as to the lawfulness of Byers' conduct were not determinative of her conclusions as to the actual state of his mind. They were, however, matters she was entitled to regard as contextually relevant to the question of whether she was positively persuaded of the dominant motive for which Patricks contended.

67. I am not persuaded that the Magistrate's conclusions in respect of the third factor demonstrate that she did not address the question of subjective intention which she had expressly identified as the relevant issue. They form part of the circumstances which she enumerates after first identifying that Byers did not himself posit the motive contended for. They relate to background matters in respect of which the Magistrate had previously rejected a sequence of aspects of Byers' evidence.

The fourth factor

68. The fourth factor referred to by her Honour is the subject of the allegation that she wrongly took into account the issue of whether Carroll was being wilfully disobedient. Once again, her Honour's finding is, in my view, properly to be understood as a contextual circumstance relevant to the question whether she was satisfied on the whole of the evidence of the motivation for which Patricks contended. It was open to her to so regard it.

69. Insofar as the particulars under ground 1 further assert that the Magistrate failed to consider whether Byers honestly (even if wrongly) believed his direction was lawful, this does not take the matter any further:

> (a) I am not satisfied that the evidence establishes that Byers gave Carroll a relevant direction to engage in duties immediately prior to the disciplinary action.
>
> (b) The Magistrate held that Byers did not in his evidence posit the motive alleged.
>
> (c) The Magistrate was entitled to treat the question of whether she was satisfied that the direction on the Jacamar was lawful as contextually relevant, independently of the question whether Byers may or may not have honestly believed the direction was lawful.

70. In summary, I do not accept that the factors identified in para [75] of her Honour's Reasons, either individually or taken together, demonstrate that she failed to apply a subjective test in relation to Byers' reasons for disciplining Carroll. Accordingly, ground 1 of the notice of appeal fails.

Ground 2

71. Ground 2 of the notice of appeal is that her Honour erred in law when she failed to direct herself to evidence relating Byers' reasons for his conduct disclosed by the evidence (sic) and to balance them against the reasons alleged in accordance with the dominant reason test in s77 of the OHS Act.

72. This ground also confronts a threshold difficulty. It is plain that her Honour did direct herself to the evidence relating to Byers' reasons for his conduct, including, in particular, the reasons posited by him for the conduct in issue (insofar as he admitted that it had occurred). She directly considered whether Byers' evidence disproved the motive alleged as an element of the offence in issue. She also considered the reason alleged by Patricks to have been the dominant reason for the disciplinary action.

73. I accept that the first matters particularised under ground 2[20] and relating to Byers' beliefs as to safety, efficiency, rigging practice and lawfulness were potentially relevant to the reasonableness of any direction Byers could be said to have given Carroll on the Jacamar and at the meeting on 1 October 2007. In turn, these underlying issues were relevant to the lawfulness of any such direction. The concept of lawful direction was articulated by Dixon J in *R v The Darling Island Stevedoring and Lighterage Company Limited*:[21]

> If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable. Accordingly, when the award was framed, the expression 'reasonable instructions' was adopted in describing the employees' duty to obey. But what is reasonable is not to be determined, so to speak, *in vacuo*. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which the determination of what is reasonable must be controlled. When an employee objects that an order, if fulfilled, would expose him to risk, he must establish a case of substantial danger outside the contemplation of the contract of service.[22]

74. Nevertheless, none of the matters particularised under ground 2 could be said to compel the conclusion as to dominant motive for which Patricks contends.[23] Further, I do not accept that her Honour's Reasons demonstrate that she failed to have regard to Byers' evidence in respect of his beliefs as to the safety and appropriateness of basket lifting as a technique.

Ground 3

75. Ground 3 relates to the last sentence of the second factor which the Magistrate mentions in support of her conclusion that she did not accept that Byers was motivated by Carroll's refusal to follow lawful instructions, rather than his raising a concern about the safety of basket lifting. It alleges that her Honour erred in law when she concluded that, in circumstances where Carroll's refusal to basket lift on Gearbulk vessels was based on an honest and reasonable concern about safety (as found by her Honour), Byers was not entitled to override the stance being taken by

Carroll. It was contextually relevant for the Magistrate to find that Carroll's refusal based on a safety concern was honest and reasonable. Insofar as she further concluded that Byers was not entitled to override it, that conclusion is one based both upon findings of fact and determinations of law. For reasons I have already indicated, I am not persuaded that the Magistrate was bound on the evidence to conclude that Byers was entitled to treat basket lifting as lawful at the time of the incident on the Jacamar, or that he was entitled to override Carroll's safety concerns as 7 October 2007. Further, and in any event, as I have said I do not accept that the evidence showed that a direction as such was given on 7 October 2007.

76. Even if I am wrong with respect to the above conclusions, I do not accept that an error as to Byers' entitlement to override Carroll's refusal to basket lift for safety reasons demonstrates that the Magistrate's conclusion with respect to Byers' motivation is vitiated. That conclusion was a negative conclusion of fact. Namely, the Magistrate was not persuaded by the evidence of Patricks' contention. The inadequacy of Byers' evidence to which the Magistrate referred in the first factor identified by her was sufficient in itself to justify the conclusion. If the Magistrate erred with respect to a subsidiary part of one of the contextual circumstances she then referred to, this would not in my view demonstrate that her ultimate conclusion was erroneous. This is because it is not sufficient to show that the Magistrate's decision was possibly affected by error of law. It must be shown that it was vitiated by error of law.[24]

77. It was submitted on behalf of the appellant that any error of law in the course of the trial before the Magistrate or in her Reasons would entitle the appellant to a retrial. Reference was made to *Weiss v R*[25] and the absence of any proviso applicable to proceedings of the type before me and equivalent to the proviso contained in s568(1) of the *Crimes Act* 1958 (Vic).

78. I do not accept this submission. In *Walford v McKinney*,[26] Tadgell JA considered s92 of the *Magistrates' Court Act* 1989 and concluded that it was intended to operate in the same way as the power exercised over 80 years by this Court in respect of orders to review relating to decisions of the Magistrates' Court. Tadgell JA stated:

> I consider that in such a case we should take the same view upon an appeal under s92 of the *Magistrates' Court Act* 1989 as that which used to be taken upon orders to review. That is to say, the court should not regard itself as bound to quash a conviction, just because evidence is wrongly admitted for the prosecution, if of opinion that the defendant, on the evidence properly admitted, clearly should have been convicted. It is true that an appeal under the present procedure is not to be assimilated in all respects to what was the procedure by way of review. The Supreme Court is, however, entitled pursuant to s92(7), after hearing and determining the appeal, to make such order as it thinks appropriate. Merely to demonstrate error of law is insufficient to warrant the appeal's being allowed: there must be some practical justification for allowing it.[27]

79. Callaway JA said:

> The authorities to which Tadgell JA has referred demonstrate, in my opinion, that, there being no challenge to the statement that the finding was inevitable, the appeal to this court is bound to fail. I would decide the case on that basis.[28]

80. The terms of s92 of the *Magistrates' Court Act* 1989 do not vary materially from those under the legislation governing this appeal.

81. Section 272(9) of the *Criminal Procedure Act* 2009 reserves a discretion to this Court with respect to the grant of relief on appeals on questions of law:

> After hearing and determining the appeal, the Supreme Court may make any order that it thinks appropriate, including an order remitting the case for rehearing to the Magistrates' Court with or without any direction in law.

82. In my view, the Court retains a discretion not to interfere with a Magistrate's decision to convict in circumstances where, although that decision has been accompanied by some error of law, this Court is persuaded that that error is not a vitiating error.

83. Accordingly, the challenges based on the Magistrate's Reasons with respect to motive fail in respect to charges 1 and 5. They fail either because they are misconceived, are not supported by the grounds particularised, do not raise matters which demonstrate that the Magistrate failed

to apply subjective test to the reasons of Byers for the conduct in issue, do not acknowledge the fundamental deficiencies in the evidence of Byers, do not acknowledge factual findings made by the Magistrate which were open to her, fail to acknowledge that the Magistrate was entitled to make findings as to the context in which she was not persuaded, and ultimately raise matters which, even if I am wrong in concluding involved no error, concern subsidiary aspects of the Magistrate's findings which would not vitiate her conclusions.

84. For the sake of completeness, I record that none of the grounds of appeal directly address the Magistrate's finding as to motive with respect to the motive for the warning letter. In respect of that letter, her Honour found as follows:

> 81. Mr Byers maintained that the reason for the letter was lack of communication. He said Mr Carroll's raising a concern about basket lifting on the Jacamar Arrow was 'absolutely not' the real reason for the letter. He also did not know if the letter would have issued without that. I reject this. It flies in the face of all the other evidence. Nothing else happened between the meeting of 1 October and 11 October to prompt the letter. I am satisfied that if Mr Carroll had agreed to basket lift on the Jacamar Arrow or in the meeting of 1 October, the letter would not have issued.
>
> 82. Mr Dougall recalled speaking to Mr Byers about the letter. According to him, their conversation was about how to deal with Mr Carroll's refusal to basket lift. The chain of correspondence between Mr Carroll and Mr Byers after this letter further illustrates that the main issue was basket lifting. Even counsel for the Accused recognised the refusal to basket lift as the precipitating factor for the letter.
>
> 83. Mr Byers also said the motivation behind the letter was 'to get Frank back in the fold' because he valued his work. The threatening nature of the letter is totally inconsistent with that motivation and I do not accept it.
>
> 84. Mr Byers' constant refusal to acknowledge the obvious connection between basket lifting and his actions reflects on his credit generally and specifically in relation to his asserted motivations. It undermines his stance that he 'never took disciplinary action against Frank because of occupational health and safety, rather it was lack of communication and things like that'.
>
> The Accused has not discharged the onus to disprove the alleged motivation. Accordingly, I am satisfied beyond reasonable doubt that the raising of a safety issue was the dominant reason for the letter.[29]

85. As I have said, Byers' evidence did not assert that the reason for the warning letter was failure to comply with a lawful direction. In my view, her Honour's specific conclusions with respect to motive on charge 2 were also open to her on the evidence. She was entitled to find that Patricks had not discharged the onus to disprove that the raising of a safety issue was not the dominant reason for the letter.

86. I do not accept the submission that [84] of the Reasons shows the Magistrate misconceived the issue of Byers' subjective intent. It simply states circumstances bearing on Byers' credit and rejects the motive relating to communication which he asserted.

The second issue – was it open to the Magistrate to make a finding of 'injury' in the relevant sense

87. Grounds 4 and 5 of the notice of appeal allege:

> 4. Her Honour erred in law in finding, contrary to the particulars alleged in Charge 1, that Mr Carroll suffered an injury.
>
> **Particulars**
> (i) The Defendant requested particulars of Charge 1 from the Informant, asking 'How the Defendant injury Mr Carroll in his employment'.
> (ii) The Informant responded that 'On or about 1 October 2007, Alan Byers stood Mr Carroll down from his job for a week without pay'.
> (iii) Mr Carroll lost no pay, and Her Honour mistook the evidence in finding that the particularised injury in fact occurred.
>
> 5. Further or in the alternative, Her Honour erred in law in finding that Mr Carroll suffered an injury in circumstances where he lost no pay.

88. Her Honour's Reasons record that the appellant disputed Carroll had suffered an injury because after he was stood down without pay the Maritime Union of Australia intervened and Carroll's pay was reinstated before there was any interruption to his normal pay cycle.

89. Her Honour further found:

> 52. Mr Carroll was not asked his view as to the effect of this action on him, but his evidence that he regarded being stood down on full pay in January as a detriment because it went on his file and was a black mark to his name, would seem equally applicable to the events of 1 October.
>
> I am satisfied that Mr Carroll was injured within the meaning of section 76(1) when he was stood down without pay in this meeting. The fact that he ultimately suffered no financial detriment does not mean there was no injury. Mr Byers' words were not just a statement of inchoate intent. They were implemented. That is, until the decision was made to restore Mr Carroll's pay, he was in fact stood down without pay. After the decision was made to restore his pay, he was still stood down. He was clearly singled out and treated differently to other employees and differently to the manner in which he was normally treated. *Squires'* case establishes that being stood down even on full pay constitutes an injury. On proper analysis, I am not persuaded that any of the cases referred to by counsel for the Accused undermine this proposition.[30]

90. It was accepted by the respondent that, as Patricks submits, the word 'injury' was to be understood in the sense explained in *Patrick Stevedores No 2*.[31] In that case the High Court considered s298K(1)(a) of the *Workplace Relations Act* 1996 (Cth) which was as follows:

> An employer must not for prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:
> (a) dismiss an employee;
>
> (b) injure an employee in his or her employment;
>
> (c) alter the position of an employee to the employee's prejudice; ...

91. The High Court observed:

> Paragraph (a) covers termination of employment; para (b) covers injury of any compensable kind; para (c) is a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.

Ground 4

92. It is submitted on behalf of Patricks first that the evidence did not establish injury as particularised in the relevant charge. I do not accept this submission. The relevant charge was:

> On or about 1 October 2007 at Geelong in the State of Victoria pursuant to section 76(2) and section 76(4) of the *Occupational Health and Safety Act* 2004 ('the Act') you were guilty of an offence in that as an employer you injured an employee, namely Frank Carroll, in employment for the dominant reason that he raised an issue or concern about health and safety to you.

93. The particulars provided of charge 1 were:
On or about 1 October 2007, Alan Byers stood Mr Carroll down from his job for a week without pay.

94. The offence is alleged to have occurred on 1 October 2007 not by the continuing failure to pay thereafter. The facts particularised as constituting the relevant offence were established by evidence. Accordingly, ground 4 fails.

Ground 5

95. It is next submitted that the standing down of Carroll without pay could not constitute injury in the relevant sense if thereafter he in fact suffered no loss of pay.

96. I do not accept this submission either. In my view, the standing down itself constituted injury. Further, the injury was to be assessed as at the date it was inflicted, not by reference to its subsequent consequences.

97. In *Squires v Flight Stewards Association of Australia*,[32] Ellicott J considered a case concerned with an alleged breach of provisions of the *Conciliation and Arbitration Act* 1904 (Cth).

It was alleged that Qantas was asked by the Flight Stewards Association to take action in breach of s5(1) of that Act. The action Qantas was asked to take could not be said to contravene s5(1) unless the dismissal of the informant constituted injury to him in his employment or altered his position to his prejudice. His Honour was satisfied that the FSAA had asked Qantas by letter to stand the informant down from his employment as a flight steward during the month of June. He was not satisfied that this requirement would have resulted in a loss of pay if complied with. His Honour held:

> In my opinion action by an employer in standing an employee down even on full pay for a month is action which injures the employee in his employment. In taking such action, he is being singled out by the employer and treated differently to other employees and for reasons not associated with the manner in which he is performing his work. An employee may not be entitled, under his contract of service, to demand work at a particular time or place, but when he is stood down, not because work in unavailable, but because of a request by his union, the taking of that step is, in my opinion, an injury to him in his employment.
>
> The words 'injure in his employment' are in the context of s5 words of wide import. I do not regard them as referring only to financial injury or injury involving the deprivation of rights which the employee has under a contract of service. They are, in my view, applicable to any circumstances where an employee in the course of his employment is treated substantially differently to the manner in which he or she is ordinarily treated and where that treatment can be seen to be injurious or prejudicial. Singling him out to be stood down from his employment for a period in circumstances where his fellow employees won't work with him for that period is in my view clearly an injury to him in his employment.[33]

98. In my view, it was open to her Honour to conclude that the standing down of Carroll without pay constituted injury to him in the relevant sense, despite the fact that his entitlement to pay was subsequently restored.

99. The injury was inflicted upon the standing down and was theoretically compensable at that point in respect of the anticipated loss of pay. It was also, as her Honour found, an injury in the sense explained by Ellicott J in *Squires*. Carroll's evidence justified a conclusion that he suffered injury because the standing down went on his file and was a black mark against his name.

The third issue – sentence

100. Ground 6 of the notice of appeal is that:

> Her Honour erred in law in failing to give any or any adequate reasons for the quantum of the penalty imposed.

101. Her Honour was under a duty to provide reasons for her sentencing decision. The reasons of a sentencing judge should cover all the important considerations so as to be sufficient to meet both the offender's right to know why he or she has received the particular sentence and the public's right to understand the process of sentencing.[34]

102. However, reasons for sentence need not be full and detailed in every case. A sentencing judge is not obliged to state in his or her reasons for judgment every single matter that he or she has taken into account, nor to give reasons for every step he or she takes.[35]

103. Her Honour's core Reasons for Sentence were as follows:

> The three charges I found proved are all inter-related. Two of the charges occurred during a meeting on 1 October and one occurred ten days later. I have found the motive for each of the charges, or the offences, was the same, namely Mr Carroll's refusal to basket lift. This amounted to the raising of a safety concern. I do not agree that the principles of double jeopardy dictate that I should not impose a penalty on more than one of the offences.
>
> Although they are inter-related each charge relates to a discrete piece of conduct justifying its own punishment. That said, in my view the circumstances of the offending lends itself to the imposition of an aggregate penalty even if the offences are founded on the same facts and are part of a series of offences of the same, or similar, character. Further, the offences are all of similar gravity.
>
> Dr Neal submitted that a non-conviction penalty was warranted and further, that an appropriate

disposition was an order under s136, or an adjourned undertaking under s137. No specific proposal was outlined in relation to s136, that is of the *Occupational Health and Safety Act*, of course. I agree with Mr Borenstein that in that event it would be practically impossible for me to proceed under s136. I do not have enough information to simply come up with a specified project myself. In the event I would only make an order under s.136 in addition to, and not instead of, any other penalty which is not what Dr Neal sought.

In my view the offences are too serious and need for general deterrence is too great to proceed in any other way than a fine with conviction. I have taken into account that the accused has no prior or subsequent convictions and that the recording of a conviction will no doubt adversely affect the accused's reputation and may also have adverse economic and/or industrial impact on the accused. However, these considerations are outweighed by the seriousness of the offences and need to deter other employers similarly minded to discriminate against their employees.

The maximum penalty for each offence is a fine of $275,300. It has been agreed between the parties that the jurisdictional maximum that I am able to impose as a Magistrate per charge is actually the same figure. I accept that the offences are [not] in the 'worst case' category, such as would be the case for an employer that was seeking to impose upon its employees an unsafe work practice.

First, Mr Carroll was not actually fired, nor did he ultimately lose any pay. I also accept that Mr Byers honestly believed that basket lifting on Gearbulk vessels was safe. I do not accept that he considered it safer than double wrapping. The fact that Mr Byers considered basket lifting to be safe does reduce his, and hence the accused's, moral culpability somewhat.

However, in my view it does not put the offences at the lower end of seriousness. Mr Carroll had an honest and reasonable concern about the safety of basket lifting, whatever Mr Byers' personal views he was not entitled to over-ride Mr Carroll's concerns by threatening and intimidating behaviour. Rather than following proper procedure this is what he did; his conduct in threatening to sack Mr Carroll, stand him down without pay, and send him a warning letter were serious instances of discriminatory behaviour. The offences cannot be excused as mere personality clashes.

Mr Byers was a very senior person within the accused's employ, he had a position of power over Mr Carroll. I am obliged to take into account the impact of the offending (indistinct) on the victim. I have read the two victim impact statements of Mr Carroll and his wife. Allowing for the fact they have canvassed issues beyond the charges I have found proved, it is still obvious that they have both been significantly affected by the offending conduct. As it was entitled to do, the accused pleaded not guilty to the charges. I have not penalised it for that, however it is axiomatic that such a course leads to the loss of a discount in penalty that would otherwise flow. Further, by its conduct in contesting the charges the accused has shown no remorse. On the contrary, the conduct of the defence amounted to an attempted justification of the offending behaviour.

I was told that the accused voluntarily embarked on harassment training with WorkSafe at its three Victorian work sites in September and October 2010. However, it appears that this training consisted of a meeting at each site between employees, managers and a representative of WorkSafe and I do not consider that as particularly significant or indicative of remorse.

Although lack of any acknowledgement of guilt by the accused is a concern, I am not satisfied on the evidence before me that specific deterrence should play a significant role in the sentencing process. I am not satisfied there was systemic discrimination within the accused's work force, and further the experience of these court proceedings should create a sufficient deterrent to similar conduct.

In fixing the amount of the fine, I have taken into account that the accused will be subject to a significant costs order. I also take into account that the accused will have incurred significant expenses in defending the proceedings, although I think this is of little weight given that I will be making a costs order in its favour in relation to those charges it has successfully defended, and that much of the rest of the expense was due to its decision to defend the charges I have found proved.

As far as costs are concerned, given the two charges I have dismissed are quite distinct from the charges I have found proved and occurred at a different time, I think it is appropriate to make a costs order which takes into account their dismissal. It seems to me the only practical way I can do this is by making some estimate of the time of the hearing which was devoted to those charges. As best I can determine, this figure is approximately 20 per cent.

Accordingly, I order that the accused is to pay 80 per cent of the informant's costs. I further order that the informant is to pay 20 per cent of the accused's costs. In (indistinct) of agreement as to quantum of the costs there is liberty for two parties to apply.

> As far as penalty is concerned, taking into account all the competing considerations on all three charges, I convict and fine the accused an aggregate amount of $180,000.[36]

104. In my view, the Reasons for Sentence do disclose the critical considerations which her Honour took into account in sentencing. They also disclose a logical process of reasoning. The Reasons for Sentence refer to the critical matters upon which Patricks placed reliance, namely the interrelated nature of the charges, the absence of prior convictions, the potential adverse effects of recording a conviction upon Patricks, the fact that the case was not of the worst kind in which an employer requires a worker to adopt a demonstrably unsafe practice, the fact that Carroll was not fired and did not actually lose pay, Byers' belief that the lifting technique was safe, the undertaking of harassment training, the asserted relatively low significance of special deterrence and liability for associated costs of the hearing.

105. There is nothing in this ground.

Ground 7 – current sentencing practice

106. Ground 7 is that her Honour failed to take current sentencing practice for occupational health and safety offences into account.

107. Only one previous sentence with respect to the relevant offence was cited to her Honour. That sentence was fixed in a context where the Magistrate identified the maximum she could impose as $100,000.

108. I do not accept that the one other sentence can be said to establish 'current sentencing practice' in any relevant sense. Further, I do not infer that the Magistrate failed to have regard to it simply because she did not refer to it in her Reasons.[37]

109. It must also be recognised that comparison of fines is not to be equated with comparison of terms of imprisonment. Section 50 of the *Sentencing Act* 1991 requires the sentencer to take account as far as practicable of the financial circumstances of the offender and the nature of the burden that a fine will impose. Section 50(5)(b) further enables a court to have regard to the value of any benefit derived by the offender as a result of the offence. These commercial considerations materially detract from the sense in which a particular fine can necessarily be seen as objectively reflecting the gravity of an offence.

110. Insofar as Patricks sought to rely on sentences for other offences under the OHS Act, I do not accept that sentences in respect of different offences constituted relevant sentencing practice. Likewise, I do not accept that sentences imposed in respect of analogous offences in a different State were relevant. This ground fails.

Ground 8 – the imposition of a conviction

111. Ground 8 is that her Honour erred in imposing conviction for these offences in light of the absence of prior convictions, the isolated nature of the conduct and the low level of culpability.

112. In my view, it was plainly within the discretion of the Court to impose a conviction. The appellant raised aspects of the circumstances of the case which favoured a lower rather than a higher penalty, but there were others which favoured both conviction and a substantial penalty. The Magistrate could not be said to be bound as a matter of law not to convict. The course she took in this regard was plainly open to her. Indeed, in my view, it was the only course properly open to her.

Ground 9 – manifest excess

113. The concepts of manifest inadequacy and manifest excess were addressed recently by the High Court in the following terms:

> The single ground of appeal advanced by the Director in each appeal to the Court of Criminal Appeal was that the sentences imposed at first instance were manifestly inadequate. That is, the error which the Director asserted that the sentencing judge had made was of the last kind mentioned in *House v The King*. By asserting manifest inadequacy, the Director alleged that the result embodied in the sentencing judge's orders was 'unreasonable or plainly unjust'. The Director did not allege that any specific error could be identified (as would be the case if the sentencing judge were said to have acted

upon wrong principle, allowed extraneous or irrelevant matters to guide or affect her, mistaken the facts or not taken into account some material considerations). Rather, the Director asserted that it was to be inferred from the result that there was 'a failure properly to exercise the discretion which the law reposes in the court of first instance'.

As was said in *Dinsdale v The Queen*, '[m]anifest inadequacy of sentence, like manifest excess, is a conclusion'. And, as the plurality pointed out in *Wong*, appellate intervention on the ground that a sentence is manifestly excessive or manifestly inadequate *'is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases'.* Rather, as the plurality went on to say in *Wong*, '[i]ntervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons'. But, by its very nature, that is a conclusion that does not admit of lengthy exposition. And, in the present matters, the Court of Criminal Appeal, having described the circumstances of the offending and the personal circumstances of the offenders, said that 'the sentence imposed in these matters is so far outside the range of sentences available that there must have been error'.

The Court of Criminal Appeal also said that 'manifest error is fundamentally intuitive'. That is not right. No doubt, as the Court went on to say, manifest error 'arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it'. *But what reveals manifest excess, or inadequacy, of sentence is consideration of all of the matters that are relevant to fixing the sentence.* The references made by the Court of Criminal Appeal to the circumstances of the offending and the personal circumstances of each offender were, therefore, important elements in the reasons of the Court of Criminal Appeal.[38]

114. In *House v The King*,[39] the High Court stated:

The appeal is a full one on law and fact (*Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*; *R v Hush: Ex parte Devanny*). But the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred. Unlike courts of criminal appeal, this court has not been given a special or particular power to review sentences imposed upon convicted persons. Its authority to do so belongs to it only in virtue of its general appellate power. But even with respect to the particular jurisdiction conferred on courts of criminal appeal, limitations upon the manner in which it will be exercised have been formulated. Lord Alverstone LCJ said that it must appear that the judge imposing the sentence had proceeded upon wrong principles or given undue weight to some of the facts. Lord Reading LCJ said the court will not interfere because its members would have given a less sentence, but only if the sentence appealed from is manifestly wrong. Lord Hewart LCJ has said that the court only interferes on matters of principle and on the ground of substantial miscarriage of justice.[40]

115. These principles were again stated by Kitto J in *Australian Coal and Shale Employees' Federation v The Commonwealth*:[41]

I shall not repeat the references I made in *Lovell v Lovell* to cases of the highest authority which appear to me to establish that the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.[42]

116. In *R v Dole*,[43] Gowans J stated:

> These principles have been applied by this Court to appeals to reduce a sentence (*R v Taylor and O'Meally* [1958] VicRp 46; [1958] VR 285). And they have been applied as well to appeals designed to increase the sentence (*R v Butler* [1971] VicRp 109; [1971] VR 892). There must be either identifiable error or the sentence must be, not merely arguably but obviously wrong.[44]

117. I accept that the notion of manifest excess is akin to that of *Wednesbury* unreasonableness.[45] In *Dwyer v Calco*,[46] the High Court stated:

> The exercise of what was called in *House v The King* 'a judicial discretion' to impose a particular sentence or to make a particular order under a power conferred by family provision legislation, attracts, upon subsequent exercise of a 'general appellate power', principles somewhat akin to those developed in public law. The well-known passage in *House v The King* illustrates this.[47]

118. It follows that manifest excess may evidence an error of law by enabling an inference to be drawn either that the decision maker has had regard to extraneous circumstances, or to wrong principles. In *R v Winter*,[48] Maxwell P stated:

> The contention that the sentence is manifestly excessive does not assert specific error. Rather, it asserts error falling into the 'unreasonableness' or 'implicit error' category. The sentence must be obviously, or strikingly, excessive, such that the appeal court is entitled to conclude that there was no proper exercise of the sentencing discretion at all. The court must conclude that, in some way not apparent on the face of the sentencing reasons, the sentencing discretion has miscarried.[49]

119. Thus in *Buzzo Holdings Pty Ltd v Loison*,[50] Kaye J, when considering in the context of an appeal on questions of law a fine imposed upon the holder of a liquor licence and the disqualification of a company director from holding a liquor licence for nine years, stated:

> In addition, I am of the view that the period of disqualification imposed by the Tribunal was so excessive that the Tribunal must have taken into account some erroneous consideration in arriving at the decision to impose it...[51]

120. Nevertheless, it remains true that some 80 years of decisions of this Court by way of the order to review procedure and a subsequent 20 years of decisions of this Court with respect to appeals on questions of law from Magistrates' decisions pursuant, first to s92 of the *Magistrates' Court Act* 1989 and then to s272 of the *Criminal Procedure Act* 2009, do not reveal any extensive application of the notion of manifest excess in the review of sentencing decisions made by the Magistrates' Court on the basis of error of law.

121. I turn to the decisions to which I was referred in argument. In *Stratton v Bestabergh Pty Ltd*,[52] Hansen J stated (in a case of alleged manifest inadequacy of penalty):

> There can be no doubt that under section 92 a party to a criminal proceeding can appeal from the Magistrates' Court to the Supreme Court on a question of sentence or penalty as long as it raises a question of law and manifest inadequacy of penalty does raise such a question.

122. McDonald J accepted this proposition in *Y v F*,[53] a case of alleged manifest inadequacy.

123. In turn, T Forrest J in *DPP v Moroney*[54] referred to these authorities and held that a question of manifest inadequacy of penalty raised a question of law.

124. Each of these three decisions also noted the observations of Lush J in *Bakker v Stewart; Wilson v Kerr*:[55]

> For my part, I make no secret of the fact that I think it is undesirable that this Court should be called upon to review sentence matters upon order nisi to review, and I do not think that it should review the sentences of Magistrates' Courts in the same way as the Full Court reviews sentences imposed by the County Court or by single judges of this Court. Whatever powers, if any, this Court has in the matter, they should be reserved for cases which can be regarded as extreme.[56]

125. In my opinion, this observation remains applicable to appeals on questions of law under the *Criminal Procedure Act* 2009. More particularly, this Court should not on an appeal on questions of law proceed as if it had the powers of a court on an appeal by way of rehearing.

126. Accepting that Patricks seeks to raise an error of the last kind mentioned in *House v The King*,[57] then as the High Court stated in *Hili*,[58] manifest excess cannot be justified simply by comparison with other sentences. Nor is it to be treated as something recognised on a fundamentally intuitive basis. What must be considered is all of the matters that are relevant to fixing the sentence.

127. In undertaking this exercise there is a fundamental difference in the evidentiary framework within which the relevant factors fall to be addressed on an appeal by way of rehearing (such as that from the County Court or a trial judge of this Court to the Court of Appeal) and, by contrast, on an appeal on questions of law.

128. On appeal by way of rehearing, the Court of Appeal may review the evidence before the sentencing court for the purpose of assessing the relevant circumstances for itself. It may also allow fresh evidence to be adduced.[59]

129. In *Dwyer v Calco*,[60] the High Court observed:

> A statutory provision of this nature generally has been regarded as providing for that species of appeal in which the appellate court proceeds on the basis of the record before the court from which the appeal is taken, together with any fresh evidence which may be admitted pursuant to such powers to admit such evidence as may be conferred upon the appellate court.
>
> In *State Rivers and Water Supply Commission v McIntyre*, Adam J described the appeal for which s 74 [of the *County Court Act*] provides as 'a rehearing *de novo* upon the material before the learned judge', and as requiring the appellate court 'to consider for itself what was the proper order to have been made'.[61]

130. On appeal on a question of law, the Court must assess the relevant circumstances on the view of the evidence and inferences from the evidence most favourable to the respondent.[62] The guiding principles were summarised in Stephen J in *Spurling v Development Underwriting (Vic) Pty Ltd*:[63]

> In the case of decisions of magistrates the position in Victoria is well established by a line of decisions culminating in *Taylor v Armour and Co Pty Ltd*, in which the Full Court of this State held that in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. In saying this the Full Court stated that it was following the view of Herring CJ in *Young v Paddle Bros Pty Ltd*. The Chief Justice, in that case, adopted as the test whether 'on any reasonable view of the evidence that decision can be supported'; a party aggrieved can thus only succeed if a decision contrary to the view of the magistrate is 'the only possible decision that the evidence on any reasonable view can support.'[64]

131. It follows that not only is the sentencing decision of a Magistrate discretionary in the sense stated in *House v The King* but the factual context in which the discretion falls to be assessed is not one capable of supplement with fresh evidence, nor one in which the appeal court can take a different view of the underlying facts from that taken by the Magistrate, save where the Magistrate's view was simply not open to her or him. The present appeal is not 'a full one on law and fact' as described in *House v The King*.[65]

132. The circumstances in which this Court can take the view that a sentencing Magistrate 'mistakes the facts' is constrained because the appeal to this Court is one on questions of law only.

133. This said, I turn back to her Honour's Reasons. There is no basis to infer from those Reasons that she has had regard to erroneous principles.

134. The most contentious aspect of the sentence to my mind is the manner in which the sequential disciplinary steps in a single course of conduct are to be treated by way of aggregate penalty.

135. It is a basic principle of sentencing law that a sentence should never exceed that which

can be justified as proportionate to the gravity of the crime committed in the light of its subjective circumstances.[66]

136. That principle is reflected in the *Sentencing Act* 1991.[67]

137. In the case of multiple offences, the total sentences must in turn be proportionate to the totality of offending. In *Postiglione v The Queen*,[68] McHugh J said:

> The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved. ...
>
> Where necessary, the Court must adjust the *prima facie* length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.[69]

138. Patricks submitted that given two of three offences arose out of a meeting on 1 October 2007 and the letter constituting the third offence followed as a consequence of that meeting, there should have been considerably lower penalties for the subsidiary offences and hence a lower aggregate penalty pursuant to s55 of the *Sentencing Act* 1991.

139. Counsel for Patricks relied on the decision in *Construction Forestry Mining and Energy Union v Williams*.[70]

140. In response, counsel for the respondent referred to the subsequent decision of the Federal Court in *Construction Forestry Mining and Energy Union v Cahill*.[71] This decision conveniently summarises the relevant principles. A 'course of conduct' or the 'one transaction principle' is not a concept peculiar to the industrial context. It is a concept which is applicable in other sentencing situations. The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. In turn, this requires careful identification of what is 'the same criminality as a matter of fact in the particular case'. Middleton and Gordon JJ stated:

> As noted above ... the principle recognises that where there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, the court must ensure that the offender is not punished twice for the same conduct. In other words, where two offences arise as a result of the same or related conduct that is not a disentitling factor to the application of the single course of conduct principle but a reason why a court *may* have regard to that principle, as one of the applicable sentencing principles, to guide it in the exercise of the sentencing discretion. It is a tool of analysis which a court is not compelled to utilise.
>
> A court is not compelled to utilise the principle because, as Owen JA said in *Royerat*, '[d]iscretionary judgments require the weighing of elements, not the formulation of adjustable rules or benchmarks'. The exercise of the sentencing discretion does not fall to be exercised in a vacuum. It is a matter of judgment to be exercised according to the facts of each case and having regard to conflicting sentencing objectives. For the same reasons, and contrary to the appellants' submissions, even if offences are properly characterised as arising from the one transaction or a single course of conduct, a judge is not obliged to apply concurrent terms if the resulting effective term fails to reflect the degree of criminality involved. Or, in the case of fines, a judge is not obliged to start from the premise that if there is a single course of conduct, the maximum fine is, in the present case, $110,000 for the CFMEU and $22,000 in the case of Mr Mates.[72]

141. In the current case, her Honour expressly addressed the relationship between the three offences in issue and her Reasons do not disclose any error of principle. Nor can it be positively inferred from the aggregate sentence imposed that she misapplied sentencing principles including the principle of totality.

142. In *Hanks v R*,[73] Bongiorno JA stated:

> The term 'manifest excess' is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood and unmistakable. It must be so far outside the range of a reasonable

discretionary judgment as to itself bespeak error.[74]

143. Although in the present case I would not myself have imposed a fine as heavy as that imposed by the Magistrate, I am not persuaded that the penalties imposed by her Honour were manifestly excessive in the relevant sense, having regard in particular to the deliberate nature of the discriminatory conduct, the relationship within which it occurred, the nature of the safety issue, the impact upon the employee and the significance of s76 in the scheme of the OHS Act.

144. Accordingly, this appeal will be dismissed.

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[1] 136 CLR 676; (1976) 12 ALR 605; (1976) 51 ALJR 235.
[2] Patricks was acquitted of charges 3 and 4.
[3] *James Reid Chasser (Victorian WorkCover Authority) v Patrick Stevedoring Pty Ltd* (Unreported, Magistrates' Court of Victoria, Carlin M, 17 January 2011) ('Magistrate's Reasons'), [13]-[15] (citations omitted, emphasis added).
[4] Magistrate's Reasons, [49] (citations omitted).
[5] Pursuant to s60 of the OHS Act, a Health and Safety Representative may issue a Provisional Improvement Notice (PIN) to an employer if they believe that a person is contravening a provision of the Act, requiring the employer to remedy the contravention. A PIN may only be issued after the representative has consulted with the employer regarding the contravention and the means of remedying it.
[6] Magistrate's Reasons, [28]-[40] (citations omitted; emphasis in original).
[7] Magistrate's Reasons, [51], [54]-[55], [59]-[60], [65]-[69] (citations omitted).
[8] Magistrate's Reasons, [72]-[76] (citations omitted).
[9] [1999] FCA 899; (1999) 93 FCR 34; (1999) 165 ALR 67; (1999) 94 IR 244.
[10] [1979] FCA 22; (1979) 26 ALR 430; (1979) 41 FLR 1; (1979) 42 LGRA 307.
[11] Ibid, 83 [295].
[12] 136 CLR 676; (1976) 12 ALR 605; (1976) 51 ALJR 235.
[13] Ibid, 617-8.
[14] [1995] VicRp 70; [1995] 2 VR 508.
[15] *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.
[16] [1995] VicRp 70; [1995] 2 VR 508, 520 (citations omitted).
[17] Magistrate's Reasons, [69].
[18] Section 35(1) provides:
(1) When doing any of the following things, an employer must so far as is reasonably practicable consult in accordance with this Part with the employees of the employer who are or are likely to be directly affected by the employer doing that thing— ...
(f) proposing changes, that may affect the health or safety of employees of the employer, to any of the following—
(i) a workplace under the employer's management and control;
(ii) the plant, substances or other things used at such a workplace;
(iii) the conduct of the work performed at such a workplace; ...
[19] Magistrate's Reasons, [66].
[20] (i) Mr Byers' belief that basket lifting of H beam steel on Gearbulk ships was used safely both internationally and in most other Australian ports and was safer than double wrapping.
(ii) Mr Byers' belief that basket lifting was preferred by Gearbulk and that it saved money for his employer.
(iii) Mr Byers' belief that basket lifting as a lawful technique and identified in Industry manuals such as the *Worksafe Guide to Rigging* (Ex 8) and the *Bullivants Chart* (Ex 7) and that he was lawfully entitled as manager to require an undertaking from Mr Carroll to follow that technique.
(iv) The fact that on 1 October 2007, Mr Byers sought an assurance from Mr Carroll that he would basket lift steel on the next Gearbulk ship and that this assurance was not given.
[21] [1938] HCA 44; (1938) 60 CLR 601.
[22] Ibid, 621-2 (citations omitted).
[23] *Ericsson v Popovski* [2000] VSCA 52; (2000) 1 VR 260.
[24] *Myers v Medical Practitioners Board* [2007] VSCA 163; (2007) 18 VR 48, 60 [46] per Warren CJ; *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 90; *Portland Properties Pty Ltd v Melbourne & Metropolitan Board of Works* (1971) 38 LGRA 6, 18 per Smith J.
[25] [2005] HCA 81; (2005) 224 CLR 300; (2005) 223 ALR 662; (2005) 80 ALJR 444; 158 A Crim R 133.
[26] [1996] VICSC 57; [1997] 2 VR 353.
[27] Ibid, 356.
[28] Ibid, 357.
[29] Magistrate's Reasons, [81]-[85] (citations omitted).
[30] Magistrate's Reasons, [52]-[53] (citations omitted).
[31] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* [1998] HCA 30; (1998) 195 CLR 1, 18; (1998) 153 ALR 643; (1998) 16 ACLC 1041; (1998) 8 Leg Rep 2; (1998) 79 IR 339.
[32] (1982) 2 IR 155 ('*Squires*').
[33] Ibid, 164.

[34] *R v Koumis* [2008] VSCA 84; (2008) 18 VR 434, 439 [63]-[64]; (2008) 184 A Crim R 421.
[35] *Valayamkandathil v R* [2010] VSCA 260, [27] per Buchanan and Neave JJA, citing *R v Giakis* [1988] VicRp 88; [1988] VR 973, 977; (1988) 33 A Crim R 22.
[36] Magistrate's Reasons for Sentence, delivered 3 February 2011.
[37] *Harrison v Mansfield* [1953] VicLawRp 53; [1953] VLR 369, 379; [1953] ALR 724.
[38] *Hili v The Queen; Jones v The Queen* [2010] HCA 45, [58]-[60]; (2010) 242 CLR 520; (2010) 272 ALR 465; (2010) 85 ALJR 195; (2010) 204 A Crim R 434; (2010) 78 ATR 11 (citations omitted; emphasis added). See also *DPP v Karazisis* [2010] VSCA 350, [127]; (2010) 31 VR 634; (2010) 206 A Crim R 14 where Ashley, Redlich and Weinberg JJA (with whom Warren CJ and Maxwell P agreed) stated 'it must be shown that it was not reasonably open to the sentencing judge to come to the sentencing conclusion which he/she did *if proper weight had been given to all the relevant circumstances of the offending and the offender*' (emphasis added).
[39] [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202.
[40] Ibid, 504-505 (citations omitted).
[41] [1953] HCA 25; (1953) 94 CLR 621.
[42] Ibid, 627 (citations omitted).
[43] [1975] VicRp 75; [1975] VR 754.
[44] Ibid, 761.
[45] *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59, 75-76 [67]-[69]; (2003) 77 ALJR 1165; (2003) 73 ALD 1; (2003) 24 Leg Rep 10 per McHugh and Gummow JJ.
[46] [2008] HCA 13; (2008) 234 CLR 124; (2008) 244 ALR 257; (2008) 82 ALJR 669.
[47] Ibid, 138 [39] (citations omitted).
[48] [2006] VSCA 144.
[49] Ibid, [55]. See also, *R v St Albans Crown Court Ex Parte Cinnamond* [1981] 1 QB 480, 484; [1981] 1 All ER 802; [1981] Crim LR 243; [1981] 2 WLR 681; (1980) 145 JP 277.
[50] (2007) VSC 31.
[51] Ibid, [31].
[52] Unreported, Supreme Court of Victoria, Hansen J, 9 September 1994.
[53] [2002] VSC 166; (2002) 130 A Crim R 11, 15 [14].
[54] [2009] VSC 584, [21]-[22].
[55] [1980] VicRp 2; [1980] VR 17.
[56] Ibid, 25.
[57] [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202.
[58] [2010] HCA 45; (2010) 242 CLR 520; (2010) 272 ALR 465; (2010) 85 ALJR 195; (2010) 204 A Crim R 434; (2010) 78 ATR 11.
[59] *County Court Act* 1958 s74(3); *Supreme Court(General Civil Procedure) Rules* r64.22(2),(3); *Criminal Procedure Act* 2009, ss276, 278.
[60] [2008] HCA 13; (2008) 234 CLR 124; (2008) 244 ALR 257; (2008) 82 ALJR 669.
[61] Ibid, 133 [22] and [23] (citations omitted).
[62] *ISPT Pty Ltd v Melbourne City Council* [2008] VSCA 180; (2008) 20 VR 447, 465 [69]; (2008) 162 LGERA 59.
[63] [1973] VicRp 1; [1973] VR 1; (1972) 30 LGRA 19.
[64] Ibid, 11 (citations omitted).
[65] Cited at [115], above.
[66] *Veen v The Queen [No 2]* [1988] HCA 14; (1988) 164 CLR 465; (1988) 77 ALR 385; 33 A Crim R 230; 62 ALJR 224.
[67] See ss5(1)(a), 5(2)(b) and (d), 5(3)-(7).
[68] [1997] HCA 26; (1997) 189 CLR 295; (1997) 145 ALR 408; (1997) 94 A Crim R 397; (1997) 71 ALJR 875; (1997) 15 Leg Rep C1.
[69] Ibid, 307-8 (citations omitted). See also *Azzopardi v R* [2011] VSCA 372, [56] following per Redlich JA.
[70] [2009] FCAFC 171; (2009) 262 ALR 417; (2009) 191 IR 445.
[71] [2010] FCAFC 39; (2010) 269 ALR 1; (2010) 194 IR 461.
[72] Ibid, 13 [41]-[42] (citations omitted; emphasis in original).
[73] [2011] VSCA 7.
[74] Ibid, [22].

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