FEDERAL COURT OF AUSTRALIA

Clarke v Beiler Constructions Pty Ltd as trustee for Fox Trading Trust [2026] FCA 734

File number:	SAD 185 of 2023
Judgment of:	**MCDONALD J**
Date of judgment:	12 June 2026
Catchwords:	**INDUSTRIAL LAW** – sexual harassment – where applicant alleges multiple contraventions of s 527D of *Fair Work Act 2009* (Cth) (**FW Act**) – where applicant claims employer vicariously liable for alleged sexual harassment pursuant to s 527E of FW Act – whether conduct occurred as alleged – whether conduct of a “sexual nature” – whether conduct “unwelcome” – some allegations of sexual harassment established on balance of probabilities – employer vicariously liable for established contraventions **INDUSTRIAL LAW** – adverse action – where applicant alleges contraventions of ss 340 and 351 of FW Act – whether applicant exercised workplace right – meaning of “complaint” under s 341 of FW Act – discrimination – where applicant alleges decision not to return her to fly-in, fly-out site made on basis of sex – whether adverse action – whether adverse action taken for “prohibited reason” – adverse action claims not established **INDUSTRIAL LAW** – award contravention – where applicant alleges employer contravened s 45 of FW Act by contravening provisions in *Building and Construction General On-site Award 2020* – underpayment of wages and allowances – failure to pay travel time and other entitlements – failure to provide pay slips – failure to provide Fair Work Information Statement
Legislation:	*Fair Work Act 2009* (Cth) ss 12, 44, 45, 55, 61, 90, 117, 125, 323, 340, 341, 342, 345, 351, 361, 362, 527D, 527E, 536, 550, 557C *Evidence Act 1995* (Cth) s 140 *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) *Sex Discrimination Act 1984* (Cth) s 28A *Fair Work Regulations 2009* (Cth) regs 3.33, 3.46

	Building and Construction General On-site Award 2020 cll 16, 18, 20, 21, 22, 25, 26, 28, 29, 31, 32
Cases cited:	*Alam v National Australia Bank Ltd* (2021) 288 FCR 301; [2021] FCAFC 178 *Briginshaw v Briginshaw* (1938) 60 CLR 336 *Cummins South Pacific Pty Ltd v Keenan* (2020) 281 FCR 421; [2020] FCAFC 204 *Fair Work Ombudsman v Woolworths Group Ltd* (2025) 343 IR 340; [2025] FCA 1092 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442; [2023] HCA 32 *Hughes (trading as Beesley and Hughes Lawyers) v Hill* (2020) 277 FCR 511; [2020] FCAFC 126 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 *Rejfek v McElroy* (1965) 112 CLR 517 *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 314 ALR 346; [2014] FCA 271 *Taylor v August and Pemberton Pty Ltd* (2023) 328 IR 1; [2023] FCA 1313 *Vitality Works Australia Pty Ltd v Yelda (No 2)* (2021) 105 NSWLR 403; [2021] NSWCA 147
Division:	Fair Work Division
Registry:	South Australia
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	428
Date of hearing:	9-13 December 2024 4-5 March 2025 7 May 2025
Counsel for the Applicant:	On 9-13 December 2024, Ms K L Sheridan and Ms S Platel On 4-5 March 2025 and 7 May 2025, Ms S Platel
Solicitor for the Applicant:	Working Women's Centre SA
Counsel for the First, Second, Fourth and Fifth Respondents:	Ms K A Edwards

Solicitor for the First, Second, Fourth and Fifth Respondents:	Irwell Law Pty Ltd
Counsel for the Third Respondent:	Mr S D G Apps
Solicitor for the Third Respondent:	Andersons Solicitors

ORDERS

SAD 185 of 2023

BETWEEN:	**ELISA CLARKE** Applicant
AND:	**BEILER CONSTRUCTIONS PTY LTD ATF FOX TRADING TRUST (ABN 64 272 336 390)** First Respondent
	SCOTT BEILER Second Respondent
	ANDREW FUSS (and others named in the Schedule) Third Respondent

ORDER MADE BY: **MCDONALD J**

DATE OF ORDER: **12 JUNE 2026**

THE COURT DECLARES THAT:

1. The fourth respondent contravened s 527D of the *Fair Work Act 2009* (Cth) (**FW Act**) by sexually harassing the applicant on two occasions.
2. The first respondent is vicariously liable for the conduct of the fourth respondent amounting to sexual harassment pursuant to s 527E of the FW Act.
3. The first respondent contravened s 45 of the FW Act by reason of its having contravened each of the following provisions of the *Building and Construction General On-site Award 2020* (**Award**):
   (a) cl 16 of the Award, by failing to make payment of the applicant's wages in full, in respect of each of:
      (i) the week that included 22 June 2023;
      (ii) the week that included 28, 29 and 30 June 2023; and
      (iii) 3 July 2023.
   (b) cl 20.3, by failing to make payment to the applicant each week on or before the end of Thursday;

(c) cl 21(a) of the Award, by failing to pay the applicant the tools allowance in full in respect of all pay periods over the period of her employment;

(d) cl 22 of the Award, by failing to pay the applicant the industry allowance in full in respect of all pay periods over the period of her employment;

(e) cl 25.6(a)(i) and (b)(i) of the Award, by failing to pay the applicant for a total of 8.25 hours at ordinary rates, for periods of travel to and from Kangaroo Island;

(f) cl 26.1(a) of the Award, by failing to pay the applicant the travel pattern allowance in respect of 32 days when she started and finished work on a construction site, working in the Adelaide area;

(g) cl 28.2(a) of the Award, by failing to make superannuation contributions to the applicant, calculated by reference to the wages which were lawfully required to be paid to her, not only those that were in fact paid to her; and

(h) cl 31.2(b) of the Award, by failing to pay the applicant annual leave loading in respect of periods of annual leave taken by her, and in relation to the accrued annual leave paid out to her upon the termination of her employment.

4. The first respondent contravened s 323(1)(a) of the FW Act by failing to make payment of the applicant's wages in full, in respect of each of:

   (a) the week that included 22 June 2023;

   (b) the week that included 28, 29 and 30 June 2023; and

   (c) 3 July 2023,

   the conduct constituting this contravention being the same as the conduct constituting the contravention of cl 16 of the Award.

5. The first respondent contravened s 536(1) of the FW Act by failing to provide the applicant with pay slips for several pay periods.

6. The second respondent was involved in the contravention by the first respondent of s 536(1) of the FW Act, in respect of the payments of wages made to Ms Clarke on each of 29 April 2023, 6 May 2023, 12 May 2023 and 20 May 2023.

7. The first respondent contravened s 44 of the FW Act by failing to provide the applicant with a copy of the Fair Work Information Statement as required by s 125 of the FW Act.

THE COURT ORDERS THAT:

1. The matter be listed for case management hearing on a date to be fixed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCDONALD J:

INTRODUCTION

1 In April 2023, the applicant, Elisa Clarke, commenced employment with the first respondent, Beiler Constructions Pty Ltd (**Beiler Constructions**) as a full-time adult apprentice carpenter who was to work at the Southern Ocean Lodge construction site on Kangaroo Island and at other sites in the general Adelaide metropolitan area. In May 2023, the second respondent, Scott Beiler, who is the director of Beiler Constructions, informed Ms Clarke that she would not be returning to work at the Kangaroo Island site.

2 Ms Clarke alleges that two employees of Beiler Constructions, the fourth respondent, James Emmerson, and the fifth respondent, Julien Lenepveu, engaged in unwelcome conduct of a sexual nature towards Ms Clarke in contravention of s 527D of the *Fair Work Act 2009* (Cth) (**FW Act**). Ms Clarke also alleges that, on 6 May 2023, Mr Emmerson made an unwelcome request for sexual favours to Ms Clarke while working at the Kangaroo Island site.

3 Ms Clarke alleges that Beiler Constructions is vicariously liable for the alleged conduct of Mr Emmerson and Mr Lenepveu pursuant to s 527E of the FW Act. Mr Emmerson denies the conduct which Ms Clarke alleges he engaged in. Mr Lenepveu submits that one question he asked Ms Clarke, which is alleged to have constituted sexual harassment, was in response to a conversation that Ms Clarke initiated with him and did not amount to sexual harassment. He denies the other conduct which Ms Clarke alleges he engaged in which is said to constitute sexual harassment. In its defence, Beiler Constructions denied vicarious liability for the alleged sexual harassment contraventions, but in closing submissions it accepted that, *if* the contraventions occurred, it will be vicariously liable for any such contravention committed by Mr Emmerson or Mr Lenepveu.

4 Ms Clarke was the only female employee of Beiler Constructions who worked on the Kangaroo Island site. Ms Clarke alleges that the fact that she had formed a sexual relationship with another person who worked for Beiler Constructions, James Stott, played a significant role in Mr Beiler's decision to remove her from working on Kangaroo Island. She alleges that, in directing her not to work at the Kangaroo Island site, Beiler Constructions took adverse action against her and did so for reasons that included her sex, in contravention of s 351(1) of the FW Act. Beiler Constructions denies both that the decision that Ms Clarke should no longer

work at the Kangaroo Island site was an adverse action and that it was made for reasons that included her sex.

5 Ms Clarke further alleges that Beiler Constructions contravened various clauses of the *Building and Construction General On-site Award 2020* (**Award**), resulting in an underpayment of her wages, allowances and entitlements, and that Beiler Constructions consequently engaged in several contraventions of ss 44, 45, 90 and 323 of the FW Act.

6 Ms Clarke's case also initially included claims against the third respondent, Andrew Fuss, who was represented separately from the other respondents. Part way through the trial, Ms Clarke reached agreement with Mr Fuss to settle the claims made against him. During the trial, leave was granted to Ms Clarke to file a second further amended originating application and a second further amended statement of claim (**2FASOC**), in which she no longer pursued any of the allegations regarding the conduct of Mr Fuss, including her claims against Beiler Constructions based on the proposition that Beiler Constructions was vicariously liable for conduct allegedly engaged in by Mr Fuss. Thereafter, Mr Fuss took no further part in the trial. Until that time Mr Fuss had been actively involved in the proceeding, and represented by counsel, but had not given evidence. Some witnesses were thus cross-examined by counsel for Mr Fuss before the settlement.

7 Beiler Constructions, Mr Beiler, Mr Emmerson and Mr Lenepveu (collectively, **Beiler respondents**) had common representation.

8 Although Beiler Constructions initially denied that it had contravened the FW Act in any respect, its position changed after the completion of the oral evidence. Mr Beiler filed a further affidavit in which he accepted that Beiler Constructions had contravened certain provisions of the FW Act. He also accepted that Ms Clarke had been underpaid in certain respects, that Beiler Constructions was prepared to make payment of what Mr Beiler calculated to be the amount of the underpayment, and that Mr Beiler and Beiler Constructions would pay any amount in respect of any pecuniary penalty that may be awarded in respect of the admitted contraventions of the FW Act. Ms Clarke maintains that the contraventions were more extensive than those which have now been accepted by Mr Beiler.

9 Ms Clarke seeks compensation and pecuniary penalty orders for each alleged contravention of the FW Act. However, the parties agreed to limit the issues at trial to questions of liability, with

any issue regarding the amount of compensation or pecuniary penalties to be addressed separately.

10 For the reasons that follow, I have concluded that Ms Clarke has established some of the contraventions of the FW Act which she alleges against Mr Emmerson and Beiler Constructions. Other alleged contraventions are not established. The Court will need to hear from the parties in relation to compensation and/or penalties in respect of the contraventions that I have found to be established.

BACKGROUND FACTS

11 At the time of the hearing, Ms Clarke was approximately 43 years of age and an apprentice carpenter. In May 2021, Ms Clarke commenced her carpentry apprenticeship with Master Builders Association SA (**MBA**) pursuant to a contract approved by the Traineeship and Apprenticeship Service (SA). Around this time, she also commenced her Certificate III in Carpentry through TAFE.

12 Mr Beiler is a qualified carpenter and has been the sole director and owner of Beiler Constructions since its incorporation in March 2010. Beiler Constructions regularly employs apprentices to work on construction sites on small and large residential and commercial projects. Ms Clarke first encountered Beiler Constructions in 2021 while working with its employees on a construction site, and on 7 May 2021, she completed a trial shift with the company.

13 From May 2021 to mid-February 2023, MBA placed Ms Clarke with a host employer, Felmeri Homes (**Felmeri**). In late February 2023, MBA advised Ms Clarke she would no longer be placed with Felmeri. MBA also informed Ms Clarke that her apprenticeship would be suspended until another host employer could be located. In response to questioning in cross-examination, Ms Clarke said for the first time that, following this, she did in fact continue to perform some work for Felmeri for a short time, but not in the capacity of an apprentice.

14 On 20 March 2023, Ms Clarke contacted Mr Beiler via text message to enquire whether he had a position available for an apprentice carpenter. Mr Beiler confirmed that he had work available and told Ms Clarke that she would be paid a flat rate of $25 per hour, but that he would have to contact MBA to discuss Ms Clarke's apprenticeship. On or around 27 March 2023, Mr Beiler called Ms Clarke to indicate that, if employed by Beiler Constructions, she would be required to work at the Kangaroo Island site on a "fly-in, fly-out" basis, and at other sites located in and

around Adelaide. Ms Clarke confirmed that she could accommodate the travel to and from Kangaroo Island.

15 On 28 March 2023, Ms Clarke signed a contract to transfer her apprenticeship from MBA to Beiler Constructions. From 31 March 2023 to 2 April 2023, before the transfer took effect, Beiler Constructions engaged Ms Clarke as a labourer. Ms Clarke commenced full-time employment as a carpentry apprentice with Beiler Constructions from 3 April 2023.

16 In accordance with a fly-in, fly-out roster maintained by Beiler Constructions, Ms Clarke was assigned to work at the Kangaroo Island site for three periods or "swings", between 17 April 2023 and 24 May 2023. During this period, Ms Clarke alleges that she was subjected to the following conduct by co-workers employed by Beiler Constructions:

(a) Mr Emmerson, who was Ms Clarke's senior site supervisor at the time, asked Ms Clarke whether Mr Stott, a colleague with whom she was having an intimate relationship, had a "sweaty dick", or words to that effect;

(b) Mr Lenepveu, a qualified carpenter who supervised Ms Clarke on occasion, asked her whether she intended to introduce Mr Stott to her children, and then proceeded to laugh with other colleagues who had heard the comment;

(c) Mr Emmerson asked Ms Clarke for oral sex while walking to the mess hall at the Kangaroo Island site one Saturday morning; and

(d) Mr Lenepveu asked Ms Clarke whether she liked anal sex.

17 On or around 25 May 2023, Mr Beiler informed Ms Clarke that she would no longer be working on Kangaroo Island but would instead work only on sites in the Adelaide area. After that, Ms Clarke worked on sites in and around Adelaide, only.

18 Ms Clarke's last shift with Beiler Constructions was on 3 July 2023. In practical terms, her employment ceased when she sent Mr Beiler a text message on the afternoon of 3 July 2023 which stated that she was "done". The precise events leading up to the end of Ms Clarke's employment, and their characterisation, are in dispute.

19 On 14 December 2023, Ms Clarke commenced the present proceeding by filing an originating application under the FW Act and a statement of claim. These pleadings were subsequently amended on 22 March 2024, 14 October 2024 and 20 March 2025.

20 The hearing of the proceeding commenced on 9 December 2024, for five days, and was further adjourned to 4 March 2025 with up to four further days set aside for evidence, and further days set aside for closing submissions at a later time. It was on 28 February 2025 that Ms Clarke's legal representative advised the Court that she had resolved her claims against Mr Fuss.

SUMMARY OF CLAIMS

21 Ms Clarke's claims against the Beiler respondents can generally be grouped into the following categories:

(a) claims alleging conduct by Mr Emmerson and Mr Lenepveu towards Ms Clarke which constituted sexual harassment in contravention of s 527D of the FW Act, for which Ms Clarke also claims that Beiler Constructions is vicariously liable by operation of s 527E of the FW Act;

(b) claims alleging that Beiler Constructions took adverse action against Ms Clarke for:

  (i) the reason of, or for reasons including, her sex, in contravention of s 351 of the FW Act, and for which Ms Clarke claims Mr Beiler was "involved" in the contravention of s 351 pursuant to the operation of s 550 of the FW Act; and

  (ii) a prohibited reason or reasons in contravention of s 340 of the FW Act;

(c) claims against Beiler Constructions for failing to comply with certain clauses of the Award in contravention of s 45 of the FW Act;

(d) a claim against Beiler Constructions for failing to pay Ms Clarke, as its employee, amounts payable to her in full in accordance with s 323 of the FW Act;

(e) claims against Beiler Constructions and Mr Beiler (as a person involved in the contravention) for alleged contraventions of s 536 of the FW Act for failing to provide Ms Clarke with pay slips in respect of amounts of money transferred to her between 6 April and 20 May 2023 for work performed as an employee of Beiler Constructions;

(f) a claim that Mr Beiler either knowingly or recklessly made a false or misleading representation to Ms Clarke regarding her entitlement to be paid as a full-time employee in contravention of s 345 of the FW Act; and

(g) a claim against Beiler Constructions for failing to provide Ms Clarke with a Fair Work Information Statement, in contravention of s 125 (which is a provision of the National Employment Standards (**NES**)), and consequently also s 44 of the FW Act.

22 By affidavit dated 7 April 2025, following the close of evidence, Mr Beiler conceded that the rate that Ms Clarke had been paid while employed by Beiler Constructions was below the rate that should have been paid in accordance with the Award, once applicable allowances and annual leave loading were taken into account.

LEGAL PRINCIPLES

Relevant provisions of the *Fair Work Act 2009* (Cth)

23 Sections 44 and 45 are found within Part 2-1 of Chapter 2 of the FW Act, which is entitled "Terms and conditions of employment".

24 Section 44 states that an employer must not contravene a provision of the NES. Section 44 is a civil remedy provision. The NES are contained in Part 2-2 of the FW Act and provide for various minimum employment conditions relating to weekly hours of work, working arrangements, leave entitlements, public holidays, notice of termination and redundancy pay, and the provision to employees of a Fair Work Information Statement. The NES cannot be displaced, even if an enterprise agreement or modern award contains terms that have the same (or substantially the same) effect as provisions of the NES, as permitted by s 55(5) of the FW Act: see FW Act, s 61.

25 Section 45 states that a person must not contravene a term of a modern award. Section 45 is a civil remedy provision. The relevant modern award applicable to Ms Clarke's employment was the Award. The provisions of the Award which Beiler Constructions is alleged to have contravened are identified at [45]-[55] below.

26 Ms Clarke alleges that, by failing to make payment of the full amount of her accrued but unused annual leave upon termination of her employment, Beiler Constructions contravened s 90(2) of the FW Act. Section 90 is one of the provisions of the NES. It provides as follows:

> **90 Payment for annual leave**
>
> (1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.
>
> (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

27 Ms Clarke alleges that Beiler Constructions contravened s 125 of the FW Act, which requires employers to provide each new employee with a copy of the Fair Work Information Statement before, or as soon as practicable after, the employee starts their employment.

28 Ms Clarke alleges that Beiler Constructions contravened s 323 of the FW Act. Section 323 states as follows:

> **323 Method and frequency of payment**
>
> (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
>
> (a) in full (except as provided by section 324); and
>
> (b) in money by one, or a combination, of the methods referred to in subsection (2); and
>
> (c) at least monthly.
>
> …
>
> Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:
>
> (a) incentive-based payments and bonuses;
>
> (b) loadings;
>
> (c) monetary allowances;
>
> (d) overtime or penalty rates;
>
> (e) leave payments.
>
> (2) The methods are as follows:
>
> (a) cash;
>
> (b) cheque, money order, postal order or similar order, payable to the employee;
>
> (c) the use of an electronic funds transfer system to credit an account held by the employee;
>
> (d) a method authorised under a modern award or an enterprise agreement.
>
> (3) Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.
>
> (Certain notes omitted.)

29 Ms Clarke alleges that Beiler Constructions failed to make payment for all days in Ms Clarke's notice period, up until and including 7 July 2023, and that, in so doing, it contravened s 117 of the FW Act. Section 117(1) provides that "[a]n employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the

termination". Section 117(2) provides that the employer must not terminate an employee's employment unless the time between the giving of the notice and the termination of the employment is at least the minimum period of notice (which in Ms Clarke's case was one week), or the employer has made payment in lieu of notice.

30 Ms Clarke alleges that, for a period, Beiler Constructions failed to provide her with pay slips, in contravention of s 536 of the FW Act:

> **536 Employer obligations in relation to pay slips**
>
> (1) An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.
>
> (2) The pay slip must:
>
> (a) if a form is prescribed by the regulations—be in that form; and
>
> (b) include any information prescribed by the regulations; and
>
> (c) not include any information prescribed by the regulations in relation to paid family and domestic violence leave; and
>
> (d) comply with any requirements prescribed by the regulations in relation to the reporting of paid family and domestic violence leave.
>
> (3) An employer must not give a pay slip for the purposes of this section that the employer knows is false or misleading.
>
> (3A) A pay slip is not false or misleading merely because it complies with regulations made for the purposes of paragraph (2)(d).
>
> (4) Subsection (3) does not apply if the pay slip is not false or misleading in a material particular.
>
> (Notes omitted.)

31 Ms Clarke alleges that Mr Beiler was involved in the contravention of s 536 of the FW Act by reason of s 550 of the FW Act, which is as follows:

> **550 Involvement in contravention treated in same way as actual contravention**
>
> (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
>
> (2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or otherwise; or

> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
>
> (d) has conspired with others to effect the contravention.
>
> (Notes omitted.)

32 Ms Clarke alleges that Mr Beiler contravened s 345 of the FW Act by making a misrepresentation to her about her workplace rights. Section 345 provides:

> (1) A person must not knowingly or recklessly make a false or misleading representation about:
>
> (a) the workplace rights of another person; or
>
> (b) the exercise, or the effect of the exercise, of a workplace right by another person.
>
> (2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.
>
> (Note omitted.)

33 Ms Clarke contends that Beiler Constructions took adverse action against her in contravention of s 340 of the FW Act, and discriminated against her in contravention of s 351 of the FW Act. Section 340 and the other provisions which inform its content, to which reference is made below, are found within Part 3-1 of the FW Act, which is entitled "General Protections".

34 Section 340 provides as follows:

> **340 Protection**
>
> (1) A person must not take adverse action against another person:
>
> (a) because the other person:
>
> (i) has a workplace right; or
>
> (ii) has, or has not, exercised a workplace right; or
>
> (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
>
> (b) to prevent the exercise of a workplace right by the other person.
>
> (2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.
>
> (Notes omitted.)

35 Section 341 (as in force at the time of Ms Clarke's employment with Beiler Constructions) provides the following in relation to the meaning of a "workplace right":

> **341 Meaning of *workplace right***
>
> *Meaning of* ***workplace right***
>
> (1) A person has a ***workplace right*** if the person:
>
> (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
>
> (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
>
> (c) is able to make a complaint or inquiry:
>
> (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
>
> (ii) if the person is an employee – in relation to his or her employment.
>
> *Meaning of* ***process or proceedings under a workplace law or workplace instrument***
>
> (2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument:***
>
> (a) a conference conducted or hearing held by the FWC;
>
> (b) court proceedings under a workplace law or workplace instrument;
>
> (c) protected industrial action;
>
> (d) a protected action ballot;
>
> (e) making, varying or terminating an enterprise agreement;
>
> (f) appointing, or terminating the appointment of, a bargaining representative;
>
> (g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;
>
> (h) agreeing to cash out paid annual leave or paid personal/carer's leave;
>
> (i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);
>
> (j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
>
> (k) any other process or proceedings under a workplace law or workplace instrument.
>
> …

36 As set out in the table in s 342, an employer takes "adverse action" against an employee if the employer (a) dismisses the employee; (b) injures the employee in his or her employment; (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.

37 Section 351 of the FW Act (as in force during the relevant period) sets out the circumstances in which an employer is taken to have discriminated against an employee. It relevantly provides:

> **351 Discrimination**
>
> (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
>
> (2) However, subsection (1) does not apply to action that is:
>
> (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
>
> (b) taken because of the inherent requirements of the particular position concerned; or
>
> (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:
>
> (i) in good faith; and
>
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
>
> …
>
> (Note omitted.)

38 Ms Clarke alleges that Mr Emmerson and Mr Lenepveu contravened s 527D(1) of the FW Act and that Beiler Constructions is vicariously liable for their conduct and thereby contravened s 527E. Sections 527D and 527E of the FW Act were introduced in 2022 by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) and were intended to cover current and prospective employees at work, echoing the protections provided by s 28B of the *Sex Discrimination Act 1984* (Cth) (**SD Act**).

39 Sexual harassment in connection with work is prohibited by s 527D of the FW Act:

> **527D Prohibiting sexual harassment in connection with work**
>
> *Prohibition*
>
> (1) A person (the ***first person***) must not sexually harass another person (the ***second person***) who is:
>
> (a) a worker in a business or undertaking; or
>
> (b) seeking to become a worker in a particular business or undertaking; or
>
> (c) a person conducting a business or undertaking;
>
> if the harassment occurs in connection with the second person being a person of the kind mentioned in paragraph (a), (b) or (c).
>
> *Meaning of worker*
>
> (2) For the purposes of this Part, ***worker*** has the same meaning as in the *Work Health and Safety Act 2011*.
>
> *When a person is a worker in a business or undertaking*
>
> (3) For the purposes of this Act, if a person (the ***first person***) is a worker because the first person carries out work for a person conducting a business or undertaking, the first person is a worker in the business or undertaking.
>
> *Other expressions*
>
> (4) Subject to subsections (2) and (3), an expression used in this section that is defined for the purposes of the *Work Health and Safety Act 2011* has the same meaning in this section as it has in that Act.
>
> (Notes omitted.)

40 Section 12 of the FW Act adopts the meaning of "sexually harass" given by s 28A of the SD Act. Section 28A of the SD Act states:

> **28A Meaning of *sexual harassment***
>
> (1) For the purposes of this Act, a person sexually harasses another person (the ***person harassed***) if:
>
> (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
>
> (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
>
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;

(c) any disability of the person harassed;

(d) any other relevant circumstance.

(2) In this section:

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

41 The three essential elements to s 28A of the SD Act were explained by Perram J (with whom Collier and Reeves JJ agreed) in *Hughes (trading as Beesley and Hughes Lawyers) v Hill* (2020) 277 FCR 511; [2020] FCAFC 126 at 516-17 [22]-[24], as follows:

> *First*, the Court is directed by subs (1) to ask itself whether there has been any of three identified forms of conduct: a sexual advance, a request for sexual favours or other conduct of a sexual nature. Each of these concepts involves the application of a defined legal standard to the facts as found. The Court must determine, on those facts, whether there was a sexual advance, a request for sexual favours or other conduct of a sexual nature. It is a question for the Court and it is a question of fact. In determining whether there has been conduct of a sexual nature the Court applies, of course, the definition of that term in s 28A(2).
>
> *Secondly*, if an identified form of conduct is established subs (1) also requires that it must be "unwelcome" to the person allegedly harassed. This is a question of fact which is subjective and which turns only on the allegedly harassed person's attitude to the conduct at the time. Even if the Court has concluded under the first limb that one person has engaged in conduct of a sexual nature towards another person, this will not constitute sexual harassment under the provision if it was not actually unwelcome in this sense. Ordinarily this will be proved by the person allegedly harassed giving evidence that the conduct was unwelcome but that mode of proof is not dictated by the statute and proof of this fact, like proof of any other fact, may be done by a variety of means. In some cases, I suspect this is one, the unwelcome quality of the conduct will be painfully obvious.
>
> *Thirdly*, once it be established that there was conduct of a sexual nature towards another and that the conduct was unwelcome, the provision imposes an objective delimitation on the provision's ambit. The "circumstances" must be such that a reasonable person would have anticipated the possibility that the person allegedly harassed would be offended, humiliated or intimidated by the conduct. The "circumstances" are defined broadly in s 28A(1A) and include, importantly for this case, the relationship between the harasser and the harassed.

42 In *Vitality Works Australia Pty Ltd v Yelda (No 2)* (2021) 105 NSWLR 403; [2021] NSWCA 147 (***Vitality Works***) at 425 [97], Bell P and Payne JA (with whom McCallum JA agreed) said,

in relation to the phrase "other unwelcome conduct of a sexual nature", as used in comparable state legislation:

> The phrase "other unwelcome conduct of a sexual nature" is not a term of art but, rather, an ordinary English expression in common usage. It is a term of broad import that should not be narrowly construed. The breadth of the conduct amounting to "other unwelcome conduct of a sexual nature" should not be read down or confined by reference to limits or restrictions which do not appear in the statute.

43 Their Honours noted that "'other unwelcome conduct of a sexual nature' includes sexually suggestive 'jokes' and comments, including 'jokes' and comments containing a double meaning" (at 426 [100]; see also at 428 [108]). Insofar as the conduct in question is the making of a statement, the concept of "other unwelcome conduct of a sexual nature" is not limited to statements that are sexually explicit: *Vitality Works* at 428 [109]; *Taylor v August and Pemberton Pty Ltd* (2023) 328 IR 1; [2023] FCA 1313 at 13 [51], 57 [356].

44 Section 527E of the FW Act makes an employer vicariously liable for any sexual harassment perpetrated by one of its employees or agents, unless the employer proves that it took all reasonable steps to prevent the employee or agent from doing acts that would contravene s 527D. In the end, the Beiler respondents did not seek to rely on that exception.

Relevant clauses of the *Building and Construction General On-site Award 2020*

45 As has been noted, Ms Clarke contends that Beiler Constructions contravened various provisions of the Award, and consequently contravened s 45 of the FW Act on multiple occasions. The provisions of the Award which are relevant to the claims made by Ms Clarke include the following.

46 Clause 16 of the Award states that the ordinary working hours are 38 hours during a week between 7.00am and 6.00pm, Monday to Friday.

47 Clause 18 of the Award deals with meal breaks and states that at no later than five hours after the start of each shift there must be a cessation of work of 30 minutes' duration to allow shift workers to take a meal break which will count as time worked. An employee must also not be required to work more than five hours without a break for a meal. Most relevantly to the present claim, cl 18.3 provides that a paid rest period of 10 minutes must be allowed between 9.00am and 11.00am.

48 Clause 20 of the Award deals with the payment of wages, how an employee should be paid, when they should be paid, and how payment is dealt with upon termination. Relevantly, the

clause states that payments must be paid and available to the employee no later than the end of ordinary hours of work on Thursday of each working week.

49 Clause 21 of the Award provides for expense-related allowances, including a weekly tools allowance, reimbursement or provision of required tools, protective clothing and equipment and meal allowances where overtime is worked. It also requires employers to compensate employees for damage to, or loss of, tools, clothing or prescribed items incurred in specified work-related circumstances.

50 Clause 22 of the Award requires payment of a weekly industry allowance, in addition to minimum rates. At the relevant time, the applicable amounts were $56.45 per week for employees in the general building and construction, civil construction, and metal and engineering construction industries, and $45.16 per week for employees in the residential building and construction industry. The allowance was payable for all purposes of the Award, meaning that it was taken into account in identifying the base rate of pay for purposes such as calculating overtime.

51 Clause 25 of the Award deals with living away from home/distant work. Relevantly, it provides that, where an employee is required by an employer to travel to a distant work site, they are entitled to, among other things, have their reasonable transport costs covered and to be paid for time spent traveling up to eight hours per day at ordinary rates. This applies to travel to and from a distant work site.

52 Clause 26 of the Award sets out travelling time entitlements. The clause provides for a daily travel allowance where employees start and finish work on construction sites and another travel option is not provided. The clause provides for payment for time and costs if employees are transferred between sites during working hours, and reimbursement for use of a private vehicle. The clause also addresses travel outside ordinary hours, distant work payments and reduced pro-rata entitlements for apprentices.

53 Clause 28 of the Award relevantly imposes an obligation on an employer to make such superannuation contributions for the benefit of an employee as are required to avoid the employer being required to pay the superannuation guarantee charge with respect to that employee.

54 Clause 29 of the Award deals with overtime provisions and states that an employer may require an employee to work reasonable hours at overtime rates. The clause provides rates for the payment of overtime rates expressed as a multiple of the employee's ordinary hourly rate.

55 Clause 31 of the Award covers annual leave entitlements, which are governed by the NES. The clause outlines how annual leave is to be taken and paid, and deals with the payment of annual leave loading. Clause 32 of the Award deals with personal/carer's leave and compassionate leave. The clause states that these entitlements are also provided for in the NES.

Principles relevant to proof and the assessment of witnesses

56 Generally speaking, Ms Clarke bears the onus of proof in relation to any fact that is necessary to establish a contravention of provisions of the FW Act or the Award. However, where, in relation to an allegation of contravention of a provision of Part 3-1 of the FW Act, Ms Clarke establishes that particular action was taken, and alleges that it was taken for a particular reason (or for reasons that include a particular reason) or with a particular intent, the onus of proof in relation to the reason why the action was taken falls on the person who is alleged to have taken that action to prove otherwise: see FW Act, s 361(1). This principle applies in relation to each of the adverse action claims.

57 In deciding whether I am satisfied that facts relevant to Ms Clarke's case are proved on the balance of probabilities, I must take into account the nature of the cause of action, the nature of the subject-matter of the proceeding and the gravity of the matters alleged: *Evidence Act 1995* (Cth), s 140. The strength of the evidence necessary to establish facts on the balance of probabilities may vary according to the nature of what it is sought to prove: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 170-1 (Mason CJ, Brennan, Deane and Gaudron JJ). The gravity of the fact sought to be proved and of the potential consequences of making a finding of fact are relevant to "the degree of persuasion of the mind according to the balance of probabilities": *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442; [2023] HCA 32 at 471 [57] (Kiefel CJ, Gageler and Jagot JJ), quoting *Rejfek v McElroy* (1965) 112 CLR 517 at 521. I must only make a positive finding of facts which Ms Clarke is required to prove if, taking these considerations into account, I "feel an actual persuasion of its occurrence or existence": *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 (Dixon J).

58 In this case, these principles are perhaps most relevant to my assessment of the evidence of Ms Clarke and the other witnesses in relation to the claims that Mr Emmerson and

Mr Lenepveu engaged in conduct amounting to sexual harassment. An allegation of sexual harassment is of a serious kind, and there are potentially serious personal consequences for a person who is found to have engaged in sexual harassment. I take this into account in assessing the evidence of Ms Clarke, Mr Emmerson and Mr Lenepveu in determining whether I am satisfied that the conduct alleged by Ms Clarke occurred on the balance of probabilities. I proceed on the basis that the principles to which I have referred are also generally applicable to Ms Clarke's allegations that the respondents engaged in conduct amounting to adverse action against Ms Clarke in the course of her employment, and to the other allegations that they contravened the principles of the FW Act or the Award.

GENERAL ASSESSMENT OF WITNESSES

59 Ms Clarke gave evidence. She also adduced evidence from the following additional witnesses:

(a) Lachlan Clarke, Ms Clarke's adult son

(b) Dr Stuart Clarke, Ms Clarke's father; and

(c) Margaret Clarke, Ms Clarke's mother.

60 Ms Clarke and Lachlan Clarke were cross-examined. The evidence of Stuart Clarke and Margaret Clarke was not challenged by the respondents, and they were not required for cross-examination.

61 The following witnesses gave evidence on behalf of the Beiler respondents:

(a) Scott Beiler;

(b) James Emmerson;

(c) Julien Lenepveu;

(d) Benjamin Widmer,

(e) Jed Gauci;

(f) Joshua Gordon; and

(g) James Stott.

62 Some of the Beiler respondents' witnesses, such as Mr Lenepveu, Mr Widmer and Mr Gordon, were, at the time they gave their evidence, no longer employed by Beiler Constructions. It was put to several of the other witnesses that their loyalty to Mr Beiler would affect the honesty of their evidence. The fact that some of the witnesses called by the Beiler respondents work for Beiler Constructions does not itself provide a compelling basis to find these witnesses falsified

their evidence in order to protect the Beiler respondents. Rather, I prefer to assess their evidence against the other evidence in the case to the extent that that is possible.

Ms Clarke

63 It was evident that Ms Clarke found the process of giving evidence and being cross-examined difficult and stressful.

64 Counsel for the Beiler respondents cross-examined Ms Clarke aggressively. Ms Clarke did not respond well to this style of questioning. She was defensive and emotional. She repeatedly sought guidance from the Court as to how she should respond, or declined to answer questions. On numerous occasions, Ms Clarke gave answers that were not responsive to questions (such as saying whether a statement was true, when she was actually being asked whether the statement had been made), and she occasionally responded by reflecting on the object of the questioning rather than responding to the substance of the question itself. Ms Clarke at times appeared to contradict herself. She became argumentative.

65 An example of the flavour of the cross-examination of Ms Clarke by counsel for the Beiler respondents is provided by the following exchange:

> Q: And Mr Beiler never told you that you only had one week left to work, didn't he?
>
> A: Yes. At that phone call, yes, he ..... on the three weeks- - -
>
> Q: The - - -?
>
> A: - - - the total three weeks.
>
> Q: Well, the agreement you always had with him was three weeks and – wasn't it?
>
> A: Yes, it was.
>
> Q: And you knew you didn't get paid unless you worked that three weeks, didn't you?
>
> A: I'm not entirely sure about that. I've never been in this situation before.
>
> Q: So you – is it your evidence before this court you expected to be paid if you didn't actually turn up to work?
>
> A: I'm not saying that at all.
>
> Q: And that's because you know that's nonsense, isn't it?
>
> A: No.
>
> Q: So you don't think that's nonsense?
>
> A: I don't know how to answer you.

Q: And you don't want to answer me, do you?

A: No, I want to answer you, but I want to answer you truthfully, where you don't twist my words and turn me into a liar.

66 It is hardly surprising that, at the end of this exchange, Ms Clarke found herself unable to know how to answer, or that she felt that her words were being twisted.

67 This approach to cross-examination was at least partially successful, in that it resulted in Ms Clarke's giving evidence that lacked coherence in some important respects, and which was, on several topics, confused or uncertain. The Beiler respondents submit that Ms Clarke's co-operation with the forensic process of cross-examination "was demonstrated over and again, to be low to non-existent". I accept that Ms Clarke was loose with details, and in some instances tended to give answers that contradicted her affidavit evidence. At some points, Ms Clarke gave the impression of trying to say what she thought her case should be, rather than giving evidence from her actual memory. The Beiler respondents point, in particular, to Ms Clarke's comment that she "tried to navigate [the] questioning the best way I could, and in a way that I was trying to be truthful". At times it appeared that her wariness about the possibility of her own answers being turned against her led Ms Clarke to take a stubborn or reactive position. I think Ms Clarke's comment reflected how stressful the process was for her, and a concern on her part regarding her ability to recall and express herself consistently, rather than being an admission that she was manipulating her evidence or giving evidence without caring whether it was truthful. However, I do have significant doubts about the reliability of some of her evidence.

68 Ms Clarke's performance under cross-examination in response to questioning by counsel for Mr Fuss was in marked contrast to her evidence in response to questioning by counsel for the Beiler respondents. The questioning by counsel for Mr Fuss was gentler and more empathetic, and Ms Clarke remained calm throughout. She was far less emotional and reactive, and provided nuanced and responsive answers. I accept that Ms Clarke's evidence in response to questions from counsel for the Beiler respondents was unsatisfactory in various respects (discussed further below), but I consider that this was largely because of Ms Clarke's emotional response to a "personality clash" and the way in which she was questioned, rather than any attempt to be dishonest or to provide answers that were not factually correct. Nevertheless, the result is that Ms Clarke's evidence on some topics was affected by inconsistency and it is not possible to proceed on the basis that her evidence was, in all respects, credible and reliable.

69 In closing submissions, the Beiler respondents identify several instances in which they submit Ms Clarke's evidence was inaccurate. They contend that her evidence contained matters that were "incorrect, overstated or understated; and arguably untruthful, or at least inaccurate and/or misleading".

70 The Beiler respondents submit that Ms Clarke's credibility is further impacted by the fact that she could not give evidence based on her recollection and, in particular, declined to give evidence about a conversation she had deposed to without reading from her affidavit. Given the large volume of evidence, the stress of the process for Ms Clarke, and the previous instances of questioning where she had been accused of being dishonest or saying whatever would help her case, I do not think it was unreasonable for Ms Clarke to wish to refresh her memory from her affidavit. However, I accept that, when considered with the inconsistencies in parts of her evidence, her refusal to provide evidence from memory reflects the fact that it is difficult to be confident in the reliability of aspects of her evidence.

71 The Beiler respondents point to several alleged inconsistencies between the affidavit evidence of Ms Clarke and her answers in cross-examination:

(1) The Beiler respondents submit that Ms Clarke's evidence concerning Felmeri, her host employer before she worked for Beiler Constructions, was inaccurate. In cross-examination, this issue arose in relation to the period between Ms Clarke being informed that Felmeri would be removed as her host employer by MBA, and a replacement host employer being identified. The Beiler respondents submit that Ms Clarke refused to make reasonable concessions that her apprenticeship was suspended during that period because she did not have a host employer, notwithstanding that this proposition was a reflection of her own evidence. I think Ms Clarke's responses in this respect are better understood as reflecting uncertainty about the status of her apprenticeship, or a concern about the possible effect of giving an incorrect answer to a question about legal status, rather than an attempt to mislead. I also do not consider that there was any real inconsistency between Ms Clarke's evidence that she did not wish to be employed by Felmeri because she was concerned about its financial position and her evidence in cross-examination that she was employed by Felmeri directly for a period of two to three weeks. I do not consider that these criticisms of Ms Clarke's evidence suggest a lack of credibility, though they may be instances of Ms Clarke being somewhat loose in her evidence, and thus reflecting on its reliability.

(2) The Beiler respondents submit that Ms Clarke inaccurately implied that she had a choice between pursuing further employment with Beiler Constructions or with MBA, following her trial shift with Beiler Constructions, when in fact Mr Beiler had not made her a formal offer of employment at the time. The meaning of this evidence is not entirely clear to me. I am not satisfied that Ms Clarke was being disingenuous or dishonest, and I would not regard this evidence as significant in my assessment of Ms Clarke's credibility and reliability.

(3) The Beiler respondents submit that Ms Clarke gave contradictory evidence about whether she was told women had their own quarters on the Kangaroo Island site. In her affidavit, Ms Clarke stated that she was told by Mr Beiler that she would have her own room. In cross-examination, she denied that she was told that Southern Ocean Lodge had guidelines that "females were able to … have a room of their own", but she did agree that she was told by Mr Beiler that she could have her own room. This evidence was not inconsistent. In any event, it is a minor matter to which I would not attach much importance.

(4) The Beiler respondents submit that Ms Clarke gave conflicting evidence when she stated that she did "not really" have conversations with Mr Gauci about her personal relationships, but later referred to a conversation that was, in essence, about her "considering the possibilities of investigating a relationship with [Mr Stott]". Again, I would not place much weight on this suggested inconsistency; the first answer was an attempt by Ms Clarke to characterise the nature of her relationship with Mr Gauci generally, while the second related to a specific conversation to which her attention was drawn. I accept that the tension in this evidence suggests – like other answers given by Ms Clarke, that generalised statements by her, without regard to specific events, may well be less reliable.

72 The Beiler respondents submit that, when it was put to Ms Clarke in cross-examination that, at a particular point in time, she was already in a sexual relationship with Mr Stott, she sought to assert that it was not a "relationship", and that that was "labels", or "semantics". What was put to Ms Clarke was that she was in a "relationship" with Mr Stott, not a "sexual relationship". Ms Clarke said that at the end of June 2023 she and Mr Stott were exclusively seeing each other but had not entered into a relationship. I understood confusion to arise because Ms Clarke was interpreting the word "relationship" in a more particular and narrow way than counsel for the Beiler respondents. I think this was an instance of Ms Clarke being defensive and

argumentative, but I do not accept that this disagreement about the language used to describe what was occurring between Ms Clarke and Mr Stott reflects poorly on her credibility.

73 The Beiler respondents submit that Ms Clarke made various assertions in cross-examination that were unsupported by evidence:

(1) The Beiler respondents submit that, if Ms Clarke was prepared to make the assertion that she did not receive her pay slips, she could and should have had her email accounts forensically examined to establish that she did not receive pay slips from Beiler Constructions. They contend that her evidence under cross-examination was inconsistent with her affidavit, including evidence about having three email addresses, her failure to give positive evidence about checking her emails until cross-examination, and her later claim that one of her email accounts had recently been "hacked". Although Ms Clarke could have done more to substantiate her claim that she did not receive pay slips, I do not accept that her failure to do so reflects poorly on either her credibility or reliability. I shall return to the substantive question of whether pay slips were sent to Ms Clarke at [301]-[317] below.

(2) The Beiler respondents further submit that Ms Clarke's failure to adduce medical evidence of a dyslexia diagnosis undermines her credibility, characterising her approach as "extraordinary". In her affidavit evidence, Ms Clarke referred to the fact that in 1999, she was diagnosed with dyslexia and further referred to that condition in her reply affidavit when responding to Mr Beiler's evidence that he had shown her the Beiler Constructions Employee Handbook (**Beiler Handbook**) on his phone. It was part of Ms Clarke's explanation that she found it difficult to read the Beiler Handbook on a small screen, while Mr Beiler stood by waiting for her to finish. It is true that Ms Clarke did not adduce independent evidence of her diagnosis. However, as I explain below, I consider the issue of whether and, if so, how the Beiler Handbook was shown to Ms Clarke to be a relatively peripheral issue in the proceeding. I would not criticise Ms Clarke for not adducing expert medical evidence of her diagnosis. Her evidence was not opinion evidence about her diagnosis; it was part of her attempt to explain the difficulties that she had in reading documents quickly under pressure. In any event, it appears that that was a forensic decision of her legal advisers and does not reflect on Ms Clarke's credibility. I do not doubt that Ms Clarke has been diagnosed with dyslexia and that she experiences difficulty reading quickly under pressure.

74 The Beiler respondents submit that Ms Clarke gave conflicting evidence about whether and, if so, when she had seen the Beiler Handbook. In her affidavit evidence Ms Clarke stated that she had not seen the Beiler Handbook until she was shown it by her legal representatives. In her reply affidavit and under cross-examination, Ms Clarke agreed that she had, in fact, been shown a large document by Mr Beiler, on his mobile phone, and that this was, in fact, the Beiler Handbook. I accept that this is a significant inconsistency in her evidence, but I think it much more likely that it arose from an initial lapse in memory on Ms Clarke's part when preparing her affidavit, with her memory being jogged when she read Mr Beiler's affidavit evidence. It is a notable instance of unreliability in Ms Clarke's evidence, but it is also an instance where Ms Clarke accepted the correct position when it was suggested to her. The circumstances in which Ms Clarke was shown the Beiler Handbook and the question of whether she read and fully digested it, assumed prominence in the cross-examination of Ms Clarke. I do not find it necessary to say much about it, except to note that the manner in which the Beiler Handbook was shown to Ms Clarke would not have been conducive to her absorbing its detailed contents, whether or not her ability to do so was influenced by dyslexia. Ms Clarke was heavily criticised in the course of cross-examination for failing to report sexual harassment to Mr Beiler in accordance with the procedures set out in the Beiler Handbook. With respect, I think that criticism was unfair to her, and I place little weight on Ms Clarke's failure to report sexual harassment to Mr Beiler in assessing whether it occurred as alleged.

75 One of the issues in the case relates to a conversation between Ms Clarke and Mr Widmer. Ms Clarke alleges that Mr Widmer called her a "retard" and Mr Widmer states that it was Ms Clarke who called herself a retard. In the course of cross-examination, Ms Clarke gave evidence that, because her son has a disability, she would never use the word "retard". The Beiler respondents draw attention to the fact that this evidence was in direct conflict with Ms Clarke's amended reply, which contains an admission that she called herself a "retard". The Beiler respondents submit in respect of this evidence that the Court does not need to find that Ms Clarke lied, but that the veracity of her evidence is diminished. I accept this submission. This is an example of an instance where, whilst under pressure, Ms Clarke gave evidence that was inconsistent with a prior statement. I accept that this is a clear instance of Ms Clarke being prepared to commit to a position in cross-examination which would bolster her case, even though it was exaggerated or inaccurate. I accept that this reflects on the reliability of her evidence generally, as well as her evidence about the specific conversation with Mr Widmer.

I return to this issue at [194]-[215] below, in the context of considering the second adverse action claim.

76 Assessing these matters overall, I do not have the impression that Ms Clarke was a deliberately dishonest witness. I do have real doubts about the reliability of aspects of her evidence, and I am concerned that her evidence may have been affected by a tendency for her sense of the gist of what occurred on particular occasions to solidify into a strident belief in her memory of events that may well have been influenced by her feelings and sense of grievance. Particularly under the acute pressure of cross-examination, she often tended to give answers that seemed to her to be right and consistent with her genuine beliefs about the events in question, but with insufficient regard to whether her answers were grounded in actual recollection. I would not characterise this as dishonestly saying "whatever would help her case".

77 There is a difference between Ms Clarke's evidence being potentially unreliable, or her exaggerating or being insufficiently attentive to the truth in respect of certain details, on the one hand, and her being mistaken or dishonest about core aspects of her claim, on the other. I am not prepared to reject her evidence entirely, or to give it no weight, but I do have real reservations about accepting its accuracy where it is not supported by other evidence, including evidence of the surrounding circumstances or evidence of Ms Clarke's own relatively contemporaneous conduct that is broadly consistent with her own account.

78 As will be seen, there are aspects of Ms Clarke's evidence which I do accept on the balance of probabilities and on which I am prepared to act, even though it conflicts with the evidence given by witnesses called by the Beiler respondents. However, where there is nothing in the surrounding circumstances that makes Ms Clarke's evidence more likely to be true, and where it is contradicted by evidence given by other witnesses which was not challenged, or which I do not have reason to doubt, I am in some instances left in a position where, while not rejecting Ms Clarke's evidence outright, I find myself unable to be sufficiently confident in it to make findings on the balance of probabilities on the basis of it.

Lachlan Clarke, Margaret Clarke and Dr Stuart Clarke

79 Ms Clarke's son, Lachlan Clarke, and her parents, Margaret Clarke and Stuart Clarke, each gave evidence in chief by way of affidavit. Each of them provided an account of conversations that they had had with Ms Clarke during the course of her employment with Beiler Constructions. Lachlan Clarke was cross-examined by counsel for Mr Fuss. Margaret Clarke and Stuart Clarke were not required for cross-examination. I generally accept the evidence of

Lachlan Clarke, Margaret Clarke and Stuart Clarke. Their evidence is most directly relevant to the fourth sexual harassment claim, and is addressed further in that context at [133]-[144] below.

Mr Beiler

80 As mentioned, Mr Beiler has been the sole director and owner of Beiler Constructions since its incorporation in March 2010. Mr Beiler gave evidence in chief by way of affidavit and was the first of the Beiler respondents to be cross-examined. The Beiler respondents submit that in general, their witnesses "were frank and forthright and made reasonable concessions based on the state of their memory and otherwise".

81 As is apparent from his eventual concessions, made after the close of oral evidence, the systems established and implemented by Mr Beiler gave rise to multiple instances where basic Award obligations were not complied with. While it can be said that it is to Mr Beiler's credit that he accepted certain propositions which were adverse to his interests when they were put to him in cross-examination, and that he ultimately accepted that Beiler Constructions contravened the Award in various respects, in my view these concessions were made late in the day and generally reflected matters that were clearly established and in respect of which adverse findings were virtually inevitable. Mr Beiler's failure to acknowledge that Ms Clarke's allegations were true at an earlier point in time does, in my view, reflect adversely on his credibility and reliability generally.

82 I formed the impression that Mr Beiler had a tendency to exaggerate the extent to which the practices on Beiler Constructions work sites and his practices with respect to his employees reflected the practices of a model employer.

83 Mr Beiler's evidence about Beiler Constructions' compliance with Award requirements was careless in some respects. For example, in relation to the taking of breaks, Mr Beiler's evidence on this topic is set out at [388]-[390] below. His affidavit evidence was apt to create the impression not only that regular morning breaks were always scheduled but that he valued the importance of employees being directed to take their breaks. He ultimately accepted in cross-examination that employees were able to take a break casually as and when they wanted, which was generally consistent with the evidence of his own employees.

84 Another example relates to Mr Beiler's evidence about payment for travel time to and from Kangaroo Island. In Mr Beiler's affidavit dated 23 September 2024, he asserted that "the flight

and travel time was paid", and claims that this "is showed in [Ms Clarke's] deputy and Xero correspondences". Later, in his affidavit dated 7 April 2025, filed after the close of oral evidence, Mr Beiler accepted that Ms Clarke had not been paid for travel to Kangaroo Island, but continued to maintain (wrongly) that she was not entitled to be paid for return travel to Adelaide. Ms Clarke's entitlements in relation to payment for travel time are addressed at [398]-[405] below. The point for present purposes is that this is an instance of Mr Beiler asserting on oath propositions which were false but which, with proper care, could easily have been checked.

85 While I do not generally consider that Mr Beiler's evidence was dishonest, I do not have complete confidence in the credibility and reliability of his evidence and I approach his evidence with a degree of caution where it is self-serving. So, while I am generally prepared to accept Mr Beiler's evidence, it will be necessary to give it careful consideration in the context of surrounding established facts and objective circumstances where it conflicts with Ms Clarke's evidence.

Mr Emmerson

86 Mr Emmerson began working for Beiler Constructions in April 2021 as a supervisor carpenter. At the time he gave evidence, he remained employed by Beiler Constructions.

87 There are several aspects of Mr Emmerson's evidence that cause me to have concerns about its veracity and reliability.

88 In cross-examination, Mr Emmerson was asked about a conversation he had with Mr Beiler shortly before Mr Beiler decided that Ms Clarke would not return to work at the Kangaroo Island site and should instead work only on sites in the Adelaide area. In Mr Emmerson's affidavit evidence, he addressed this conversation in the following terms:

> … [T]he reason Elisa was removed from Kangaroo Island was because:
>
> a) She received a lot of complaints from other employees that did not want to work with her; and
>
> b) She had underlying performance issues.
>
> I had a phone conversation with Scott about all employees' performance as we did quite often. In this conversation, he informed me that he would be downsizing our crew. There were conversations as to who I thought would be removed from Kangaroo Island. This was based on performance and the tasks outstanding on the project and the skill sets we required to finish the project. Unfortunately, Elisa did not fit these criteria, similar to at least four other employees who were also removed. I cannot recall the names of the employees, but I believe Scott will have this information on file.

89 Mr Emmerson's affidavit evidence was thus to the effect that complaints from other employees and, it would appear primarily, Ms Clarke's performance, constituted the reason or reasons why he recommended to Mr Beiler that she be removed from the Kangaroo Island site.

90 In cross-examination, Mr Emmerson accepted that he had "told Mr Beiler to remove [Ms Clarke] from [the Kangaroo Island] site". It was put to Mr Emmerson that he did so because Ms Clarke had rejected his sexual advances, which he denied. When asked what other reason there was to remove her from the Kangaroo Island site, Mr Emmerson said, consistently with his affidavit evidence, that "[i]t was performance-based, and then other employees didn't want to work with her".

91 Mr Emmerson was asked to consider an email containing a witness statement, dated 15 August 2023, that he had provided in a proceeding commenced by Ms Clarke in the Fair Work Commission. The witness statement identified various performance issues and described how Ms Clarke would become angry and upset when she made mistakes. Those could fairly be regarded as "performance based" issues. Mr Emmerson's witness statement then read:

> We all had a job to do and very strict timeline to achieve it so I was allocating people to tasks that I knew would be the quickest and most efficient to get the job done.
>
> After hours, there were a few incidents that were unacceptable for any workplace or work site. Elisa was found out to be fornicating with another employee/leading hand most night in onsite accommodation and partaking [i]n the illegal consumption of Cannabis. Which was quite clear to me and to others it was clouding her judgement and [a]ffecting her work.
>
> After I found out this was happening, I asked Scott to remove her from Kangaroo Island as it was affecting other employees and production of work.

92 Mr Emmerson was expressly asked about his reasons for asking that Ms Clarke be removed from Kangaroo Island, in the following series of questions:

> Q: You suggested to Scott, or you asked Scott, to remove her from the island, didn't you?
>
> A: Yes.
>
> Q: And the reason that you did that was because – or one of the reasons that you did that, was because she was fornicating?
>
> A: No.
>
> Q: And one of the other reasons that you did that was because of the relationship between Ms Clarke and Mr Stott?
>
> A: No.

93 Mr Emmerson was then cross-examined about his Fair Work Commission witness statement as follows:

> Q: And, just taking you to the reasons again that you gave some 12 months ago, just the second last paragraph there:
>
> > "Elisa was found out to be fornicating with another employee leading hand on most nights."
>
> And that refers, doesn't it, to that relationship that Elisa had with Mr Stott?
>
> A: Yes.
>
> Q: … Do you agree that one of the reasons why you didn't want Ms Clarke to return to the site was because of her relationship with Mr Stott?
>
> A: That was part of it, yes.

94 Mr Emmerson then denied propositions to the effect that Ms Clarke's relationship with Mr Stott was a "significant reason" for asking Mr Beiler to remove her from the island, and denied that it was "one of the main reasons".

95 Having initially identified "complaints" (whether about Ms Clarke's relationship with Mr Stott or about Ms Clarke's performance is not entirely clear) as a reason for asking that Ms Clarke be removed from the island, and having then explicitly denied that "fornicating" or the sexual relationship with Mr Stott was one of the reasons for asking that Ms Clarke be removed from the island, Mr Emmerson – faced with his earlier statement – later accepted in cross-examination that the existence of the relationship between Ms Clarke and Mr Stott was a reason, but not a significant reason, why he asked for her to be removed from the island.

96 Mr Emmerson was then asked to consider a response form that he had provided in the Fair Work Commission proceeding. Mr Emmerson confirmed that the response form was authored by him. The response form was not tendered in evidence, but Mr Emmerson made admissions in cross-examination as to certain matters contained in it. In particular, he admitted that he had said, in the response form, that he "did ask Scott Beiler not to send [Ms Clarke] back to Kangaroo Island as the relationship and the use of illicit drugs after hours was affecting the work". When asked to explain what he meant by "affecting the work", he said:

> Affecting the work, meaning mainly around the crew. Everyone sort of was treading on eggshells once the relationship started. It got uncomfortable between everyone once they started entering into a relationship.

97 Mr Emmerson resisted the proposition that Ms Clarke's relationship with Mr Stott played any part in his reasons for asking that she be removed from the island, first by omitting any

reference to that reason from his affidavit and then in cross-examination, until it became apparent from his earlier statements that he could not sensibly deny that the relationship had been one of the reasons. He downplayed the significance of the relationship in making his recommendation to Mr Beiler, even though it was presented as a prominent reason in his earlier statements. I consider that Mr Emmerson was being evasive and not forthright in this aspect of his evidence.

98 The next issue that causes me some concern about the veracity of Mr Emmerson's evidence is that it conflicts with Ms Clarke's evidence in relation to the fourth sexual harassment allegation, in circumstances where Ms Clarke's evidence is supported by uncontradicted evidence from Lachlan Clarke, Margaret Clarke and Stuart Clarke. I address the evidence in relation to this claim at [123]-[151] below, and explain why I prefer Ms Clarke's evidence to Mr Emmerson's on this issue.

99 I note that Mr Emmerson made some quite sweeping and self-serving statements in support of his own evidence. For example, in circumstances where Ms Clarke's evidence regarding the fourth sexual harassment claim was that Mr Emmerson was walking with her on the way to a morning break, Mr Emmerson denied that he had *ever* walked to that break (instead *always* taking a vehicle), and said that he could not recall *ever* eating with Ms Clarke while on Kangaroo Island. I do not give these self-serving statements much weight in support of Mr Emmerson's evidence.

100 Taking these matters into account holistically, I have some concerns about the reliability and credibility of Mr Emmerson's evidence. I have taken into account the whole of his evidence in assessing how much weight to give to his evidence of specific events in respect of which it is necessary to make findings.

Mr Stott

101 Mr Stott commenced with Beiler Constructions in November 2019. He worked full time as a carpenter. After six months, he was promoted to the position of leading hand. By May 2023, he had worked full time for Beiler Constructions for around three and a half years.

102 Mr Stott's evidence, on critical topics where the Beiler respondents' position was at odds with Ms Clarke's evidence, was repeatedly framed in terms of an inability to recall matters that were put to him. Mr Stott was asked whether Ms Clarke had told him that Mr Emmerson had propositioned her for oral sex. The following exchange occurred:

Q: During the periods when you and Elisa were not on Kangaroo Island together you and Elisa would communicate with each other via a social-media platform - - -?

A: Correct.

Q: - - - including Snapchat?

A: Yes.

Q: And she told you over Snapchat what was happening on Kangaroo Island?

A: Somewhat. Yes.

Q: And she would tell you about her day?

A: Yes.

Q: And she told you about Mr Emmerson's sexual proposition, didn't she?

103 Objection was taken to this question, but Mr Stott answered it anyway, before a ruling was given, saying, "Not that I can recall." The cross-examination continued as follows:

Q: She told you that Mr Emmerson asked her for a BJ, or a blow job or words to that effect, didn't she?

A: Not that I can recall.

Q: And she told you about this incident over Snapchat, didn't she?

A: Not that I can recall.

Q: And she told you this on 6 May 2023 via a message on Snapchat, didn't she?

A: Not that I can recall.

104 Mr Stott was not prepared to say with certainty that Ms Clarke had *not* told him via Snapchat about Mr Emmerson's request for oral sex. Rather, he quite deliberately and repeatedly stated that he could not recall such a communication. The somewhat formulaic language chosen by Mr Stott is consistent with his being careful and, potentially, somewhat evasive.

105 This impression is reinforced when Mr Stott's inability to recall certain matters is contrasted with his ability to give a relatively detailed account of other events that occurred significantly earlier than May 2023. For example, in cross-examination Mr Stott gave the following evidence in relation to commencing work with Beiler Constructions in 2019 and receiving the Beiler Handbook:

Q: You say in your affidavit that you received a copy of the handbook back in 2019; is that right?

A: That is correct.

Q: And can you tell me what was in that employee handbook?

A: Everything that Scott expects of us, how the company is run and the requirements of all workers and leading hands on working for Scott.

Q: And can you tell me, when did you read that employee handbook?

A: The same night I got it.

Q: Were you told to read the employee handbook?

A: Yes.

106 Further, Mr Stott gave evidence in his affidavit about events that occurred in May 2023, relating to the end of his relationship with Ms Clarke. He stated:

> Our relationship ended around late May 2023, I can't remember the exact date, but I believe there were a few reasons it ended. One reason it ended was because she left the island and started to work more in Adelaide. The second reason it ended was because was I found out she had another man in her life to fool around with after she left the island. I only found out because I was still snapchatting her at this time. I know this because:
>
> (a) I don't really remember the date but she took a snap of herself and sent it to me;
>
> (b) I opened the snap and there was man with her;
>
> (c) I replied to her snap and asked her who it was;
>
> (d) [s]he replied back to me and said "it or he was just a friend" or words to that effect; and
>
> (e) then later on she continued seeing this friend, so I had my suspicions that something else was going on and that I did not need to continue our relationship so I pulled away.

107 Mr Stott also spoke about this evidence with apparent certainty under cross-examination.

Q: Yes. … [Y]ou say that you found out – and I'm paraphrasing here, you saw her in a snap with another man?

A: Yes.

Q: And you asked who it was and she said it was just a friend?

A: Yes.

Q; And you had your suspicions that something else was going on?

A: Correct.

Q: And so, therefore, you decided you did not need to continue your relationship with her?

A: Correct.

108 Notably, the subject matter of the events that Mr Stott said he could not recall, namely whether Ms Clarke told him over Snapchat that Mr Emmerson had propositioned her, is similar to the

events that he did clearly recall. I am doubtful about Mr Stott's evidence that he had no recollection as to whether Ms Clarke send him a Snapchat message about Mr Emmerson's propositioning her, as she alleges. Coupled with the fact that he did not address Ms Clarke's specific allegation in his own affidavit evidence in chief (only in the very general way described at [132] below), I have reservations about accepting Mr Stott's evidence that he "could not recall" as evidence in support of the conclusion that Ms Clarke did not in fact tell him about Mr Emmerson's request at all.

109 Ultimately, Mr Stott's evidence on the topic of whether Ms Clarke reported Mr Emmerson's proposition to him was not inconsistent with Ms Clarke's evidence and, although I have some doubts about it, it is unnecessary to reach a concluded view as to whether his lack of recollection was entirely genuine, or reflected an unwillingness to become involved in disputed issues between his employer and a person with whom he had had a relationship. It is sufficient to conclude that Mr Stott's professed lack of recollection does not weigh as an additional consideration that would cause me to doubt Ms Clarke's evidence.

110 The Beiler respondents submit that, because Mr Stott was not cross-examined on the affidavit evidence he gave regarding his experience as a leading hand dealing with instances of bullying, harassment or in-fighting, his evidence on these topics should be accepted. The relevant examples were:

> Bullying or harassment, or in-fighting, was not tolerated. I know this because I have been involved in the following situations.
>
> (a) I had an apprentice/worker come to me and tell me that they were not happy with what one of the workers said to them it was something racist, but I cannot remember the exact words. I told the worker to apologise for making the racist joke and they did.
>
> (b) I have personally witnessed one time I cannot remember the year or date, one of the workers complaining about being harassed by another worker. [I] went to Scott, and he dealt with it pretty quickly to ensure it stopped.

111 The Beiler respondents submit that "in this context, the Court cannot accept [Ms Clarke's] evidence that she told Mr Stott about the blowjob comment as his evidence was she did not, but also it is inconsistent with his own historical approach of dealing with such issues". As I have discussed above, I do not accept that Mr Stott's evidence was that Ms Clarke did not tell him about the comment. Rather, his evidence was that he could not recall any such report. The absence of his recollection does not provide a sufficient basis to conclude that no complaint was made. While I accept Mr Stott's evidence about examples of situations where he addressed

complaints quickly and appropriately, the circumstances of Ms Clarke's claimed report to Mr Stott in this case (via Snapchat; when they were in a sexual relationship; and not in the context of making a complaint at work) were somewhat different, and these examples do not lead me to draw a conclusion about what occurred in this case.

Mr Lenepveu

112 Mr Lenepveu commenced work with Beiler Constructions as a carpenter in February 2021, following a five-day trial period. He is a qualified carpenter. By the time of the hearing, he was no longer employed by Beiler Constructions.

113 There is nothing in the manner in which Mr Lenepveu gave his evidence that leads me to have particular concerns about his reliability or credibility. Where his evidence conflicts with Ms Clarke's – in particular, in relation to the seventh sexual harassment claim – I am not prepared to make findings on the balance of probabilities against Mr Lenepveu on the basis of Ms Clarke's evidence alone. Aspects of Mr Lenepveu's evidence were challenged in cross-examination, but this largely took the form of putting to him the blunt proposition that Ms Clarke's version of events was the truth and that his was not. As I have said above, I do not consider that Ms Clarke's evidence about her core claims was deliberately untruthful. While I think there is a real prospect that her evidence about the seventh sexual harassment claim is correct, I am not prepared to reject Mr Lenepveu's evidence on that topic to the extent of finding that it is proved on the balance of probabilities.

114 In relation to the conversation that gives rise to the third sexual harassment claim, Mr Lenepveu accepted that he said the words attributed to him by Ms Clarke, although he denied that what he said was intended to be sexual in nature. No other witness deposed to having heard this conversation. Had Mr Lenepveu been dishonest, he might easily have denied the conversation happened at all. His willingness to accept aspects of the allegations advanced by Ms Clarke as true, when he might not have, lends credibility to his evidence generally, and bears on whether Ms Clarke has established the claims against him on the balance of probabilities.

115 I address the evidence of Mr Lenepveu further in my discussion of the third and seventh sexual harassment claims at [166]-[182] below.

Mr Widmer, Mr Gauci and Mr Gordon

116 Mr Widmer began working with Beiler Constructions as an apprentice in 2017. When he completed his apprenticeship in 2020, he then was employed as a leading hand by Mr Beiler.

117 Mr Gauci was hosted, and later employed, by Beiler Constructions as an apprentice. At the time when he was cross-examined, he stated that he was due to finish his apprenticeship in two months. Mr Gordon was hosted by Beiler Constructions. He was never employed directly by Beiler Constructions.

118 There is nothing about the evidence of Mr Widmer, Mr Gauci and Mr Gordon that leads me to assess them as an unreliable or untruthful witnesses.

119 Insofar as Mr Widmer's evidence, relating to incidents and conversations shortly before the cessation of Ms Clarke's employment, is in tension with Ms Clarke's evidence, I address that issue below. I assess Mr Widmer's evidence together with the objective contemporaneous evidence (and Mr Gauci's evidence) in reaching conclusions about what findings I am prepared to make.

SEXUAL HARASSMENT CLAIMS UNDER S 527D OF THE FW ACT

The first, fifth, sixth, and eight sexual harassment claims

120 Ms Clarke originally pleaded eight distinct incidents which she claimed amounted to sexual harassment. The allegations involved alleged conduct on the part of Mr Emmerson, Mr Lenepveu and Mr Fuss, each of whom was either an employee or contractor of Beiler Constructions at the relevant time. Ms Clarke pleaded that Beiler Constructions was vicariously liable for each of the incidents of sexual harassment.

121 The first, fifth, sixth and eighth sexual harassment claims that were initially pleaded related to alleged conduct on the part of Mr Fuss. Part way through the trial, those claims were settled as between Ms Clarke and Mr Fuss, and Ms Clarke no longer maintains the claim that Beiler Constructions is vicariously liable for any alleged conduct of Mr Fuss. These four claims are therefore no longer in issue in the proceedings and it is unnecessary to say anything further about them. It is convenient to continue to refer to the remaining claims by reference to the number by which they are identified in the 2FASOC.

Vicarious liability of Beiler Constructions for any sexual harassment by its employees

122 Beiler Constructions indicated in closing submissions that it does not dispute that it is vicariously liable for the conduct of its employees, Mr Emmerson and Mr Lenepveu, if it is found that they engaged in the conduct Ms Clarke alleges against them, and that such conduct amounted to sexual harassment.

Fourth sexual harassment claim

123 It is convenient to commence by considering the fourth sexual harassment claim. Unlike some of the other claims made by Ms Clarke, several witnesses called by Ms Clarke and by the Beiler respondents were able to give evidence bearing on the assessment of the claim.

124 The fourth sexual harassment claim relates to comments allegedly made by Mr Emmerson toward Ms Clarke. The allegation in the 2FASOC in relation to the fourth sexual harassment claim is as follows:

> At approximately 10:00 am on or about 6 May 2023 while Ms Clarke was walking with Mr Emmerson to the mess hall for the morning tea break:
>
> (a) Mr Emmerson asked Ms Clarke for oral sex;
>
> (b) Ms Clarke did not respond;
>
> (c) Mr Emmerson continued by saying that it was "okay because what happens on the island stays on the island"; and
>
> (d) Ms Clarke declined Mr Emmerson's request for sexual favours by responding with words to the following effect "I'm not a home wrecker".

125 Ms Clarke gave the following affidavit evidence about these events:

> At approximately 10:00am on or about 6 May 2023, I was walking with Mr Emmerson from site to the mess hall for morning tea when he propositioned me for sex. [The words "when he propositioned me for sex" were admitted on the basis that they referred only to the conduct described in the following paragraphs.]
>
> The route I took with Mr Emmerson to the mess hall was through the breezeway and was approximately a five-minute walk. The breezeway had a narrow-inclined walkway, approximately two metres wide. On the left side of the walkway, the walls had been constructed and closed off and the other wall was under construction. The entrance to the breezeway was semi constructed, but as we walked closer to the mess hall, the walls of the hallway were more built up and so provided more screening. Mr Emmerson was walking approximately half a metre in front of me down the breezeway.
>
> Mr Emmerson usually took the gator to the mess hall but on this day he did not. A gator is a quad bike with a tub on the back. I don't know why he did not take the gator that day.
>
> As we approached the closed off section of the breezeway, which was near the spa retreat, Mr Emmerson propositioned me for oral sex. I do not remember his exact words other than him asking me if I would give him a "blow job".
>
> I did not initially respond to his sexual proposition because I was shocked.
>
> Up until that point, Mr Emmerson and I were walking in silence.
>
> Mr Emmerson then continued by saying, "it's okay because what happens on the island stays on the island" or words to that effect.

> I didn't know what to say as I was shocked and offended, and so I responded by saying "I'm not a home wrecker" or words to that effect. I responded in this way because I was not interested in Mr Emmerson, nor did I welcome his proposition. I was also aware that [Mr] Emmerson was married with children.
>
> After I made my comment, I overtook Mr Emmerson on the breezeway and sped up my walking pace to put some distance between us.
>
> The whole situation was very uncomfortable, I made it clear that I was definitely not interested in him in any way. I was horrified that he would ask me for sex.
>
> Later that evening, I told Mr Stott, via the Snapchat application, about Mr Emmerson's sexual proposition. I no longer have a copy of this Snapchat conversation in my possession. The nature of Snapchat communication is that it generally disappears or expires after viewing.
>
> After Mr Emmerson's sexual proposition, I felt too uncomfortable to eat with colleagues so I stopped having my meals in the mess hall and started eating in my room.

126 Mr Emmerson provided affidavit evidence in response to this allegation:

> … I never walked with Elisa to the Mess Hall. In fact, I never walked to the Mess Hall. Everyone on site knew that I drove a site vehicle, a gator (farm vehicle) to get to places on site. When I used to drive around the site to lunch or meal breaks, I had Naji, James and maybe one or two other employees with me. To the best of my recollection, I do not think I ever walked up to lunch, I would just use the Gator.
>
> I also did not proposition or speak to Elisa requesting "blow jobs". I do not know where this has actually come from and it never happened.
>
> … I do not remember Elisa eating in her room, but in saying that, I do not even remember her eating at the same times as I did.

127 In cross-examination of Ms Clarke, she was asked about this alleged incident as follows:

> Q: Would you agree with me that by reference to your own evidence, what you say [Mr Emmerson] did was done without any witnesses?
>
> A: That is correct. What Mr [Emmerson] did was done with nobody else around.
>
> Q: And so on your evidence, no one saw it?
>
> A: No one saw it. No one heard it.
>
> Q: And you say that you didn't tell anyone except James Stott, don't you?
>
> A: Correct.
>
> Q: So you say James Stott knew about it?
>
> A: Yes, he did.
>
> Q: And you didn't stop seeing James because he knew about it, did you?
>
> A: No, we continued seeing each other after the fact.
>
> Q: Well, you didn't hide yourself from him, did you?

A: Why would I?

Q: Well, that's my question. You said you felt so uncomfortable with colleagues, you stopped eating your meals in the mess hall?

A: There was a job to do. I had to work. I didn't get to not do that. I was stuck on an island. How do I escape from that?

Q: It doesn't make sense, does it, to say you felt uncomfortable eating with colleagues who knew nothing about what happened?

A: I felt uncomfortable in general.

128 Insofar as this exchange might suggest an attack on Ms Clarke's credit by reference to the fact that she continued to see Mr Stott, despite having said that she felt uncomfortable with her colleagues, and might suggest that she had no reason to feel uncomfortable around colleagues who were not aware of the exchange with Mr Emmerson, I do not find this at all significant in my assessment of her evidence. If the incident occurred as Ms Clarke said, it seems natural that she might tell Mr Stott, with whom she had a close relationship, and not others, and it also seems natural that Mr Emmerson's behaviour would contribute to her feeling uncomfortable with her work colleagues in general. I do not think that her evidence in this respect was odd, or inconsistent.

129 Mr Emmerson was cross-examined about this alleged incident as follows:

Q: And on [6 May], at about 10 o'clock or just before, you were both – you both found yourself walking to the mess hall, didn't you?

A: No.

Q: And you both found yourself walking along the breezeway, didn't you?

A: No.

Q: And when you were on the breezeway, you were walking ahead of Elisa, weren't you?

A: No.

Q: And you walked ahead of Elisa and you were aware that she was behind you, weren't you?

A: No.

Q: And you turned around to Elisa, didn't you?

A: No.

Q: You turned around to her, and you asked her – and you propositioned her, well, the words that she has used. You asked her to give you a blowjob?

A: No.

…

Q: Isn't it the case that you continued to walk together to the mess hall, and having made the comment, you persisted in pursuing that proposition. You said to her, Don't worry", or words to that effect, "Everything that happens on the island, stays on the island"?

A: No.

…

Q: [Ms Clarke] gave you no indication that she was interested in pursuing any kind of sexual conduct with you, did she?

A: It never happened.

130 The cross-examination of Mr Emmerson on this issue really involved no more than counsel putting Ms Clarke's version of events to him. There was nothing about Mr Emmerson's answers to these question that caused me to form a view one way or the other as to whether he was being truthful or dishonest.

131 In his affidavit, Mr Stott addressed Ms Clarke's evidence that she had told Mr Stott about Mr Emmerson's proposition, only in general terms, stating, "During my relationship with Elisa, I cannot recall if she made any complaints to me about anyone from the Island." In his affidavit, Mr Stott did not respond directly to Ms Clarke's specific evidence that she had told Mr Stott, using the Snapchat app, about Mr Emmerson's asking her for oral sex. Further, in his affidavit evidence, Mr Stott stated in general terms that the first he had heard about sexual harassment claims by Ms Clarke was when she brought an unfair dismissal claim. He said that he was first told that Ms Clarke had made allegations of that kind by Scott Beiler via a telephone call. His reaction was to say, "You are kidding me right," or words to that effect.

132 The way Mr Stott's affidavit evidence was expressed left open the possibility that Ms Clarke had told Mr Stott about Mr Emmerson's request for oral sex but he did not recall it. My assessment of Mr Stott's evidence on this topic has been addressed at [102]ff above. As I have explained there, I have reservations about accepting Mr Stott's evidence that he "could not recall" as evidence in support of the conclusion that Ms Clarke did not in fact tell him about Mr Emmerson's request. While I still give Mr Stott's evidence some weight, I am not prepared to find, on the basis of his evidence, that Ms Clarke was being untruthful (or was mistaken) when she said, in her own evidence, that she told Mr Stott, via Snapchat, about Mr Emmerson's alleged conduct. If the conduct did in fact occur, I think it is more likely that she did tell Mr Stott as she claims. As I have said above, Mr Stott's professed lack of recollection does not cause me to doubt Ms Clarke's evidence about what was said to her by Mr Emmerson.

133 Ms Clarke also relied on the evidence of her son, Lachlan Clarke, which was said to support her evidence regarding Mr Emmerson's asking her for oral sex. Lachlan Clarke is in his early 20s and lives with Ms Clarke. In his affidavit, Lachlan Clarke stated that he and Ms Clarke have a close relationship, and talk openly about what is happening in their lives, such as relationships and work. He said that most nights when they are both at home, they "sit under the porch outside on the couch talking". When Ms Clarke went to the Kangaroo Island site, they would video-call via FaceTime about every night or every second night. Ms Clarke had told Lachlan Clarke about her relationship with Mr Stott after returning home following her second "swing".

134 Lachlan Clarke's affidavit evidence was to the effect that, a few days after Ms Clarke returned from her third swing on Kangaroo Island, she told him about one of the alleged incidents involving Mr Fuss (which is no longer in issue between the parties). Then, in relation to the allegation against Mr Emmerson, Lachlan Clarke stated:

> During this conversation, Mum also told me about James Emmerson … propositioning her and how this made her feel uncomfortable. Mum said "he propositioned me" or words to that effect.

135 Lachlan Clarke's affidavit evidence was not challenged in any respect by the respondents. He was cross-examined by counsel for Mr Fuss (who at that time remained the third respondent in the proceedings), but was not asked any questions about his evidence that Ms Clarke had told him about Mr Emmerson's propositioning her. It was not suggested that he was mistaken or was being untruthful in reporting that Ms Clarke had told him that Mr Emmerson had propositioned her. Nor was it suggested to Lachlan Clarke that he was mistaken about the timing of Ms Clarke's statement about Mr Emmerson's propositioning her. Lachlan Clarke was not cross-examined by counsel for the Beiler respondents.

136 The undisputed evidence of Lachlan Clarke is, therefore, that Ms Clarke told him that Mr Emmerson had "propositioned" her. I accept this evidence. Although obviously lacking in detail, Lachlan Clarke's evidence tends to support Ms Clarke's evidence that a direct sexual advance or request for sexual favours of some kind was made to her by Mr Emmerson. It reports a statement made by Ms Clarke relatively soon after the alleged event, at a time when she was still employed by Beiler Constructions. There was no evident reason why she would invent such a claim at that time, particularly in a conversation with Lachlan Clarke, and she is unlikely to have been mistaken.

137 In my view, it is highly improbable that Ms Clarke would have told Lachlan Clarke, her son, that Mr Emmerson had propositioned her if she did not truly believe that he had done so. The description of Mr Emmerson's conduct as "propositioning her" is consistent with Ms Clarke's evidence that he asked her for oral sex, and her use of a fairly general description when describing the incident to her son is natural and believable. There is no evidence that Mr Emmerson had said anything else to Ms Clarke that could be described as "propositioning" her.

138 Ms Clarke's mother, Margaret Clarke gave evidence in her affidavit as follows:

> One Saturday or Sunday in May or June 2023, around the time Elisa had been told that she was not going to be returning to Kangaroo Island, we were having a meal together at my house. I believe it was the weekend after she had finished on the Island. My husband, Elisa and I were present. At the end of the meal, around 7.30 pm, Elisa blurted out that that "a guy had propositioned [her] with oral sex" at work on the Island. I remember that her demeanour when she said this seemed annoyed and offended that she would be spoken to like this. She referred to the man who propositioned her as Emmerson, and I was aware from Elisa that he was a supervisor. … Elisa told me that she responded to the proposition by saying "I'm not a home wrecker, you have a family".

139 The respondents did not require Margaret Clarke for cross-examination. Except by way of submission, her evidence was not challenged. I accept Margaret Clarke's evidence regarding the conversation described in this paragraph of her affidavit.

140 Ms Clarke's father, Stuart Clarke, also gave evidence by way of affidavit. He was not cross-examined by the respondents, and I also accept his evidence. In his affidavit he said:

> In around May or June 2023, I observed Elisa's demeanour change. Around this time, my wife, Elisa and I were having dinner together. We were sitting around the table, talking. Elisa appeared to me to be pretty upset. She is normally outgoing and gregarious. At this time, she was solemn and looked embarrassed by what she was saying. Elisa told my wife and I that she "won't be going back to the Island" because this guy, someone with authority, had asked her to perform a sexual act. She told us that she had told the guy words to the effect that she was "not in the habit of breaking up families" but that he had told her "what happens on the island, stays on the island" when she refused to perform the sexual act. I got upset when she told us this because I was angry that someone would do that to my daughter. I responded to what she had told us with words to the effect of "they are just animals, and it was not okay, what was happening".

141 I infer that the conversation to which Stuart Clarke refers was the same conversation that Margaret Clarke referred to in her affidavit. In context, Stuart Clarke's reference to "someone in authority" can only have been to Mr Emmerson, even though Stuart Clarke appears not to have recalled (or in any event did not state) Mr Emmerson's name when making his affidavit. The course of the conversation as recounted by Stuart Clarke is consistent, in its essential

aspects, with Ms Clarke's own evidence about the conversation she had with Mr Emmerson (including the effect of what was said following Mr Emmerson's request for oral sex), and with Margaret Clarke's evidence about what Ms Clarke had said to Margaret and Stuart Clarke. Unsurprisingly, each of Margaret Clarke and Stuart Clarke remembered different aspects of the same conversation but, overall, the details of the incident involving Mr Emmerson are generally consistent both with what Ms Clarke said to Lachlan Clarke on a separate occasion and with Ms Clarke's own evidence about what Mr Emmerson said to her.

142 Stuart Clarke's evidence suggests that Ms Clarke, when speaking to her parents, linked not "going back to the island" with Mr Emmerson's propositioning her for oral sex. That is not really consistent with the fact that Ms Clarke was told not to return to the island by Mr Beiler, and was upset about that decision. It is possible that, in what she said to her parents, Ms Clarke did not explicitly link her not returning to Kangaroo Island with the conduct of Mr Emmerson, but that Stuart Clarke drew the inference that the one was caused by the other. It is also, I think, quite possible that Ms Clarke did make that link, for example, in order to save face and provide her parents with a justification as to why she would not be returning to the Kangaroo Island. Nevertheless, I reject as implausible the possibility that she entirely invented the alleged incident involving Mr Emmerson in order to explain to her parents why she was not returning to Kangaroo Island, and then compounded the false story by making a sexual harassment claim and ultimately suing Mr Emmerson. Even if it were to be assumed that Ms Clarke was less than forthright with her parents about the reason why she was not returning to Kangaroo Island, that does not cause me to doubt that the reason she told her parents that Mr Emmerson had propositioned her for oral sex is because that is what had in fact happened.

143 The consistency between what Ms Clarke told her parents and what she had earlier said to Lachlan Clarke tends to support this conclusion.

144 The Beiler respondents submit that, just because Ms Clarke told her family members something (on two separate occasions), that does not mean that it is true. While that may certainly be accepted as a logical proposition, to my mind, the fact that Ms Clarke separately told both her son and her parents that Mr Emmerson propositioned her is far more consistent with its being true. I am of course conscious that the evidence which I regard as providing support for this allegation is not independent of Ms Clarke herself, but I still regard it as providing significant support, in that it demonstrates consistency in the allegations made by Ms Clarke, dating from

a period when she was still working for Beiler Constructions, and in a context where telling her family members what had happened did not serve to advance a claim or lawsuit.

145 Taking into account all the evidence, I find it significantly more probable that Mr Emmerson did ask Ms Clarke whether she would give him a blowjob, or words to that effect. I think it unlikely that Ms Clarke would fabricate the allegation against Mr Emmerson, or that she could have been mistaken about what Mr Emmerson said to her. I am conscious that this is a serious finding to make against Mr Emmerson but, having taken that into account, I am satisfied on the balance of probabilities that he did say words to that effect to Ms Clarke. I am prepared to act on Ms Clarke's evidence in relation to this allegation.

146 To the extent that Mr Emmerson's evidence on oath is inconsistent with this finding, I reject it on the balance of probabilities. I do not consider that Mr Emmerson could have been mistaken about whether this incident occurred. His evidence was calculated to make Ms Clarke's account seem implausible. It follows that I find on balance that his evidence in relation to this incident was dishonest. I will take this finding into account in assessing other aspects of his evidence; in particular, his evidence regarding the conduct the subject of the second sexual harassment claim.

147 Directly asking someone for oral sex constitutes a sexual advance and a request for sexual favours. Even accepting that Ms Clarke had from time to time engaged in mutual "banter" at the work site, including in relation to sexual topics and jokes, and having regard to all the circumstances so far as they are revealed by the evidence, I consider that a reasonable person in the circumstances in which Mr Emmerson found himself would have anticipated at least the possibility that Ms Clarke would be offended, humiliated or intimidated by his question.

148 To the extent that it is submitted by the Beiler respondents that Ms Clarke was putting "such a logically inconsistent position" that she could not have been genuinely concerned about the comments made to her (including Mr Emmerson's asking her for oral sex), I reject that submission. Even if Ms Clarke is confused about the timing of events, that does not cause me to doubt that what Mr Emmerson said to her was unwelcome. Again, I accept her evidence regarding this allegation generally.

149 The Beiler respondents submit that sexual remarks were not unwelcome because Ms Clarke "gave as good as she got". The evidence of some of the witnesses was to the effect that employees at Beiler Constructions regularly engaged in banter, including at times of a sexual

nature, as part of their ordinary workplace interactions. This is notably supported by the affidavit evidence of Mr Stott, who said that Ms Clarke "played along with jokes whether they were sexual or not", "said as much as anyone would have and there was mutual banter by the people on site", and "had mutual standing with the boys". He said that, when Ms Clarke started on Kangaroo Island, "most of the boys were careful and respectful to her … because she was old enough to be their mum" and "[i]t was not until Elisa opened up with jokes and banter, the boys said similar things to her". Ms Clarke accepted, in the course of cross-examination by counsel for Mr Fuss, that "people would … act up and have a few jokes … a bit of banter", and that she would engage in banter "from time to time".

150 While I accept that the evidence generally supports a conclusion that Ms Clarke participated in banter with other workers, including banter of a sexual nature, I nevertheless find that Mr Emmerson's asking her for oral sex went beyond that kind of chat, and that it was subjectively unwelcome to Ms Clarke. The conversations she had with Lachlan Clarke and Margaret and Stuart Clarke also provide relatively contemporaneous confirmation that it was unwelcome. In assessing Ms Clarke's evidence that the conduct was unwelcome, I have taken into account the fact that Ms Clarke did not make a complaint to Mr Beiler about Mr Emmerson's conduct. I accept that that is capable of being relevant, but I nonetheless accept Ms Clarke's evidence that the conduct was unwelcome.

151 For these reasons, I find that Mr Emmerson's act of asking Ms Clarke for oral sex amounted to sexual harassment. I find that the fourth sexual harassment claim is established.

Second sexual harassment claim

152 The second and third sexual harassment claims relate to events that are alleged to have occurred on or about 5 May 2023, some time after Ms Clarke had commenced a sexual relationship with Mr Stott. The allegation in the 2FASOC in relation to the second sexual harassment claim is stated as follows:

> On or about 5 May 2023, while working on the Kangaroo Island Site, Mr Emmerson asked Ms Clarke whether she knew "that James Stott has a sweaty dick?" or words to this effect. Ms Clarke did not respond … .
>
> **Particulars**
>
> Mr Emmerson's comment was entirely verbal and made in person to Ms Clarke.

153 Ms Clarke's affidavit evidence regarding this allegation is as follows:

> On or about 5 May 2023, while doing KI Work, Mr Emmerson asked me whether I knew if "James has a sweaty dick" or words to that effect. He made the comment in a mocking tone and smirked as he said this. I was working on timber framing, positioned between the wall and the breezeway when Mr Emmerson made this comment. Mr Emmerson was nearby, but above me as he was working on the roof.
>
> I did not respond to Mr Emmerson's comment as it made me feel uncomfortable. It was not welcomed, and I felt humiliated, embarrassed, and as if I was being shamed for having a relationship with Mr Stott.
>
> During this conversation, Mr Emmerson also said "are you going to be sacked?" or words to that effect. I responded by saying "I can't be sacked because I have a training contract" or words to that effect. I perceived the reference to being "sacked" to mean that my relationship with Stott was not approved. Mr Emmerson continued to taunt me by saying "are you sure you can't be sacked" or words to that effect.
>
> I can't remember whether Mr Emmerson made the "sweaty dick" or the "sacked" comment first.

154 In his affidavit evidence, Mr Emmerson denied ever making a comment to Ms Clarke that referred to Mr Stott's having "a sweaty dick", or any other comment referencing Mr Stott's penis. He stated that he could not have been working on the roof as he was not allowed to.

155 Ms Clarke responded to this in her reply affidavit:

> … I note that Mr Emmerson was not physically on the roof when he made this comment to me. Mr Emmerson was in an EWO scissor lift leaning on the top plate. A top plate is a timber beam on top of the walls that supports the roof structure. When I said Mr Emmerson was "working on the roof" … I did not mean that he was physically on the roof; I meant that he was working on a part of the roof, near the top plates.

156 The cross-examination of Ms Clarke in relation to this allegation specifically focused on the location of Mr Emmerson, when the comment was allegedly made:

> Q: In fact, Mr Emmerson never said anything like that to you, did he?
>
> A: Yes, he did.
>
> Q: And your recollection of where he was when he said that was wrong, wasn't it?
>
> A: No, it wasn't wrong.
>
> Q: You said he was nearby but above you as he was working on the roof. Those are the words you use, aren't they?
>
> A: Yes.
>
> Q: And, in fact, only contractors were allowed to work on the roof; that's right, isn't it? You were aware of that?
>
> A: No, because I was up there strapping the roof.

Q: Well – and that's new evidence, isn't it?

A: I find it highly entertaining that when you find it applicable that that's new evidence, but when I want to say something that appeals to you, you don't say that.

…

Q: And so would you agree with me that, insofar as you say Mr Emmerson was working on the roof, that was not right?

A: He was inside a EWP, and he was up at level at the top plate, so maybe my description of where he was wasn't clear enough or elaborated enough.

Q: Well, on the roof is different to next to the roof, isn't it?

A: Semantics, yes.

Q: It's not semantics?

A: It is.

Q: And your explanation at paragraph 67 on page 483 accepts that you were wrong to say he was working on the roof, doesn't it?

A: No, it doesn't.

…

Q: The height of the roof where you were working was around three metres, wasn't it?

A: Roughly.

Q: This is a workplace, a building site, isn't it? So it's noisy. Would you agree with that?

A: Yes.

Q: Would you agree that perhaps you didn't hear what you say you heard?

A: No. I 100 per cent heard what he said.

157 When Mr Emmerson gave evidence, he was also cross-examined about this alleged incident. He denied making the comment.

Q: You're aware, aren't you, that Elisa, Ms Clarke, has said that there is alleged sexual harassment that occurred by you towards her?

A: Yes, I'm aware of that.

….

Q: So on 5 May you made that comment to Elisa, didn't you?

A: No.

158 Following a clarification as to which comment was being referred to, Mr Emmerson confirmed that his evidence was that that "didn't happen". Apart from the bare allegation being put to Mr Emmerson, he was not further cross-examined in relation to this alleged incident.

159 The Beiler respondents submit that Ms Clarke, after initially claiming that Mr Emmerson was "on the roof", subsequently recanted her evidence concerning his location at the relevant time. They contend that this alleged inconsistency means that her evidence in relation to the allegation as a whole should be treated "with caution". I do not accept this criticism. To say that a person was "working on the roof" – the expression which Ms Clarke initially used to describe Mr Emmerson – is ambiguous. It can refer to a person themselves being physically located on the roof, but it is also natural to use the expression to describe someone who is doing work to the roof, even if they are not themselves physically located on the roof. The Beiler respondents placed a lot of emphasis on this suggested inconsistency in Ms Clarke's evidence but I do not regard it as at all significant in assessing her evidence of this incident (or more generally, for that matter).

160 The Beiler respondents submit that Mr Emmerson was a "frank witness who did not obfuscate or embellish his answers, which is to be contrasted with the evidence of [Ms Clarke]". However, in light of my findings, made on the balance, in relation to the fourth sexual harassment allegation, I do not accept the submission that Mr Emmerson was a frank witness. I consider it improbable that Ms Clarke falsely invented the allegation forming the basis of the second sexual harassment claim. Although the possibility that she misheard what was said cannot be excluded beyond doubt, I think it relatively unlikely that she is mistaken about what was said. In his evidence, Mr Emmerson did not suggest that he had said something else to Ms Clarke, but I bear in mind that the incident is unlikely to have had much significance for him if he had said something anodyne. Given my assessment of Mr Emmerson's honesty as regards the fourth sexual harassment allegation, I am not prepared to place much weight on his denial that he made the remark attributed to him. Weighing up the evidence in relation to this incident, and bearing in mind my general reservations about the reliability of Ms Clarke's evidence generally, as well as the seriousness of the allegation, I find myself satisfied on the balance of probabilities that Mr Emmerson did ask Ms Clarke whether Mr Stott had "a sweaty dick".

161 The Beiler respondents submit that Mr Emmerson's evidence about this incident should be preferred to Ms Clarke's, particularly "given the steps taken by Mr Beiler to ensure his staff

understood their obligations by reference to the [Beiler] Handbook and the fact [Ms Clarke] made no complaint to anyone (aside from, she says, Mr Stott …)". I do not think the fact that employees were made aware of the requirement not to engage in sexual harassment makes it much less likely that Mr Emmerson said the words attributed to him. I also do not regard Ms Clarke's failure to make a complaint to Mr Beiler as undermining the likelihood of her claims against Mr Emmerson being true (irrespective of whether she actually read the part of the Beiler Handbook addressing sexual harassment when she was asked by Mr Beiler to read it on his mobile phone while he waited).

162 It is not in dispute between the parties that, if it was made, the comment would "meet the definition of sexual harassment".

163 The question about whether Mr Stott had a "sweaty dick" referenced Ms Clarke's own personal sexual experience with Mr Stott. It was not a joke that merely referenced sexual subject matter, or discussed a sexual experience generally. It was quite explicit and crude, and, although it may have been intended as a joke, in terms it sought information that Ms Clarke could have had about Mr Stott only by virtue of their intimate sexual experiences. A reasonable person in Mr Emmerson's position would, in my view, have anticipated at least the *possibility* that Ms Clarke could be offended or humiliated by what he said.

164 The feelings that Ms Clarke deposes to feeling in response to Mr Emmerson's inquiry are entirely plausible and I accept her evidence that the comment was subjectively unwelcome at the time.

165 For these reasons, I find on the balance of probabilities that the second sexual harassment claim is established.

Third sexual harassment claim

166 The third sexual harassment claim relates to a statement made by Mr Lenepveu. In the 2FASOC it is pleaded as follows:

> On or about 7 May 2023, while working on the Kangaroo Island Site:
>
> i. Mr Lenepveu asked Ms Clarke if she was going to introduce Mr Stott to her children;
>
> ii. Mr Lenepveu made the comment in front of Ms Clarke's colleagues, Mr Henry Morton and Mr Foti Pipinis;

iii. Mr Lenepveu, Mr Morton and Mr Pipinis then laughed at Mr Lenepveu's comment; and

iv. Ms Clarke did not respond.

…

Particulars

Mr Lenepveu's comment was entirely verbal and made in person to Ms Clarke.

167 Ms Clarke's affidavit evidence regarding the incident that gives rise to the third sexual harassment claim states as follows:

> On or about 7 May 2023 while working at the Kangaroo Island work site, Mr Lenepveu asked me whether I was "going to introduce Mr Stott to my children" or words to that effect. Mr Lenepveu's tone of voice was mocking when he said this. Mr Lenepveu then laughed.
>
> Mr Lenepveu and I had not been discussing relationships or family prior to him making this comment. I did not want to talk, nor did I invite Mr Lenepveu to talk about my family and private relationship with Mr Stott.
>
> Mr Lenepveu made this comment in front of two apprentices, Foti Pipinis and Henry Morton. Mr Pipinis and Mr Morton also laughed at this comment.
>
> I did not welcome Mr Lenepveu's comment. Mr Lenepveu's comment made me feel embarrassed, offended and humiliated. I felt this way because I understood that his comment was referring to my intimate relationship with Mr Stott and to our age difference.
>
> I stayed silent and did not respond to Mr Lenepveu's comment. Instead, I continued to work.

168 This allegation was addressed by Mr Lenepveu in his affidavit evidence as follows:

> … I cannot remember the month or date but I do recall asking Elisa if she was going to introduce her two kids to Mr Stott, because her kids were the same age as Mr Stott. I do not remember how the conversation came about but I do remember asking her that question. At that moment, it was a proper conversation between Elisa and me. I was not mocking her or laughing at her when I asked her that question. There was nobody else that was present, from memory. If Elisa was offended about it, I can completely apologise. I did not know she got upset about that comment because:
>
> a) she never said anything to me at that time to indicate she had a problem with my question;
>
> b) we kept working together throughout the worksite and I never felt any anger or anything else from Elisa when I worked or talked with her;
>
> c) she never made complaint to me about the comment I made or ask me to apologise, or asked me not to ask about her personal life; and
>
> d) Elisa never changed her behaviour with me after that comment.

169 Ms Clarke's evidence was that this conversation occurred in front of Henry Morton and Foti Pipinis. Both Mr Morton and Mr Pipinis were apprentices working for Beiler

Constructions. Mr Beiler gave evidence that their employment with Beiler Constructions was terminated at or around the same time as Ms Clarke's. Neither party called Mr Pipinis or Mr Morton to give evidence and I do not draw any inference either way from the fact that they were not called to give evidence. As is apparent from Mr Lenepveu's evidence, his position was that, to the best of his recollection, neither Mr Pipinis nor Mr Morton was present during the relevant conversation.

170 Mr Lenepveu gave evidence by way of affidavit that "[i]t was not unusual for [Ms Clarke] and [Mr Lenepveu] to have discussions about our partners". In cross-examination of Ms Clarke, it was put to her that, on another occasion, she had engaged in a conversation with Mr Lenepveu about his own relationship:

> Q: I want to ask you some questions now about Julien Lenepveu. You talked with Mr Lenepveu about his girlfriend, didn't you?
>
> A: Yes, we did have conversations about his girlfriend. Yes.
>
> Q: And you asked whether he was still with his partner, didn't you?
>
> A: When I first saw him again, yes.
>
> Q: Because you knew he had a girlfriend from earlier, didn't you?
>
> A: He only just started seeing her when I was working with him back in 2021.
>
> Q: So you used personal knowledge you had of him in 2021 to have a conversation with him about whether he was still with the same person?
>
> A: We were just reconnecting after a couple of years. Like, what – how was that an issue?
>
> Q: And that was a conversation about his private life, wasn't it?
>
> A: I believed it was general chit chat.
>
> Q: Well, it was conversation about his private life, though, wasn't it?
>
> A: Correct.
>
> Q: And you initiated that conversation with him, didn't you?
>
> A: Yes, I did.
>
> …
>
> Q: So questioning him about his girlfriend was not, in your view, overtly sexual, was it?
>
> A: No, it wasn't.
>
> Q: I think you said it was general chitchat?
>
> A: It's inquiring of how he's going as a person.

Q: And so that’s one of the things that you would do in terms of interacting with people onsite?

A: Not generally. Generally, I wait till people talk to me. I don’t go out of my way to make conversation, unless it’s about work.

Q: Well, you did in this circumstance with Mr Lenepveu, didn’t you?

A: In that circumstance, I did. Yes.

Q: And insofar as you say it was sexual harassment for Mr Lenepveu to ask you whether you were going to introduce James Stott to your children, would you agree with me there was nothing sexual about that comment at all?

A: I would agree with that.

Q: And would you agree it was in the same category of asking whether he still was with his girlfriend?

A: I guess so.

Q: And there was nothing sexual about your inquiry, was there?

A: No.

Q: And there was nothing sexual about his inquiry, was there?

A: Correct.

Q: And you understood that he was genuinely interested in your life as a colleague, didn’t you?

A: By asking that question of me?

Q: Yes?

A: No.

Q: But it’s in the same category as your question you asked of him, isn’t it, about - - -?

A: It could be construed as that now, yes.

Q: Yes. And you never communicated – and you asked that question of him because you were genuinely interested in his life, weren’t you?

A: Yes, I’m a nice person.

Q: And you asked that question because you – I think you used the word, you were reconnecting?

A: Correct.

Q: You never communicated to him that this question was unwelcome, did you?

A: Nor did he of me.

171 Mr Lenepveu was cross-examined about the allegation that forms the basis of the third sexual harassment claim as follows:

> Q: … So you asked that question even after you were told by Ms Clarke that she wasn't in a serious relationship, it was just a bit of fun?
>
> A: Yes.
>
> Q: You were mocking her, weren't you, when you asked the question - - -?
>
> A: No.
>
> Q: - - - about whether James would introduce – whether she would introduce James to her children. You were mocking her?
>
> A: No.
>
> Q: You were making a joke at her expense?
>
> A: No. I was not.
>
> Q: A sexual joke at her expense?
>
> A: There's nothing sexual saying this.
>
> Q: You were mocking her relationship with a younger man?
>
> A: No. I was not.
>
> Q: Her sexual relationship with a younger man?
>
> A: I was not.
>
> …
>
> Q: Let me ask this. You did not ask whether Elisa would introduce James to her parents, did you?
>
> A: No.
>
> Q: But you did ask whether she would introduce James to her children?
>
> A: Yes.
>
> Q: And the reason you suggested her children was because they were the same age as James?
>
> A: Roughly, yes.
>
> Q: Yes. And so the reason you suggested her children was because they were the same age as a person she was having sex with, isn't it?
>
> A: Yes.
>
> Q: And that is how you were mocking her?
>
> A: No.

172 Consistently with his own evidence, I find that Mr Lenepveu said words to Ms Clarke to the effect of those attributed to him.

173 Mr Lenepveu's statement did not constitute a sexual advance or a request for sexual favours. It was a comment that was made to Ms Clarke in the knowledge that she was in a sexual relationship with Mr Stott. However, I would not characterise the making of the comment as conduct of a sexual nature. I would reach that conclusion even if the comment occurred in the manner and circumstances described by Ms Clarke in her evidence. For this reason, making the comment did not constitute sexual harassment as defined, and it is not necessary to resolve the specific disagreements between the evidence of Mr Lenepveu and Ms Clarke in relation to this conversation.

174 It follows that the allegation the subject of the third sexual harassment claim is not shown to have amounted to a contravention of the FW Act.

Seventh sexual harassment claim

175 The seventh sexual harassment claim also relates to a question alleged to have been asked of Ms Clarke by Mr Lenepveu. The claim is pleaded as follows in the 2FASOC:

> Between approximately 19 and 21 May 2023, Mr Lenepveu asked Ms Clarke whether she liked anal sex. Ms Clarke responded by saying "no" … .
>
> **Particulars**
>
> This comment was entirely verbal and occurred in person while Ms Clarke and Mr Lenepveu were working on a Southern Ocean Lodge suite on Kangaroo Island.

176 Ms Clarke gave the following evidence in her affidavit in relation to the seventh sexual harassment claim:

> Between approximately 19 and 21 May 2023, while I was working on one of the Southern Ocean Lodge suites with Mr Lenepveu, he asked me whether I liked anal sex. I responded by saying "no". I remember I was on the ground by the timber packs, cleaning up or cutting timber when this comment was made. There were people around when this comment was made but I don't remember who. As we were on site, there were people moving about and around us.

177 In Mr Lenepveu's affidavit, he denied that this occurred:

> … I have never asked Elisa about anal sex neither at work nor anywhere else. I am a private person; I have my partner that I love and we have been together for 4 years already. I have no idea where she got it from, but it was certainly not from me.

178 Ms Clarke was cross-examined about this allegation as follows:

> Q: And this allegation you made for the first time when you filed this evidence, didn't you?
>
> A: That's correct.

Q: And it never happened, did it?

A: No, it did happen.

Q: And this was an entirely new allegation you made to bolster your case?

A: No, that is not the case.

179 In cross-examination, this allegation was briefly put to Mr Lenepveu:

> Q: Mr Lenepveu, can you please go to paragraph 46 of your affidavit at page 710 of the court book. Now, in that paragraph, you are responding to the applicant's paragraph 99 of her affidavit, and you deny in that paragraph that you ever asked Elisa about anal sex?
>
> A: Yes, I deny - - -
>
> Q: And you say that that's because you're a private person?
>
> A: Yes.
>
> Q: Yes. I suggest that you did ask her about whether she liked anal sex, Mr Lenepveu?
>
> A: I didn't.

180 The allegation that Mr Lenepveu asked Ms Clarke about anal sex was not meaningfully tested in cross-examination, and Mr Lenepveu's denial was likewise not further explored. No other witnesses were asked about the incident the subject of this allegation.

181 For the reasons already explained above, I have some reservations about the reliability of Ms Clarke's evidence generally. I have not formed the view that she was dishonest in her evidence about Mr Lenepveu's question as to whether she liked anal sex. However, unlike the allegation concerning Mr Emmerson's request for oral sex, the allegation concerning Mr Lenepveu is not supported by any other evidence. I do not mean to suggest that such corroboration is a pre-requisite for the acceptance of an allegation of sexual harassment generally, but having regard to my reservations about Ms Clarke's evidence, the fact that the evidence on this issue was not really tested, and that it amounted to two inconsistent versions of events given on oath, I find myself unable to determine where the truth lies. I am therefore not satisfied that Ms Clarke has proved that Mr Lenepveu asked the question that she attributes to him.

182 For these reasons, I am not satisfied that Ms Clarke has established the seventh sexual harassment claim on the balance of probabilities.

ADVERSE ACTION CLAIMS UNDER S 340 OF THE FW ACT

First adverse action claim

183 The first adverse action claim alleges that Beiler Constructions took adverse action against Ms Clarke, through the conduct of Mr Emmerson. The basis for the claim is that Ms Clarke exercised a workplace right to make a complaint and that Mr Emmerson then subjected Ms Clarke to detrimental treatment in her employment by engaging in conduct which is identified in the 2FASOC as follows:

> … From approximately 7 May 2023 to 24 May 2023, during the periods Ms Clarke was working on Kangaroo Island, Mr Emmerson subjected Ms Clarke to detrimental treatment in employment by:
>
> (a) assigning a more junior apprentice to oversee and lead a task Ms Clarke was more experienced and qualified to lead;
>
> **Particulars**
>
> Mr Emmerson put a 1st year apprentice, Mr Henry Morton, to lead the installation of the breezeway hebel wall, something which Ms Clarke was more qualified to do as she had more experience with flooring systems and had completed the flooring systems module.
>
> (b) assigning Ms Clarke to do more menial tasks including cleaning duties;
>
> **Particulars**
>
> The menial tasks included packing up the edge protection, cleaning up timbers, and cleaning up hebel.
>
> (c) acting colder and being more hostile towards Ms Clarke;
>
> **Particulars**
>
> Mr Emmerson's cold and hostile conduct includes:
>
> a. ceasing to address Ms Clarke directly;
>
> b. excluding her from group conversations; and
>
> c. Generally isolating Ms Clarke by reason of his demeanour.
>
> (d) blaming her for mistakes made by other apprentices;
>
> **Particulars**
>
> Ms Clarke was blamed for incorrectly measuring and assembling the rafters on a building at the Kangaroo Island Site on or about 19 May 2023. However, she had no involvement in this task.
>
> …

184 Ms Clarke contends that, by "rejecting Mr Emmerson's request for sexual favours", Ms Clarke was exercising her workplace right to "make a complaint", and that Mr Emmerson's later

conduct towards Ms Clarke was engaged in *because* she had made the complaint. Ms Clarke's pleaded case is that Mr Emmerson's alleged conduct amounted to altering Ms Clarke's position to her prejudice, injuring her in her employment, or discriminating against her in comparison to other employees of Beiler Constructions by singling her out and treating her less favourably.

185 I do not consider that Ms Clarke's action in rejecting Mr Emmerson's request for oral sex constituted the making of a "complaint" by her.

186 Ms Clarke submits that the concept of a "complaint" for the purpose of s 341(1)(c)(ii) of the FW Act is to be construed broadly. In support of this submission, she referred generally to *Alam v National Australia Bank Ltd* (2021) 288 FCR 301; [2021] FCAFC 178 (***Alam***), *Cummins South Pacific Pty Ltd v Keenan* (2020) 281 FCR 421; [2020] FCAFC 204 (***Cummins South Pacific***), and *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 314 ALR 346; [2014] FCA 271 (***Shea v TRUenergy***). However, Ms Clarke did not identify any particular passages in those judgments that were said to support the conclusion that Ms Clarke's rejection of Mr Emmerson's request was a "complaint" within the meaning of s 341(1)(c)(ii).

187 In each of *Alam*, *Cummins South Pacific* and *Shea v TRUenergy*, the applicant's statement of claim alleged that adverse action was taken against the applicant because they had made various complaints about conduct engaged in by other employees. In each case, one or more of the alleged complaints was found to be a complaint for the purpose of s 341(1)(c)(ii) of the FW Act, while others were not. In all three cases, the alleged complaints were constituted by statements that were made by the applicant to another person about the conduct of a third person. None of the decisions in *Alam*, *Cummins South Pacific* or *Shea v TRUenergy* support the proposition that the very act of declining a sexual advance itself constitutes the making of a complaint and thus amounts to the exercise of a workplace right.

188 In *Shea v TRUenergy*, Dodds-Streeton J considered (at 354 [29(a)], [29(d)] – and see also 440 [627]) that, in the context of s 341(1)(c)(ii) of the FW Act, a complaint "is a communication which, whether expressly or implicitly, as a matter of substance, irrespective of the words used, conveys a grievance, a finding of fault or accusation". Her Honour also considered that "the proper purpose of making a complaint was giving notification of the grievance, accusation or finding of fault so that it may be, at least, received and, where appropriate, investigated or redressed". Likewise in *Cummins South Pacific*, Bromberg J identified the basic concept of a "complaint" in s 341(1)(c)(ii) as follows at 428 [13]:

> The natural meaning of the term "complaint" in the context in which it is used in s 341(1)(c) connotes an expression of discontent which seeks consideration, redress or relief from a matter in relation to which the complainant is aggrieved. A complaint is more than a mere request for assistance and must state a particular grievance or finding of fault: [*Shea v TRUenergy* at 433 [579]-[581]] and the authorities there cited. Whether an employee has made a complaint is a matter of substance, not form, and is to be determined in light of all the relevant circumstances, it being only necessary that the relevant communication, whatever its form, is "reasonably understood in context as an expression of grievance or a finding of fault which seeks, whether expressly or implicitly, that the employer or other relevant party at least take notice of and consider the complaint": [*Shea v TRUenergy* at 440 [626]-[627]].

The Full Court in *Alam* (at 322 [59]) referred to these statements with approval.

189 Nothing that Ms Clarke did on the occasion when Mr Emmerson asked her for oral sex can be characterised as the making of a complaint about his conduct. In any case, Ms Clarke's pleaded case is that Mr Emmerson engaged in later adverse conduct towards Ms Clarke *because she had rejected his sexual advance*, and I find that her rejection of the sexual advance did not constitute the making of a complaint for the purpose of s 341(1)(c)(ii). Ms Clarke's refusal of Mr Emmerson's request for oral sex did not itself communicate a grievance, finding or fault or accusation. Nor was it made for the purpose of giving notification of the grievance. It was made for the purpose of informing Mr Emmerson that she would not engage in oral sex with him. In saying that, I am not of course suggesting that Ms Clarke was acting for any improper purpose; just that what she said cannot be characterised as making a "complaint".

190 For these reasons, although I have accepted Ms Clarke's evidence that Mr Emmerson asked her for oral sex and that she declined his request, I do not accept that, in doing so, she made a "complaint" for the purpose of s 341(1)(c)(ii) of the FW Act. Nor did Ms Clarke's contemporaneous statement to Mr Emmerson to the effect that she was "not a home wrecker" constitute the making of a complaint. Her response did not communicate an expression of grievance; it refused Mr Emmerson's sexual advance.

191 In closing submissions, although it was not clearly part of her pleaded case, Ms Clarke contended in the alternative that Mr Emmerson had taken adverse action against her because she had exercised a workplace right, namely the right not to be sexually harassed. That is not a right of a kind that is obviously able to be "exercised", except perhaps by making a complaint about sexual harassment. Ms Clarke's response to Mr Emmerson's infringement of that right did not itself involve an exercise of a workplace right; it was instead an exercise of Ms Clarke's personal capacity to decline Mr Emmerson's advance (and to state a reason why she had done so).

192 In light of these conclusions, it is not necessary to determine whether any of the later conduct alleged against Mr Emmerson is proved to have occurred or, if it did, whether any or all of it was done *because* Ms Clarke had declined Mr Emmerson's request for oral sex. Even if anything was done by Mr Emmerson for that reason, it was not done because Ms Clarke had made a "complaint".

Second adverse action claim

193 The second adverse action claim is that Beiler Constructions took adverse action against Ms Clarke, through the conduct of Mr Widmer, an employee of Beiler Constructions, in connection with an incident that was referred to as the "Iron Sheet Incident" and is pleaded as follows in the 2FASOC:

> On 28 June 2023, after Ms Clarke had made a mistake by cutting incorrect sheets of corrugated iron:
>
> (a) Mr Widmer repeatedly asked Ms Clarke whether she was "a retard?" and whether she was "a fucking retard?" or words to this effect;
>
> (b) Ms Clarke objected to Mr Widmer's treatment by making a complaint to the effect of "when you go off at me and call me a retard it doesn't help me", and then became upset … ;
>
> (c) Mr Widmer reacted to Ms Clarke's complaint by telling her not to "turn the water works on for [him]" and "you might as well fucking go home" or words to this effect … ; and
>
> (d) Ms Clarke immediately collected her belongings and left the worksite.

194 Ms Clarke contends that her statement to Mr Widmer to the effect that "when you go off at me and call me a retard it doesn't help me" constituted a "complaint" that she was able to make, within the meaning of s 341(1)(c)(ii) of the FW Act. She further contends that Mr Widmer's statement that "you might as well fucking go home", or words to that effect, constituted the taking of adverse action within the meaning of s 340 of the FW Act, and that it was done because she made the complaint.

195 In their amended defence, the Beiler respondents allege that "it was [Ms Clarke] who called herself 'a retard' in front of two other employees, being Mr Jed Gauci and Mr Benjamin Widmer".

196 In Ms Clarke's amended reply to the amended defence, she states that she "admits that she did chide herself by calling herself a retard but otherwise refers to and repeats [allegations in terms of those set out at [193] above]".

197 Ms Clarke's affidavit evidence regarding this allegation is as follows:

> On 28 June 2023, while working at the Belair Holiday Park Site, I started cutting corrugated iron sheets. Mr Widmer approached me and asked how many sheets we had left. As there were no sheets left, I realised that I had cut the longer sheets that were meant for another part of the building. As a result, I explained to Mr Widmer that I had cut all the sheets. Mr Widmer responded by asking whether I was "a fucking retard" or words to that effect.
>
> I found his tone to be aggressive and so I responded saying "when you go off at me and call me a retard, it doesn't help me" or words to this effect. By this point, my voice started to crack, I was upset, and I was holding back tears.
>
> In response, Mr Widmer told me "not to turn on the water works" or words to this effect. He said this in a dismissive tone.
>
> When he said this, tears did start to run down my face. I had tried to hold the tears back but could not control them at that point.
>
> Mr Widmer would have seen the tears running down my face, when he added you "might as well fucking go home" or words to this effect.
>
> I understood Mr Widmer's last comment to mean that I was not allowed to continue working and had to immediately leave work. [This statement was admitted on the basis that it was limited to Ms Clarke's understanding of Mr Widmer's comments.] I therefore collected my belongings from around the site and left the worksite at approximately 11:00am.

198 Notably, Ms Clarke's evidence was generally consistent with the allegations contained in the 2FASOC, but her evidence did not incorporate or explain the admission made in her amended reply.

199 While Ms Clarke deposes to her own understanding of Mr Widmer's statement that she "might as well fucking go home", or words to that effect, that is not conclusive of their meaning. The allegation that Mr Widmer said that Ms Clarke "might as well fucking go home", or words to that effect, is relevant to Ms Clarke's contention that she was, in effect, directed not to remain at the site. This contention is addressed separately for other purposes at [338]-[341] below.

200 Mr Widmer's affidavit evidence regarding the Iron Sheet Incident is as follows:

> I have read [the relevant paragraphs] of Elisa's affidavit and respond as follows.
>
> a. When Elisa was under my supervision in Adelaide, I saw the extent of her performance issues. From what I saw at [the] Belair site, Elisa:
>
> i. Struggled with following simple instructions; and
>
> ii. Could not measure or cut materials properly.
>
> b. I think it all came down to the incident that occurred when I tasked Elisa [with] cutting the corrugated iron sheets (**Iron Sheet Incident**).

c. As a leading hand on site, I always felt like I tried to look after the apprentices. If mistakes were made, they would usually be handled on site. However, if there was a major impact that would affect the completion of a job, or there were recurring issues, this would be where I would have to tell Scott.

d. The Iron Sheet Incident had a major impact on the job so I knew I would need to speak to Scott about it. When I gave Elisa feedback [on] the Iron Sheet Incident and when she had realised the extent of the mistake, she started to say to herself "I'm such a retard" and I saw her visibly becoming upset. When this occurred, I said to her "don't start that with me," or words to that effect. In response, she said that she had "fuck all sleep" because her adult son had chicken pox or words to this effect. I also remember her saying "you're always on me" or words to that effect. Her demeanour had changed from being upset to angry and very short tempered. In response, I said to her "that's my job, especially if you are making repetitive mistakes" or words to this effect. As Elisa was quite rude, I eventually said to her "you can go if you want" or words to that effect. Before I could finish the rest of my conversation with Elisa, she dropped her stuff, and left site.

e. After the Iron Sheet Incident, I called Scott and told him about the Iron Sheet [Incident].

f. After the Iron Sheet Incident, she sent me a text message the same morning apologising for her behaviour. A copy of this text message is annexed and marked "**BSW-01**" hereto.

g. Later that afternoon, I was told by Scott to call Elisa. I called Elisa and asked how she felt. She was apologetic about the mistakes made and the way she had spoken to me. During our conversation, she assured me that she was happy, enjoyed working at Beiler and was keen to get back to work.

I deny the version of events as set out in [the relevant paragraphs] of Elisa's affidavit to the extent it is different from what is set out above and specifically say:

a. I never called Elisa "a fucking retard";

b. Elisa never said the words set out in paragraph 120 to me [ie, saying "when you go off at me and call me a retard, it doesn't help me" or words to that effect];

c. I deny saying anything like "don't turn on the water works". What I actually said was "don't start that with me" or words to that effect; -

d. I did see her cry after she called herself "a retard";

e. I never said "you might as well fucking go home";

f. I agree she told me about her adult son being sick with chickenpox, but this was not until after we were discussing the Iron Sheet Incident, not prior.

201 Ms Clarke left the work site and went home after the Iron Sheet Incident. Mr Widmer's evidence stated that he told Ms Clarke she could "go if [she] want[s]" or words to that effect, rather than saying "you might as well fucking go home" as Ms Clarke alleges.

202 The annexure BSW-01, referred to by Mr Widmer in his affidavit evidence, is a screenshot of a text message sent from Ms Clarke to Mr Widmer following the Iron Sheet Incident, later the same morning. It reads:

> Dear Horse I sincerely apologise for being rude to you. This is not my intention to be disrespectful. I take it very personally when I stuff up and actually do care about the wastage. I just wanted you to know that I'm sorry.

203 Ms Clarke's affidavit evidence in relation to this text message was as follows:

> At 11:53am I sent a text message to Mr Widmer apologising for being rude and asking when I could return to work. I sent this text message because I was worried about losing my job and wanted to try and smooth the situation over with Mr Widmer so we could move past the disagreement and continue working together. Mr Widmer did not respond to this message. …

204 It became a point of contention whether it was Mr Widmer who called Ms Clarke a "retard" or whether it had been Ms Clarke that called herself a "retard". The proposition that it was Ms Clarke who used that expression was put to her in cross-examination:

> Q: And when you realise[d] the extent of the mistake, you started to say to yourself, "I'm such a retard," didn't you?
>
> A: I don't believe I did.
>
> Q: When you say, "I don't believe I did," that's not accurate, is it? You did actually, [you were] hard on yourself on this occasion, weren't you?
>
> A: I was extremely tired and – and yes, I – I was hard on myself, but I find the word "retard" offensive.
>
> Q: That's what you called yourself, didn't you?
>
> A: My youngest son has Asperger's, high-functioning Asperger's. I don't think that I would typically call anybody a retard.
>
> …
>
> Q: Sorry … you just denied a moment ago that you called yourself a retard and gave lots of reasons why you wouldn't use that term, haven't you?
>
> A: Yes.
>
> Q: You gave instructions to your lawyers before they filed any of the documents that they filed?
>
> A: Yes.
>
> Q: And can I ask you to turn to page 123? Let me know when you've got that. Look at paragraph 8. Let me know when you've read that, please?
>
> …
>
> Q: … [I]n your statement of claim you plead that you were called a retard by Mr Widmer, don't you? … And it says at 55C [of the defence] the respondents

say it was you who called yourself a retard in front of two other employees. You see that?

A: Yes.

Q: And so, if you go back to page 123, and you see at paragraph 8, this is your response, isn't it?

A: It says that the amendment has happened, and I did – so I'm agreeing basically.

Q: Yes. That you called yourself a retard?

A: No words.

Q: Ms Clarke, the reality is, isn't it, you will say whatever you need to say?

A: No, that's not the reality at all. I'm under high pressure right now. I was under high pressure at the time when it all took place. It's been a very long time. I don't think that's unreasonable.

Q: It's always other people's fault when you get it wrong, isn't it?

A: No, it's not. I've had to have accountability all of my life.

Q: And the fact that you gave evidence about never using the term retard, that was not right, was it?

A: No.

205 Although it is somewhat ambiguous in written form, I understood the last answer in this exchange to be acknowledgment by Ms Clarke that her evidence that she herself never used the word "retard" was not right.

206 Mr Widmer was cross-examined about the Iron Sheet Incident and the use of the term "retard" as follows:

Q: I put to you that you called Ms Clarke a fucking retard during the iron sheet or as a result of the iron sheet incident?

A: I did not.

Q: I put to you that she made a complaint to you to stop yelling at her?

A: She did not.

Q: And I also put to you that she made a complaint to you so that – telling you to stop calling her a fucking retard?

A: No. She did not.

…

Q: It is your evidence that after the iron sheet incident, you spoke with Scott about it?

Q: Was this a telephone conversation you had with Scott?

A: Yes.

Q: And it's also your evidence, isn't it, that later on the same day, the same day of the iron sheet incident, you spoke with Elisa over the phone?

A: Correct.

Q: And she told you she was keen to return to work?

A: Yes.

Q: She specifically asked you during this phone call when she could return to work; is that right?

A: Correct.

Q: And it's your evidence that you told Elisa that she would need to speak with Scott about returning to work?

A: Correct.

Q: And that's because you had sent her home permanently that day, didn't you?

A: No. I did not.

Q: But the point is, she was very keen to return to work?

A: Yes.

Q: She expressed as much to you?

A: Yes.

Q: However, it is correct to say that you felt Elisa was quite rude to you after you told her off for cutting iron sheets incorrectly?

A: Correct.

207 The cross-examination of Mr Widmer about the terms of the conversation lacked nuance, and did not accommodate Ms Clarke's admission made in the amended reply that she had referred to herself as a "retard". The possibility that *both* Ms Clarke and Mr Widmer may have stated or implied that Ms Clarke was a "retard" or a "fucking retard" was not explored in the evidence.

208 The evidence of Ms Clarke and Mr Widmer about the Iron Sheet Incident and the exchange that followed is generally consistent in some important respects. Both witnesses accept that Ms Clarke made mistakes in cutting iron sheets, and after that a conversation occurred, in which Mr Widmer spoke critically to Ms Clarke about those mistakes. They both agree that Ms Clarke became visibly upset. They both accept that Mr Widmer noticed that Ms Clarke was becoming upset and said something to her to the effect that she should not become emotional (whether what was said was more like "don't turn on the water works" or "don't start that with me"). Their recollections differ in relation to other details of the incident and, in particular, as to exactly what was said by whom.

209 Mr Gauci also gave evidence about the Iron Sheet Incident. His account was recorded in a statutory declaration signed by him on 16 August 2023, which he adopts in his affidavit. Mr Gauci states:

> On the morning of the 28th of June, Elisa approached me before our shift commenced, saying she "Can't be fucked dealing with work today because I've had a shit night at home." When our shift started Elisa was instructed to cut corrugated iron sheets for cladding, she was told to cut the sheets out of the pack that was designed for the short side of the cabin we were working on. After she was finished cutting the sheets Horse asked her how many sheets were left knowing there should've been 4 sheets left over. Elisa replied "there are no sheets left over." Elisa had cut the wrong sheets which meant there wouldn't be enough sheets to finish the rest of the cladding that needed to be done. Elisa's reaction was "I'm so retarded" which Horse replied with "No you're not" and he said something along the lines of "you just didn't follow my simple instruction." This was a common occurrence whenever Elisa made a mistake she would visibly get angry and upset with herself Eg. The day prior to the 28th Elisa made a mistake drilling holes in the sheets which made the sheet completely unusable, Elisa immediately became angry and upset with herself and started to tear up. Horse's reaction to the mistake of the sheets being cut incorrectly on the 28th, was clearly frustrated but he was not once abusive or aggressive in any manner.

210 Mr Gauci's evidence identifies Ms Clarke as the source of a comment, "I'm so retarded." This is not quite the same as Ms Clarke calling herself a "retard", but I accept that Mr Gauci's evidence is generally consistent with Mr Widmer's version of the conversation, and is consistent with Ms Clarke's acceptance in her reply that she was the source of the reference to a "retard" or being "retarded".

211 There is no compelling reason to doubt the general effect of Mr Widmer's evidence about the conversation with Ms Clarke. Mr Widmer's account of the conversation is at least consistent with Ms Clarke's later text message where she apologised for being rude to him (although I accept that Ms Clarke might still have sent the same message if she had felt that Mr Widmer had been rude to her as well, or if she perceived that Mr Widmer thought she had been rude where she did not think she had been). Whilst Mr Widmer did not purport to have a perfect recollection of the conversation, I accept, on the balance of probabilities, his evidence that he did not say particular things to Ms Clarke that she attributes to him.

212 Given the nature of the work site, and the fact that Ms Clarke evidently became quite upset, it would not be surprising if Mr Widmer expressed himself forcefully and used strong language. That would not be inconsistent with his evidence that he said words "to the effect" of those stated in his affidavit, such as "don't start that with me". I make no finding about exactly what was said, but I accept on the balance of probabilities that the conversation was generally to the effect deposed to by Mr Widmer.

213 In closing submissions, Ms Clarke acknowledged that her evidence under cross-examination on this issue diverged from her affidavit evidence and submitted that she made appropriate concessions which demonstrated her commitment to answering questions with honesty and integrity. I regard it as significant that Ms Clarke was quite inconsistent across her pleadings and her evidence. I do not think she was trying to be dishonest, but I am not able to accept her evidence about this conversation as a reliable account of what occurred following the Iron Sheet Incident.

214 I have taken Ms Clarke's evidence in relation to this conversation into account in assessing the reliability of her evidence generally (including in respect of issues already resolved above), and I accept that it causes me to be concerned about the reliability of her evidence overall. Again, it does not lead me to conclude that she was being deliberately dishonest, but I think it shows that she had a tendency to become convinced of her own position and to insist on the accuracy of details, even where it could be shown that she was mistaken or that her actual memory was unclear.

215 A significant inconsistency between the various accounts given by Ms Clarke in relation to the details of the conversation include whether it was Ms Clarke who called herself a "retard" or Mr Widmer. It is possible that *both* Ms Clarke and Mr Widmer used the word "retard" in the course of the conversation, but on neither version of events given in evidence was it suggested that that was the case. Given that Ms Clarke accepted, at least once, that she did call herself a "retard", I do not consider that I can proceed on the basis that the version of the conversation pleaded in the 2FASOC is accurate in important respects. Ms Clarke's account that Mr Widmer said to her words in the form of a question – "Are you a fucking retard?" – is less probable if she had already referred to herself as a retard, as she has accepted she did. Further, I am unable to accept, on the balance of probabilities, Ms Clarke's statement that she told Mr Widmer that "when you go off at me and call me a retard, it doesn't help me". It is that statement that was relied on as constituting the relevant "complaint" for the purpose of the second adverse action claim.

216 However, even on Mr Widmer's own evidence, Ms Clarke did say words to the effect that he was being unduly harsh on her, albeit that that comment was not linked to Mr Widmer's calling her a "retard". In particular, Mr Widmer deposes that Ms Clarke said "you're always on me" or words to that effect.

217 I have significant reservations as to whether, on either version of events, what Ms Clarke said to Mr Widmer can properly be characterised as a "complaint" within the meaning of s 341(1)(c)(ii) of the FW Act. Ms Clarke's statement that Mr Widmer was "always on [her]" (or words to that effect), or – on Ms Clarke's version of events – that his "[going] off at [her]" and calling her a retard "does not help [her]" – was a remark made in the midst of an emotional exchange, and it was made to the very person who had criticised her, in the immediate context of that ongoing conversation. I doubt whether that constitutes a "complaint" that Ms Clarke was able to make, for the purpose of s 341(1)(c)(ii).

218 However, it is not necessary to reach a final view about that issue. That is because, even assuming that Mr Widmer's suggestion to Ms Clarke, to the effect that she could or should go home, relevantly constituted a detriment to her, I am not satisfied that he made that suggestion *because* she had made either of the statements that could arguably be characterised as a "complaint".

219 It is improbable that a reason that Mr Widmer suggested that Ms Clarke might go home was because she had made a complaint to him, which was also about him. Rather, having regard to the evidence of the events following the Iron Sheet Incident, it is far more likely – and I find on the balance of probabilities – that Mr Widmer told Ms Clarke either that she could or that she should go home for a combination of the reasons that (a) she was crying and was clearly upset following her mistake and their heated exchange; (b) he considered that her presence, in that emotional state, was unlikely to make a positive contribution to the work site; and/or (c) he did not want to continue to work with her any more for the rest of the day in the aftermath of what had happened.

220 It follows that I am not satisfied that Ms Clarke has established the second adverse action claim.

221 In discussing this evidence for the purpose of determining the second adverse action claim, I have not found it necessary to reach a conclusion as to whether what Mr Widmer said to Ms Clarke following the Iron Sheet Incident amounted to a direction to her to go home. That issue is relevant to another claim advanced by Ms Clarke, as to the failure of Beiler Constructions to pay her ordinary wages for the week that included 28, 29 and 30 June 2023, and it will be necessary to return to that issue at [336]-[354] below.

Third adverse action claim and threatened dismissal claim

222 The third adverse action claim is that Beiler Constructions, through the conduct of Mr Beiler, took adverse action against Ms Clarke. The claim is based on what Mr Beiler is alleged to have said to Ms Clarke in a telephone conversation that took place on 28 June 2023. This conversation occurred after she left the work site following the Iron Sheet Incident and after her conversation with Mr Widmer that was the subject of the second adverse action claim. The evidence establishes that, immediately after Ms Clarke left the work site, Mr Widmer spoke to Mr Beiler by telephone to tell him what had happened, and Mr Beiler then called Ms Clarke and had a conversation with her.

223 Additionally, Ms Clarke pleads that, in the course of the telephone conversation with Mr Beiler, he made a statement which amounted to a threat to dismiss her from her employment. The alleged threatened dismissal is also said to constitute adverse action, by reason of item 1 in the table in s 342(1) of the FW Act, taken together with s 342(2)(a).

224 The facts relevant to the third adverse action claim and the threatened dismissal claim are pleaded in the 2FASOC as follows:

> On 28 June 2023, after the Second Adverse Action, Mr Beiler contacted Ms Clarke during which:
>
> (a) he informed Ms Clarke that Mr Widmer had told him what had happened at the Holiday Park Site;
>
> (b) Ms Clarke informed Mr Beiler of her side of the story, reiterating what she had said to Mr Widmer in protest of the way he treated her and expressing to Mr Beiler that she felt frustrated and upset by his behaviour … ;
>
> (c) Mr Beiler dismissed Ms Clarke's complaint and concerns about Mr Widmer by saying that what she told him "sounds like an excuse" or words to this effect and thereby maintaining that she was in the wrong … ;
>
> (d) Mr Beiler informed Ms Clarke that Mr Widmer had told him previously that Ms Clarke was performing well;
>
> (e) Mr Beiler did not instruct Ms Clarke to return to work, but instead said that he would be in contact with Ms Clarke once he had decided what would happen next with respect to her employment … .
>
> **Particulars**
>
> This conversation was entirely verbal and occurred on 28 June 2023 during a phone call between Mr Beiler and Ms Clarke.

225 The adverse action the subject of the third adverse action claim is said to be constituted by the alleged conduct of Mr Beiler pleaded in paragraph (c) – namely, that Mr Beiler "dismissed Ms Clarke's concerns about Mr Widmer by saying that what she told him 'sounds like an

excuse' or words to this effect". Ms Clarke's pleaded case is that that constituted altering Ms Clarke's position to her prejudice, injuring her in her employment, or discriminating against her in comparison to other employees of Beiler Constructions by singling her out and treating her less favourably. The adverse action the subject of the threatened dismissal claim is said to be constituted by the alleged conduct of Mr Beiler pleaded in paragraph (e).

226 Ms Clarke's affidavit evidence regarding the third adverse action is as follows:

> Approximately 5-10 minutes after leaving the site at Mr Widmer's direction, I received a call from Mr Beiler.
>
> During this phone call, Mr Beiler told me that Mr Widmer had told him that I had been sent home.
>
> I responded by telling Mr Beiler that I felt frustrated and upset by the way Mr Widmer treated me and that I had tried to stand up for myself. I told Mr Beiler that my son Lachy had adult chickenpox, and that I was really tired as I was looking after him.
>
> Mr Beiler asked if I had "told Horse about Lachy being sick" or words to that effect. I responded "yes". I had told Mr Widmer about my son being sick and that I was caring for him on or about 26 June 2023.
>
> Mr Beiler then continued by saying that what I had said "sounded like an excuse" or words to that effect.
>
> Mr Beiler then commented that Mr Widmer said I was performing well at work, but that he would be in contact with me once he decided what would happen with my employment. He said he would give me a call back later after he had spoken to Mr Widmer.

227 In cross-examination, Ms Clarke was taken to her affidavit evidence and the following exchange occurred in relation to her account of the conversation giving rise to the third adverse action claim and the threatened dismissal claim:

> Q: That's just not a correct account of what happened, is it?
>
> A: That is absolutely a correct account of what happened.
>
> Q: And what happened was this – and I want you to agree or disagree with each of the things I'm about to put to you, please?
>
> A: Yes.
>
> Q: Mr Beiler called you to ask you for your version of events, didn't he?
>
> A: He called me, yes.
>
> Q: And he asked you what happened, didn't he?
>
> A: Yes.
>
> Q: And you explained that you had incorrectly cut the sheets?
>
> A: Yes.

Q: And you told him that you were very upset, didn't you?

A: Yes, I did.

Q: And you told him that you would offer to pay for the sheets?

A: I did, yes.

Q: And Mr Beiler then said to you something like, "I don't expect you to pay for the sheets," didn't he?

A: Yes.

Q: And he said something like, "It's a mistake I wouldn't expect an apprentice to pay for", didn't he?

A: Yes.

Q: And he said something like, "I'm disappointed because I can now see these same problems from Kangaroo Island are developing in Adelaide", didn't he?

A: Words to those effects, yes.

Q: And you said something like, "I cut the sheets wrong because I had been up all night with my 22 year old with chicken pox", didn't you?

A: Incorrect.

Q: And you told him, "I have barely had any sleep"?

A: Yes.

Q: And Mr Beiler said, "Did you tell Horse this"?

A: Yes.

Q: And just to be clear, "Horse" is Mr Widmer's nickname, isn't it?

A: Correct. Yes.

Q: And you told him, "Yes, I told him that", didn't you?

A: Yes.

Q: And Mr Beiler said, "You could have taken the day off if you are not able to concentrate", didn't he?

A: I can't remember.

Q: So it's possible he did?

A: Possible.

Q: And you never told him you felt frustrated, did you?

A: Yes, I did.

Q: And you never told him you felt upset about how Mr Widmer treated you?

A: Yes, I did.

Q: You never said to him, "I was standing up for myself"?

A: I can't remember.

Q: So it's possible that you never did?

A: I can't remember.

Q: Would you accept that if you can't remember, you can't give evidence about saying something like that?

A: No, I don't accept that.

Q: So you say you can give evidence if you have no positive recollection; is that right?

A: I really don't like answering things that I can't be truthful with, and I really feel like you're backing me into a corner.

Q: You're not being truthful about saying you were standing up?

A: I am being truthful to the best of my ability in this - - -

Q: Please just let me finish my question, because it's really important that the court knows what my question is so that the court can understand your answer. You never said, "I was trying to stand up for myself", did you?

A: I can't remember.

Q: And if you can't remember, then it shouldn't be in your evidence, should it?

A: If it is in my evidence, then it – it is what I said, and it is what is true and correct.

Q: Well, would you agree with me if you don't have a recollection, it should not be in your evidence?

A: If it is in my evidence, point me to where it is, and I will look at it, and I will reread it.

Q: Mr Beiler never said, "That sounds like an excuse", did he?

A: He a hundred per cent did say that.

Q: And Mr Beiler never told you that Mr Widmer told him that you were doing well, did he?

A: Yes, he did. He did.

Q: It is completely illogical, isn't it, in the circumstances?

A: No, it is not illogical. He definitely said that.

228 In his affidavit evidence, Mr Beiler denied stating that what Ms Clarke had said "sounded like an excuse". In cross-examination, Mr Beiler was asked about the telephone call and gave evidence as follows:

Q: And what did you say to her?

A: Can you tell me what has happened?

Q: And she complained to you, didn't she?

A: No.

Q: What did she say to you?

A: She said that, "I've stuffed up, and I've cut the sheets wrong."

Q: And didn't she also say that Mr Widmer had called her a retard or a fucking retard or something?

A: No.

Q: She didn't say that he was aggressive and yelling and going off at her?

A: No, she didn't mention that

Q: And did she tell you anything else in that conversation?

A: She said that she would be prepared to pay for the incorrect sheets that she had cut.

Q: And did she tell you anything else in that conversation?

A: I can't recall the rest of the conversation, if there was – I believe it was just around the incident that happened.

Q: Didn't she tell you that she had been up all night with her son who was unwell?

A: Yes, that's right.

Q: So she did tell you that?

A: She – yes, she did. Yes.

Q: I suggest to you that she also told you that Mr Widmer had called her a fucking retard?

A: No, that's incorrect. That's something that I would remember.

…

Q: It's possible, though, that she did complain to you about Mr Widmer's language?

A: No.

Q: It's possible that she did complain about him yelling at her?

A: I don't believe so, not yelling.

Q: So she didn't ask – isn't it possible that she asked you to help her with resolving the issues with Mr Widmer?

A: No.

Q: She never asked you?

A: No, she never asked me.

229 In light of my finding above, on the balance of probabilities, that Ms Clarke was the one who had said that she was a "retard" in the conversation with Mr Widmer, there are evident

difficulties accepting, in full, Ms Clarke's evidence as to what precisely was said in the course of the telephone call with Mr Beiler.

230 However, I shall assume for present purposes that, after Mr Beiler called her, Ms Clarke said to him (among other things) words to the effect that she considered Mr Widmer had treated her harshly or poorly and that she was upset by his behaviour. I shall further assume (without deciding) that expressing this to Mr Beiler would constitute a "complaint" that Ms Clarke was able to make in relation to her employment, and consequently that the making of the complaint to Mr Beiler constituted the exercise of a workplace right, in accordance with s 341(1)(c)(ii) of the FW Act.

231 Even if this is assumed, Mr Beiler's response to Ms Clarke did not constitute adverse action within the meaning of s 342 of the FW Act. The comment that Ms Clarke's reference to being tired, due to having been up all night with her son who had chickenpox, "sounded like an excuse", if it was made, would seem to have been a verbal response to her explanation as to why she had made a mistake in cutting the iron sheets. The failure of Mr Beiler to respond sympathetically, or to immediately accept or act on Ms Clarke's complaint about the way Mr Widmer had spoken to her, did not involve altering Ms Clarke's position to her prejudice, injuring her in her employment, or discriminating against her in comparison to other employees of Beiler Constructions. The rejection of a complaint, or the failure to take action (or appropriate action) in response to a complaint, does not itself constitute adverse action: see the table in s 342(1) of the FW Act.

232 Further, I am satisfied on the balance of probabilities that, if Mr Beiler did make the comment attributed to him and which is said to constitute the third adverse action, he did not do so *because* Ms Clarke had made a complaint about Mr Widmer's treatment of her. Rather, I am satisfied that, if Mr Beiler made the comment attributed to him, it was because he believed that Ms Clarke was identifying her lack of sleep as the reason for making a mistake in cutting the iron sheets.

233 I turn next to the alleged threatened dismissal. I am not satisfied that Mr Beiler's comment (if it was made), that he would be in contact with Ms Clarke "once he had decided what would happen next with respect to her employment" was a threat to dismiss her. Rather, given the circumstances, I am satisfied that, if Mr Beiler did say words to that effect, he did so because he was confronted by a situation in which Ms Clarke and Mr Widmer had, only five to ten minutes earlier, been involved in an emotional conversation following the Iron Sheet Incident,

which had resulted in Ms Clarke's immediately leaving the work site. Mr Beiler was asked by Ms Clarke whether she could return to the work site. It is natural that he should wish to take some time to consider any decision he might make in relation to her employment. The possible action that Mr Beiler might take could have included the dismissal of Ms Clarke from her employment, but merely telling her that he was considering what to do next with respect to her employment, and that he would be in contact once he had made a decision, did not, in my view, amount to a "threat" to dismiss her from her employment.

234 Further, and in any event, I am satisfied that, assuming Mr Beiler did tell Ms Clarke that he would be in contact with her once he had decided what should happen next with her employment, he did not do so *because* she had made a compliant to Mr Widmer or to Mr Beiler. I find that, if Mr Beiler made that comment, he did so because he found himself having to address a situation in which Ms Clarke had made a mistake in the cutting of the iron sheets, and had left the work site after an emotional exchange with Mr Widmer, and because Mr Beiler considered that he would need to make a decision of the kind he described, and intended to take some time to consider it before deciding and communicating the decision to Ms Clarke. This seems to me to be the obvious and natural reason why Mr Beiler would make the comment attributed to him. The evident purpose of Mr Beiler's call to Ms Clarke was to hear from her what she said had occurred during the Iron Sheet Incident and the subsequent conversation with Mr Widmer. It is highly improbable that the fact that Ms Clarke had complained to Mr Widmer or the fact that she had complained to Mr Beiler constituted the reason, or part of the reason, for telling her that he would be in contact with her after he had decided what should happen next with respect to her employment.

235 For these reasons, I am not satisfied that Ms Clarke has established either the third adverse action claim or the threatened dismissal claim.

Fourth adverse action claim

236 The fourth adverse action claim is that Beiler Constructions took adverse action, again through the conduct of Mr Beiler, by shortening the notice period to which Mr Beiler had previously agreed. The general factual context of the fourth adverse action claim is set out by Ms Clarke as follows. On 30 June 2023, Mr Beiler met with Ms Clarke and verbally informed her that he had "decided to let [Ms Clarke] go", or words to that effect. He told her that she would be given three weeks' notice instead of the one week's notice to which she was entitled, and that she could work her three weeks' notice period from 3 July 2023. Mr Beiler also offered to give

Ms Clarke a written reference. After Ms Clarke returned to work on 3 July 2023, she called Mr Beiler and made a complaint regarding Mr Widmer. During this call, according to Ms Clarke, Mr Beiler retracted his offer to provide three weeks' notice, and told Ms Clarke that she would only be given one week's notice.

237 Ms Clarke provides the following account of the conversation she had with Mr Beiler on 30 June 2023 in her affidavit evidence:

> Between approximately 2:00pm and 3:00pm on 30 June 2023, I arrived at the Glenelg North site. I sat out the front on a concrete fence with Mr Beiler. Mr Beiler told me that he "needed to scale down and let a few people go" and that he had "decided to let [me] go" or words to that effect. Mr Beiler did not tell me the names of any of the other people he was letting go. Mr Beiler said I could have one week's notice. I asked if I could "work until I found something else" or words to that effect. Mr Beiler responded saying "no" but the "best [he] could do was three weeks' notice" or words to that effect and added that he would provide me with a reference. Mr Beiler then said that he was going to "put in some phone calls to find [me] another position" or words to that effect…

238 Mr Beiler's affidavit evidence in relation to the facts relevant to the fourth adverse action claim is as follows:

> I never told her that I would give her three weeks['] notice. This has been taken out of context. [N]otice was 1 week. Because I saw her become upset and teary, I basically told her that I would pay her for an extra couple of weeks (if needed) while she worked for me and actively looked for work elsewhere … .

239 Ms Clarke replied to this in her reply affidavit:

> … He did say that he would give me three weeks' notice. He told me "I can give you a maximum of three weeks" or words to that effect. Mr Beiler did tell me he would provide me with a reference, and he never said I was being terminated due to poor performance, he just said he was letting me go because he was "downsizing".

240 In cross-examination, Mr Beiler was asked about this conversation further and, in relation to notice, admitted that he "had agreed to give [Ms Clarke] an additional two weeks on the one week".

241 When Ms Clarke was cross-examined about the same phone conversation, it was put to her, and she agreed, that "the agreement [she] always had with [Mr Beiler] was three weeks". When Ms Clarke was asked whether she "knew [she] didn't get paid unless [she] worked that three weeks" she replied that she "wasn't sure" because she had "never been in this situation before". It was further put to her that she never worked any of the notice period, to which she replied, "I was being bullied and abused. I wasn't going to work in [those] conditions."

242 There is a subtle difference between the evidence of Ms Clarke and Mr Beiler about the circumstances in which Mr Beiler originally came to agree that Ms Clarke could continue to work for *up to* a further three weeks rather than merely serving out her one-week notice period, and about the precise terms of their agreement. Both Ms Clarke and Mr Beiler agree that Mr Beiler informed Ms Clarke that her employment was to be terminated, and that she was to be given one week's notice. Ms Clarke either became upset or asked whether she could continue to work for Beiler Constructions until she was able to find new employment (or both). In response, Mr Beiler offered to allow her to continue to work for Beiler Constructions for a further two weeks (on Ms Clarke's evidence) or for *up to* a further two weeks until she found other employment (on Mr Beiler's evidence).

243 Given that Ms Clarke's evidence is that she had asked Mr Beiler whether she could continue to work for Beiler Constructions until she found new employment, it seems consistent and probable that Mr Beiler offered to permit her to continue working for *up to* three weeks while she looked for other work. This is also consistent with Mr Beiler's offering to provide her with a reference and to see if he could find another employer who would be prepared to take her on. It is, however, quite possible that Ms Clarke did not appreciate the subtlety of Mr Beiler's position and regarded his offer as a simple offer to allow her a three-week notice period. In light of what happened later, I do not find it necessary to decide whether the arrangement should be regarded as an offer of a three-week notice period rather than a one-week notice period. On any view, the practical effect of Mr Beiler's offer was that, at least if Ms Clarke did not find new employment within the additional two-week period, she was being allowed three weeks until her employment was to come to an end, during which time she would be paid, providing she continued to work for Beiler Constructions.

244 I accept that, given Mr Beiler's offer to Ms Clarke, if he made a decision to retract that offer, and to substitute a period of one week's notice, the making of that decision would constitute adverse action within the meaning of s 342 of the FW Act. That is so because the making of such a decision would amount to altering the position of Ms Clarke to her prejudice: see item 1 of the table in s 342(1) of the FW Act.

245 As mentioned, Ms Clarke alleges that on or about 3 July 2023, she called Mr Beiler and told him that "it's happening again" or words to that effect, and that she needed his help with Mr Widmer. During this conversation Ms Clarke alleges that Mr Beiler retracted the

three-week notice period and reinstated the one-week notice period. I shall assume (without deciding) that Ms Clarke's statement to Mr Beiler amounted to a "complaint".

246 It was put to Mr Beiler in cross-examination that, in the telephone conversation he had with Ms Clarke on 3 July 2023, he reduced the notice period from three weeks to one week:

> Q: And you, in the course of that conversation with Ms Clarke – you replied to her saying that she only had a week left to work; is that correct?
>
> A: I don't believe so, because we – we both agreed there was a week notice period, and I was going to give her an extra two weeks additional on top of that, so I don't believe I would have said "I'm going to give you one week" when we both agreed that it was going to be one week notice plus an additional two. So it would be a total of three.
>
> Q: And then you also said during that conversation that you would give her a call back?
>
> A: Yes. I believe I was busy at the time.
>
> Q: But you didn't call her back, did you?
>
> A: No.
>
> Q: And you never called her back at any time since that last conversation, did you?
>
> A: No, she sent me a text message saying that she was done, and she was going to leave.
>
> Q: And you never followed that up, did you?
>
> A: No.
>
> Q: And so she complained to you about Mr Widmer?
>
> A: No.
>
> …
>
> Q: I put it to you that she made a complaint to you, didn't she, on 3 July?
>
> A: No.
>
> Q: At or about lunchtime?
>
> A: No.
>
> Q: And you ignored her. You ignored her, didn't you?
>
> A: No.
>
> Q: You didn't call her back?
>
> A: I didn't call her back, no.

247 The terms and effect of the telephone conversation between Ms Clarke and Mr Beiler on 3 July 2023 are in dispute. Ms Clarke's position is that the three weeks' notice was retracted, while

Mr Beiler’s is that he did not retract the three weeks’ notice. Mr Beiler’s position is that it was Ms Clarke who chose not to work out the agreed three-week notice period, and that she notified him of her decision via the text message that she sent on 3 July 2023.

248 I am inclined, on balance, to accept Mr Beiler’s evidence about this conversation as more likely to be reliable. Both Mr Beiler and Ms Clarke agree that that telephone conversation ended with Mr Beiler saying her would call Ms Clarke back. That suggests that Mr Beiler intended to continue the conversation. Having regard to that fact, and my assessment of the evidence of Mr Beiler and Ms Clarke generally, I accept on balance Mr Beiler’s evidence that he had not made any decision to reduce the three-week period during which Ms Clarke was able to continue working for Beiler Constructions.

249 As events turned out, Mr Beiler did not in fact call Ms Clarke back, but I accept his evidence that that was because, before he had done so, Ms Clarke sent him a text message at 3.05pm on 3 July 2023, stating (among other things) that she was “done”.

250 I am not in a position where I find that I disbelieve Ms Clarke’s evidence about this, and it is possible that Ms Clarke somehow formed the impression that Mr Beiler was reneging on his agreement to allow her to work up to three weeks. However, I am not prepared to find on balance, and contrary to Mr Beiler’s testimony, that he told Ms Clarke that he was reducing her notice period from (up to) three weeks down to one week.

251 For these reasons, I find that the fourth adverse action claim is not established on the balance of probabilities.

Claim that adverse action in removing Ms Clarke from working on Kangaroo Island was taken on the basis of Ms Clarke’s sex

252 Ms Clarke contends that Beiler Constructions took adverse action against through the decision of Mr Beiler to remove her from working on Kangaroo Island after her third swing, and that one of the reasons for doing so was because of Ms Clarke’s sex, in contravention of s 351 of the FW Act.

253 The allegation is pleaded as follows in the 2FASOC:

> On or about 24 or 25 May 2023, Mr Beiler had a telephone conversation with Ms Clarke during which:
>
> (a) He said that he wanted to speak with Ms Clarke about the things that were happening on Kangaroo Island;

(b) He indicated that Ms Clarke would not be returning to the Kangaroo Island Site;

(c) Ms Clarke asked if this was because of something to do with Mr Stott;

(d) In response, Mr Beiler accused Ms Clarke of being a distraction, commenting that Mr [Stott] was favouring her over the other apprentices;

(e) Ms Clarke responded by saying "absolutely not" and that "James is treating [her] the way he treats other apprentices" or words to this effect;

(f) Ms Clarke then explained that she had "worked so hard these last 4 years for it to be ruined over this, is there any way I could fix this? I promise it won't happen again" or words to this effect[.]

Ms Clarke's evidence

254 In Ms Clarke's affidavit evidence, she deposes to the following in relation to the telephone conversation in which Mr Beiler informed her that he had decided to remove her from Kangaroo Island:

> On or about 25 May 2023, after I returned home from my third FIFO Swing on Kangaroo Island, I received a call from Mr Beiler.
>
> During this phone call, Mr Beiler told me that he wanted to talk to me about the things that were happening on Kangaroo Island. He said that he would not be returning me to the Kangaroo Island site. I asked Mr Beiler if he made his decision because of something to do with the relationship between Mr Stott and I. Mr Beiler did not deny this and said that he was "unhappy" or words to that effect. Mr Beiler alleged that I was a distraction, and that Mr Stott was favouring me over the other apprentices. I denied this saying "absolutely not" and that "James is treating me the way he treats other apprentices" or words to this effect. I then pleaded with Mr Beiler saying I "worked so hard these last four years for it to be ruined over this, is there any way I can fix this? I promise it won't happen again" or words to this effect. Mr Beiler told me that we would continue our discussion when we met in person.
>
> It was clear from our conversation that Mr Beiler would not be returning me to Kangaroo Island. After 24 May 2023, I was no longer rostered to do Kl Work.

255 Ms Clarke was cross-examined about this matter as follows:

Q: The conversation you set out in that paragraph never happened, did it?

A: It absolutely did happen.

Q: And, in fact, Mr Beiler told you he was not happy with your work performance on the island, didn't he?

A: No, he didn't.

Q: And he told you you would not be returning to Kangaroo Island, didn't he?

A: Yes, he did tell me that I was not returning to Kangaroo Island.

Q: And he told you that the decision was based on your performance?

A: No, he didn't.

Q: And you understood from this conversation that Mr Beiler had significant concerns with your performance, didn't you?

A: No.

Q: And insofar as he mentioned your relationship with Mr Stott, he restated his concerns that if things didn't work out, it could get messy, didn't he?

A: I'm not 100 per cent sure on that.

Q: So it's possible?

A: It's possible.

Q: And you didn't raise any of the complaints of sexual harassment at this stage with Mr Beiler, did you?

A: I thought about making those complaints when we were - - -

Q: I'm not asking you what you thought about. You did not raise any complaints of sexual harassment at this stage, did you?

A: No, I didn't.

Q: And you didn't say to him anything like the only reason people say I don't perform is because I refuse to give Emmerson a blowjob, do you?

A: I didn't have the chance to have that conversation with him.

Q: Well, you could have had that conversation with him at this time, couldn't you?

A: No, I couldn't have had that conversation with him at that time.

Q: And it's part of your case that you think you're being removed from Kangaroo Island because of how you were treated there, isn't it?

A: Yes.

Q: … This was your opportunity to raise it, wasn't it?

A: No, it was not my opportunity to raise it.

Q: Because if Mr Beiler had known about what was going on, then maybe he might have made a different decision. Would you agree with that?

A: Maybe.

Q: … You don't give any reason as to why you didn't have a frank discussion with Mr Beiler about what was going on at this point, do you?

A: I do. I state in my affidavit that on the – around the twenty – after 24 May, we were supposed to have a conversation in person while we were working, but Mr Beiler decided not to have that conversation because Stevie was around, and he tabled the – that conversation, and he was – he said that he was going to have the conversation with me in the future. That future conversation never took place.

Q: Well, you can't blame Mr [Beiler] for not making time to have a conversation with you if you didn't ask for that, can you?

A: He requested the conversation.

Q: Well, but he didn't know what was going on with you, did he?

A: That was the purpose of us working on that day. We were supposed to have a conversation and talk and work at the same time, but that never took place. I tried to bring up that conversation at lunchtime, which is when I told him about the call-up for TAFE.

Q: There was nothing preventing you from making a complaint to Mr Beiler, was there?

A: Physically, no. Mentally, yes.

Q: And you didn't make a complaint because, in fact, there was nothing to complain to Mr Beiler about, was there?

A: There absolutely was something to complain about, and I wish I did.

Mr Beiler's evidence

256 Mr Beiler gave the following evidence in his affidavit about the phone call with Ms Clarke:

> … I had a phone conversation with Elisa. I told her that I was not happy with her work performance on the island I told her that she would not be returning to Kangaroo Island. I told her the decision was based on her work performance. I briefly touched on the topic about her relationship with James and restated my concerns about if things did not work out, it could get messy, but that was not the reason. My thoughts were about what skills I needed onsite. James was a Qualified carpenter who was in Kangaroo Island for 6 months before Elisa, which meant he knew the site well; I needed that skill level there. I made the decision to take Elisa from the site (and the others mentioned) because they were not performing as well. In particular I wanted to give Elisa a chance to prove her skills with some more support and in a place, I could better supervise her myself and that was not on Kangaroo Island.
>
> … I wanted to continue having a conversation with Elisa about her performance and clearly explained to her directly my expectations about what I expected of her as a second-year apprentice. Elisa text messaged me saying "when and where did you want to meet" I replied saying "I was halfway through replying earlier and that I was busy and I would call shortly" or words to that effect. I called Elisa on the 26th May during the day to arrange a meeting. This meeting was meant to take place at a job site in Glenelg. The purpose of the meeting was to discuss her performance on Kangaroo Island. My intentions were to have a pre-start talk with Elisa but I was late due to family commitments and when I got to site, Elisa was already working so I thought I would reschedule the meeting for another time.

257 Mr Beiler was cross-examined about this phone call as follows:

Q: At paragraph 74 you say that you had a conversation with Elisa and you told her that you were not happy with her work performance?

A: That's correct.

Q: But that never happened, did it?

A: No, it happened.

Q: Well, you didn't tell her that you weren't happy with her work performance?

A: Yes.

…

Q: I put to you that you didn't raise the issue about her work performance?

A: No, I didn't, yes.

Q: And that rather what you said to her was that you were not happy about the things that were happening on site?

A: Yes.

Q: On KI?

A: Yes.

Q: Isn't it the case that that general phrase, "The things that were happening on KI," could have meant or did mean that that was about the Stott – the relationship with Mr Stott?

A: No.

Q: Well, that is the case, isn't it?

A: No.

Q: That is the reason why you took her off site?

A: No.

Q: Not one of the reasons?

A: I would agree that it wasn't – I wasn't happy about the situation, or rather I didn't – it made me feel uncomfortable. But that wasn't one of the reasons why I removed her from the site.

Q: Are you sure about that?

A: Yes.

Q: Well, that's just – I mean it's not the case, is it?

A: No.

Q: There's no – you can see that there's no performance issues that you have been – that you've been witness to at KI?

A: I didn't see her that often in KI - - -

Q: Correct?

A: - - - working.

Q: So you never saw them and the only thing that you're going off is what Emmerson has told you?

A: Amongst others.

…

Q: And then at paragraph 75 you say that you were going to have a conversation with her about performance. I'm paraphrasing there obviously?

A: Sorry, yes, I wanted to continue a conversation, I believe.

Q: But you never had that conversation, did you?

A: No.

Q: And you had an opportunity to have the conversation. Well, you could have called her?

A: Correct.

Q: You didn't call her?

A: No.

Q: I put it to you that no one reported performance issues to you?

A: No, that's incorrect.

Mr Emmerson's evidence

258 In his affidavit, Mr Emmerson gave the following evidence regarding Ms Clarke's removal from Kangaroo Island:

> As I said in [the relevant paragraph] of this Affidavit, the reason Elisa was removed from Kangaroo Island was because:
>
> a) She received a lot of complaints from other employees that did not want to work with her; and
>
> b) She had underlying performance issues.
>
> I had a phone conversation with Scott [Beiler] about all employees' performance as we did quite often. In this conversation, he informed me that he would be downsizing our crew. There were conversations as to who I thought would be removed from Kangaroo Island. This was based on performance and the tasks outstanding on the project and the skill sets we required to finish the project. Unfortunately, Elisa did not fit these criteria, similar to at least four other employees who were also removed. I cannot recall the names of the employees, but I believe Scott will have this information on file.

259 Mr Emmerson was cross-examined in relation to his conversation with Mr Beiler. He was asked about his evidence in relation to the complaints received from other employees:

Q: You told Mr Beiler to remove her from site, didn't you?

A: Yes.

Q: And you did that because she had rejected your sexual advances

A: No.

Q: There was no other reason for removing her from site, was there?

A: Yes, there was.

Q:	Well, the reason was what, do you say?
A:	It was performance-based, and then other employees didn't want to work with her.
Q:	But you agree that there was no performance management system on foot with her? You've already said that?
A:	Yes.
Q:	And there aren't any complaints that we've seen in your evidence to support your contention that other employees complained about her?
A:	There was other employees.
Q:	Well, there are no complaints in your affidavit, are there, that refer to other people?
A:	Not written complaints, but I do say in my affidavit that there was people that complained.
Q:	But you don't provide any specifics of that, do you?
A:	No I don't. They were just conversations.
Q:	But there's no specific conversation. It could be – they could have complained about her because she was female, couldn't they?
A:	No.

Conclusions regarding Mr Emmerson's involvement in the decision to remove Ms Clarke from Kangaroo Island

260 There is disagreement between the parties as to whether the relevant "reasons" for Ms Clarke's removal from Kangaroo Island are limited to Mr Beiler's subjective reasons for taking that action, or whether Mr Emmerson's subjective reasons for asking that Ms Clarke be removed from Kangaroo Island are also relevant.

261 As I have explained above, Mr Emmerson was evasive in response to questions about whether the relationship between Mr Stott and Ms Clarke was one of the reasons why he recommended to Mr Beiler that Ms Clarke be removed from the island. Consistently with what Mr Emmerson accepted he had said in both his witness statement and response in the Fair Work Commission, I find that his reasons included the existence of the relationship and his perception that it was causing disruption, and that he communicated that to Mr Beiler.

262 I find that Mr Emmerson asked Mr Beiler to remove Ms Clarke from working on Kangaroo Island partly because of issues concerning her performance (in particular, that she had made a number of mistakes, some of which were costly) and partly because he considered that her relationship with Mr Stott was having a negative effect. These were, from Mr Emmerson's perspective, rational reasons for making the request and, given that he had those rational

reasons, I do not think it is likely that the fact that Ms Clarke was a woman was itself one of Mr Emmerson's reasons for asking Mr Beiler to remove her from working on the island.

263 Notably, it was *not* put to Mr Emmerson that one of his reasons for asking Mr Beiler to remove Ms Clarke from Kangaroo Island was because Ms Clarke was a woman, or even because she was the female partner in the relationship with Mr Stott. At one point in cross-examination, it was put to him that he had not substantiated his assertion that other employees had complained about the standard of Ms Clarke's work. Mr Emmerson responded that he had not provided specifics because "[t]hey were just conversations" that he had had. It was then put to him that "they could have complained about her because she was female", which Mr Emmerson denied. In any event, that was not a proposition about Mr Emmerson's own reasons. The failure to put to Mr Emmerson that his reasons included that Ms Clarke was a woman makes it easier for me to accept that that was not one of his reasons for asking Mr Beiler to remove Ms Clarke from the island.

Findings and conclusions as to the reasons for removing Ms Clarke from working on Kangaroo Island

264 I find that Mr Beiler was the sole effective decision-maker in respect of the question of whether Ms Clarke should be removed from Kangaroo Island. However, in making that decision, he took into account information that had been provided to him by Mr Emmerson.

265 It is Mr Beiler's subjective reasons for taking the action that he did, which are relevant in the circumstances of this case: see the discussion in *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) 234 IR 139; [2013] FCA 451 at 147-8 [25]-[29]. The evidence of what Mr Emmerson said to Mr Beiler is relevant to ascertaining the reasons why Mr Beiler made the decision, but that does not mean that all of Mr Emmerson's subjective reasons for wanting Ms Clarke removed from Kangaroo Island can automatically be attributed to either Mr Beiler or Beiler Constructions as the reasons for the action that was taken.

266 I am prepared to assume for present purposes that one of the reasons why Mr Beiler decided to remove Ms Clarke from Kangaroo Island was because of Mr Emmerson's reports that her relationship with Mr Stott was having an adverse effect on the employees there. However, even if that is assumed, it does not follow – and I do not accept – that Mr Beiler chose to remove Ms Clarke rather than Mr Stott from working on the island because of Ms Clarke's sex.

267 First, Mr Stott was an employee who had earned the trust and respect of Mr Beiler through working for him over a period of around three and a half years. He had been promoted to the position of leading hand after working for Mr Beiler for around six months. He performed the role of a supervisor on the site and was not an apprentice. It is unsurprising that he would be regarded as more important to the performance of the work of Beiler Constructions on Kangaroo Island than Ms Clarke, who was an apprentice.

268 This is supported by Mr Beiler's evidence that, at the same time that Ms Clarke was removed from working on Kangaroo Island, Mr Beiler also decided to remove four other apprentices. Mr Beiler gave evidence that all the apprentices who were no longer to work on Kangaroo Island, other than Ms Clarke, also ceased working for Beiler Constructions at that time. Ms Clarke submits that there is no corroborative evidence of this, and that Mr Gordon's evidence in cross-examination was to the contrary. Mr Gordon's evidence was that Mr Beiler told him in around mid-2023 that he would be let go, and that following this, he was sent back to MBA to be assigned to a new host employer. When cross-examined, Mr Gordon said that he could not remember the exact date he stopped working for Beiler Constructions but that it was "around the middle of the year". When it was put to him that it was "July, approximately", he answered that it was "around then". There is some uncertainty about this evidence, and I am not prepared to make any particular finding as to whether Mr Gordon ceased working for Beiler Constructions at the time when he stopped working on Kangaroo Island.

269 Secondly, I accept that there were performance issues in relation to Ms Clarke's work. She had made a number of mistakes, including costly mistakes. If Mr Beiler regarded it as beneficial to remove either Ms Clarke or Mr Stott from the island, the decision to remove Ms Clarke would enable her to work in a location where Mr Beiler could more closely supervise her. This is consistent with Mr Beiler's evidence, which I accept on this issue.

270 Even though there was evidence that Mr Stott himself had made one mistake on the work site, Mr Stott was an experienced employee with a supervising role. He had a much longer track record of working with Mr Beiler and was clearly capable of working under less supervision. Even assuming that Mr Beiler's decision to remove Ms Clarke from working on Kangaroo Island was influenced by the fact that she and Mr Stott were in a sexual relationship, such that they should not continue to work together, I accept Mr Beiler's evidence insofar as he says that he did not decide to remove Ms Clarke from the island because of her sex.

271 Ultimately, this contention seems to amount to a submission on behalf of Ms Clarke that, in circumstances where she and Mr Stott were carrying on a sexual relationship, Mr Beiler had decided that one of them ought to be removed from the island; that Mr Beiler decided that it should be Ms Clarke, rather than Mr Stot, who should be removed; *and that his reasons for deciding to remove her, rather than Mr Stott, from Kangaroo Island included the fact that she was a woman*.

272 While Mr Beiler's decision may well have been influenced by the report he had received from Mr Emmerson, that Ms Clarke's relationship with Mr Stott was causing disruption, I am satisfied on balance that Beiler Constructions did not remove her from working on Kangaroo Island for reasons that included her sex. I find that Ms Clarke's relative lack of seniority, relative lack of a track record with Mr Beiler, and performance issues were matters that Mr Beiler took into account, and that it was these considerations, and not the fact that Ms Clarke was a woman, that constituted the reasons why Beiler Constructions removed Ms Clarke from working on Kangaroo Island.

The allegation that Mr Emmerson contravened s 340 of the FW Act

273 In relation to Mr Emmerson, Ms Clarke alleges that he contravened s 340 of the FW Act by "advis[ing], encourage[ing] or incit[ing]" Beiler Constructions to take adverse action against Ms Clarke (engaging s 362 of the FW Act). I accept that Mr Emmerson recommended to Mr Beiler that Ms Clarke be removed from working on Kangaroo Island. I find that his reasons for making that recommendation included performance issues as well as the fact that he considered that Ms Clarke's presence on the island was causing disruption, because of her relationship with Mr Stott. Although Mr Emmerson in his cross-examination appeared initially reluctant to admit that the relationship between Ms Clarke and Mr Stott formed any part of his reasons, he did ultimately accept that it was part of the reason. I accept that aspect of his evidence.

274 Ms Clarke alleges that Mr Emmerson encouraged Mr Beiler to remove Ms Clarke from working on Kangaroo Island because she had made a "complaint" by refusing his request for oral sex. For the reasons already given at [185]-[190] above, I do not accept that Ms Clarke's response to Mr Emmerson constituted a "complaint" in the sense necessary to engage s 341(1) of the FW Act. Ms Clarke's allegation that Mr Emmerson contravened s 340 fails for that reason.

275 Further and in any event, as I have said at [262] above, I accept on the balance of probabilities that Mr Emmerson's reasons for recommending that Mr Beiler remove Ms Clarke from working on Kangaroo Island related to the fact that she was in a sexual relationship with Mr Stott, as well as performance-related issues, and that they did not include the fact that she had declined his request for oral sex.

Conclusion

276 For these reasons, I find that Ms Clarke has not established the adverse action claims against Beiler Constructions and Mr Emmerson relating to the decision to remove her from working on Kangaroo Island.

OTHER ALLEGED CONTRAVENTIONS OF THE FW ACT

False or misleading representation

277 Ms Clarke alleges that Mr Beiler contravened s 345 of the FW Act by making a misrepresentation to her that she would not be paid her ordinary hours for the period from 28 June 2023 to 30 June 2023, and that she would need to draw upon her annual leave to receive pay for this period. This is pleaded in the 2FASOC as follows:

> Mr Beiler agreed to deduct Ms Clarke's annual leave to cover the period from 28 June 2023 to 30 June 2023 during which she was not provided work or permitted to return to work … .
>
> **Particulars**
>
> Mr Beiler's agreement is to be inferred by conduct, being the unlawful deduction of 22.80 hours of annual leave from Ms Clarke for the 24 June 2023 to 30 June 2023 pay period.

278 It will be noted that this part of the pleading does not identify what is said to be the relevant "representation", and instead refers to an "agreement" that is "to be inferred by conduct". In another part of the 2FASOC, the contravention of s 345 of the FW Act is pleaded in the following terms:

> In contravention of s 345 of the FW Act, Beiler Constructions knowingly or recklessly made a false or misleading representation by:
>
> (a) failing, refusing or omitting to correct Ms Clarke's misapprehension as to her entitlement to be paid for at least 38 hours ordinary hours per week as a full time employee, in circumstance where Beiler Constructions had not provided her work for the period between 28 June 2023 to 3 July 2023; and/or
>
> (b) refusing or omitting to inform Ms Clarke that she did not need to draw upon her annual leave to be paid her full time ordinary hours for the period between

28 June 2023 to 3 July 2023 when she was directed not to attend work and not provided work; and/or

(c) conduct when it deducted annual leave for the period during which Ms Clarke was instead entitled to be paid for ordinary hours.

279 The circumstances surrounding this claim relate to the aftermath of the Iron Sheet Incident. Some of the evidence relating to this incident has been described above. It will be recalled that Ms Clarke went home on the afternoon of 28 June 2023 following a heated discussion with Mr Widmer.

280 Ms Clarke sent a text message to Mr Beiler at 8.52pm on the day she went home, 28 June 2023. The text message reads as follows:

> Sorry to bother you but I'm just wondering what am I doing tomorrow? Also I left my impact driver onsite. Horse said that Jed has it but I have no way to contact Jed? I'm just looking for some guidance, horse said not come to site till I had spoken to you.

281 Mr Beiler's response did not direct Ms Clarke to attend work the following day, nor did it provide her the option to do so. He responded by text message as follows:

> Na all good. Sorry I was meant to call you earlier but have been flat out. I'm back tomorrow evening and want to have a chat with you. Have tomorrow off to look after your lad and I'll give you a call tomorrow. 👍

282 Mr Beiler gave the following evidence in relation to his text message in response:

> I was under the impression that Elisa wanted to know what she was doing tomorrow in relation to work such as what tasks was, she going to be undertaking, as she had made such a huge mistake that day cutting the corrugated iron sheets. I thought she was requiring more guidance in work related tasks due to the consistent mistakes she was making. I knew her son was not well as she explained in the phone call so I thought it would be better if she looked after him and herself as she explained that was why she had made the mistakes earlier that day.

283 Ms Clarke then did not attend work on 29 and 30 June 2023. It is contested whether Ms Clarke was permitted to work after the Iron Sheet Incident. In cross-examination, Mr Beiler asserted that Ms Clarke was still permitted to return to the worksite on 29 and 30 June 2023 as follows:

> Q: Isn't it the case that Elisa was not able to return to the worksite, was she?
>
> A: No, she was definitely able to return to the worksite.
>
> …
>
> Q: So you've included there evidence that Elisa has contacted you to ask you what she's doing the next day?
>
> A: That's correct.

Q: Well, doesn't that mean that she doesn't know what she's doing the next day because she can't come back to work?

A: No. So I interpret her message differently than the way you're explaining it.

Q: Well, how do you interpret that message?

A: As in wondering what she was going to do tomorrow, meaning what task she was going to be performing.

Q: Well, that's not true, is it? She was not able to return to work?

A: No, she was definitely able to return to work. She was scheduled to return to work.

284 Mr Beiler's interpretation of Ms Clarke's text message (that it referred to what kind of work Ms Clarke would be performing) is not completely implausible if the words "wondering what am I doing tomorrow" are read in isolation. If that is how Mr Beiler interpreted the message, he evidently entirely missed the significance of Ms Clarke's statement that Horse (Mr Widmer) had told her not to come to site until she had spoken to Mr Beiler. Mr Beiler's evidence did not directly address that part of Ms Clarke's text message at all.

285 Mr Beiler's message in response to Ms Clarke's encouraged Ms Clarke to stay home for the purpose of looking after her son. Implicit in that statement was that Mr Beiler had accepted Ms Clarke's statement to him that her son was sick. Mr Beiler's text message can only sensibly be understood as accepting that Ms Clarke's son was sick and that he approved her remaining home from work on 29 June 2023 to look after him.

286 In light of Ms Clarke's understanding (which she effectively communicated by her text message) that she was not to return to work until that was approved by Mr Beiler, Ms Clarke effectively had no option other than to stay home from work on 29 June 2023 for the purpose of looking after Lachlan Clarke. Objectively assessed, this was a direction from Mr Beiler to Ms Clarke not to work on 29 June 2023.

287 Ms Clarke's undisputed evidence was that on 29 June 2023, Mr Beiler called her to arrange a time to meet the following day. Ms Clarke states that, on 30 June 2023, when she met with Mr Beiler, he told her words to the effect that he "needed to scale down a let a few people go" and that he had decided to let her go. Ms Clarke gave the following evidence in relation to this:

> As I was walking out the house at the Glenelg North site with Mr Beiler, I asked him whether I could be paid annual leave to cover the period 28 to 30 June 2023 as I had only worked two days that week. 28 to 30 June 2023 was the period when Mr Beiler directed me not to return to work. My understanding was that if I did not ask for annual leave for those days, then I would not be paid. In response to my request, Mr Beiler agreed to pay my annual leave to cover the three days where I was directed not to

> attend work. My payslip for the period 24 June 2023 to 30 June 2023 shows that 22.80 hours of annual leave, being three days' work, has been deducted. …

288 Mr Beiler then specifically addressed the deduction of annual leave in his affidavit evidence, as follows:

> In reference to [the relevant paragraph] of Elisa's affidavit, she was scheduled to work at Belair on 28 June 2023, 29 June 2023 and 30 June 2023. However, she left early on … 28 June 2023 because of the [Iron Sheet Incident]. Elisa took 29 June 2023 and 30 June 2023 off to look after her son Lachy, who had chicken pox. She did not provide any medical certificate for this period. I am not too sure why she did not provide the medical certificates, but this was her responsibility.
>
> Further … , when I told Elisa I was letting her go, Elisa asked me to pay her annual leave for the days she did not attend work. The days she was rostered to attend work but did not attend were 29 June 2023 and 30 June 2023. Normally, it is not our policy because I would need 1 week notice to approve annual leave, but I made the decision on the spot and agreed to pay her annual leave to cover her for that week. She also did not obtain her sick leave certificate.

289 Mr Beiler was cross-examined about this aspect of his evidence, as follows:

> Q: And when you spoke to her, she raised concerns about not getting paid, didn't she?
>
> A: No. She asked if she could take annual leave.
>
> Q: And she raised concerns that she wouldn't get paid between the period of 28 June to 30 June?
>
> A: No. She just asked if she could be paid her annual leave for that period.
>
> Q: Didn't she raise concerns with you to say that, "I've only worked two days this week." She did, didn't she?
>
> A: Potentially.
>
> Q: Yes?
>
> A: Yes.
>
> Q: So she said to you, "Scott, I'm concerned I've only worked two days this week," you know, "I've got things to pay for," etcetera, etcetera. "Can I take the shortfall, you know, can I make up my hours? Can I take annual leave?"
>
> A: I don't believe how that – that's how the conversation went, but, yes, she asked to take her annual leave for the period of two days that she took off.
>
> Q: But you agree, don't you, that the reason that she asked to take the annual leave was because she thought she wasn't going to get paid for those hours?
>
> A: No. I thought that she hadn't got a sick certificate to provide for those days, so she wanted to use her annual leave rather than carer's leave or - - -
>
> Q: Why would she want to – why would that be the case?
>
> A: To cover for the two days that she potentially wasn't getting paid for because she didn't have the sick certificate.

290 The cross-examination of Ms Clarke in relation to this conversation was as follows:

> Q: It's the case, isn't it, that during the conversation with Mr Beiler when he told you he was letting you go, you asked him to pay you annual leave for the days you didn't attend work?
>
> A: Yes, I asked him that.
>
> Q: And that's because you knew you weren't going to be paid for days you didn't attend work, where you didn't provide a sick leave certificate, wasn't it?
>
> A: No.
>
> Q: And did you understand it was the ordinary policy that you had to ask for annual leave in advance?
>
> A: Ordinary, yes. You have to ask for annual leave in advance.
>
> Q: And you would agree that Mr Beiler, despite that policy, approved annual leave for those days, didn't he?
>
> A: That is what happened.
>
> Q: And you didn't obtain any sick leave certificate for those days, did you?
>
> A: I wasn't aware that I needed a certificate for that.
>
> Q: … You were aware that you had to get a sick leave certificate for personal leave for caring, weren't you?
>
> A: I've never taken personal care, ever.
>
> Q: And would you agree that, if you had read the handbook, you may well have understood that?
>
> A: If I had have read the handbook, yes.

291 It is not necessary to resolve the difference between Mr Beiler's and Ms Clarke's recollection of the details of the conversations between them. Both Ms Clarke and Mr Beiler accept that it was Ms Clarke who requested that she be permitted to use her annual leave for the period between 28 and 30 June 2023.

292 The Beiler respondents submit that Mr Beiler treated Ms Clarke more favourably than he was required to, in allowing her to take annual leave, given that it was not applied for in advance, and agreed to pay her annual leave "so her pay would not be reduced as a result of her own actions and decisions".

293 I accept that, whatever the true legal position (which is addressed further below), Mr Beiler believed that Ms Clarke was not entitled to be paid for the period between 28 and 30 June 2023 and that he was, in effect, doing her a favour by allowing her to take those days as annual leave. The actual generosity of Mr Beiler's position is somewhat tempered by the fact that he did not

propose that that time be taken as personal/carer's leave. In the proceedings, he maintained the position that Ms Clarke was not entitled to personal/carer's leave because she had not provided a medical certificate – even though he himself had accepted that the purpose of Ms Clarke's absence from work was to care for her sick son, that he had proposed that course, and that he had not mentioned the possible relevance of a medical certificate.

294 Given the manner in which Ms Clarke was cross-examined about her state of mind when she asked to take the period between 28 and 30 June 2023 as annual leave, it is appropriate to mention the relevant passage in the Beiler Handbook, which the Beiler respondents relied on. The Beiler Handbook provided that employees were "entitled to take personal leave" for reasons that include "to provide care or support to a member of your immediate family, or a member of your household who requires your care and support because of … a personal illness or injury affecting the member…". The Beiler Handbook also includes the following statement:

> **6.3 EVIDENCE**
>
> A medical certificate from a registered health practitioner or if not reasonably practical, a statutory declaration is required for all personal leave, unless otherwise agreed by the Employer in specific circumstances.
>
> The Employer retains the discretion to require evidence for carer's leave. The Employer will notify you of this requirement as appropriate.

295 If the expression "personal leave" were read as including carer's leave, and if the clause were read literally, it would be self-contradictory. The only sensible reading of cl 6.3 is that evidence for personal leave which is in the nature of "carer's leave" is only required where the employer notifies an employee that it is required. There is no suggestion that Mr Beiler ever informed Ms Clarke that evidence (beyond the information she had already told him) was required, or that he informed her that she would have to take the leave as annual leave unless she produced a medical certificate relating to her son.

296 In any event, it is not really to the point that the Beiler Handbook stated that Ms Clarke would ordinarily be required to provide a medical certificate in order to obtain approval for taking personal leave, given that Mr Beiler had already accepted that Lachlan Clarke was sick and had directed Ms Clarke to take 29 June 2023 to care for him.

297 It is apparent that Ms Clarke made the request that she be permitted to take annual leave for those two days on the assumption that she was not entitled to personal/carer's leave, and that she thought that she was not entitled to be paid her ordinary hours for those days.

298 It was not put to Mr Beiler that he knew that Ms Clarke was entitled to be paid her ordinary hours in the somewhat unusual circumstances in which he found himself in the period between 28 and 30 June 2023, or (for example) that he had subjectively alluded to that possibility and ignored it. I find, on the balance of probabilities, that Mr Beiler was proceeding under the same misapprehension as Ms Clarke.

299 It follows that Ms Clarke has not established that any representation made by Mr Beiler, on behalf of Beiler Constructions, was made with the knowledge that it was false, or reckless as to whether it was false.

300 In any event, it seems highly doubtful to me that the conduct on which Ms Clarke relies amounted to a representation by Mr Beiler with respect to Ms Clarke's workplace rights. Merely failing to correct Ms Clarke's own misapprehension that she was not entitled to be paid ordinary hours for the period between 28 and 30 June 2023 did not involve any representation by Mr Beiler, even accepting that Ms Clarke's statements demonstrated that she believed that she was not entitled to be paid in respect of that period of time unless she was able to take annual leave. And, while it might be said to be implicit in processing her request for annual leave for 22.80 hours that Beiler Constructions believed that Ms Clarke was not entitled to be paid ordinary hours, I do not accept that the act of processing those days as annual leave should be regarded as making a "representation by conduct" that Ms Clarke did not have a workplace right to be paid ordinary hours in respect of those days. Nor, in any event, could Ms Clarke have been expected to rely on any implicit representation that could be said to have been made by Mr Beiler, since it was she who had asked to take the relevant days as annual leave: cf FW Act, s 345(2).

Failure to provide pay slips to Ms Clarke

301 In the 2FASOC, Ms Clarke sets out eight dates on which she received payment via electronic funds transfer from Beiler Constructions. Ms Clarke provides particulars of the amounts paid for work performed in pay periods between 25 March 2023 and 19 May 2023. Beiler Constructions admits that payments were made on the eight specified dates but does not plead to the particulars.

302 Ms Clarke alleges that Beiler Constructions failed to provide pay slips in respect of those eight pay periods, in contravention of s 536(1) of the FW Act, and that Mr Beiler aided and abetted, counselled or procured, or was knowingly concerned in or a party to the contravention, and is therefore liable for the contravention by reason of s 550(1) of the FW Act.

303 In her affidavit, Ms Clarke gave the following evidence about the text message she sent to Mr Beiler on 23 April 2023:

> On 23 April 2023 at 5:11pm, I sent Mr Scott Beiler a text message requesting my payslips and letting him know that I had not received any payslips since starting employment with Beiler Constructions. Also in that message, I expressed some confusion about the wage paid into my account saying that my "pay seemed to be very big" and "can you when you have a chance take a look".

304 A copy of the text message was exhibited to Ms Clarke's affidavit. The text message read:

> Oki Doki cool cool😎
> Also my pay seemed to be very big not that I am complaining but I haven't received any payslip yet and have nothing to compare it to. Can you when you have a chance have a look?

305 Ms Clarke deposes that she started receiving pay slips regularly from 2 June 2023 and continued to receive them until the end of her employment approximately one month later.

306 Beiler Constructions and Mr Beiler deny the allegation that pay slips were not sent to Ms Clarke, and further say that pay slips were provided to a particular personal email address maintained by Ms Clarke, through the bookkeeping software called Xero.

307 Ms Clarke gave evidence by way of affidavit that on 29 July 2024, Beiler Constructions provided her legal representatives with her pay slips for the period from 1 April 2023 to 19 May 2023. She states:

> I have now looked over these payslips and confirm that I have neither seen, nor received a copy of those payslips prior to Beiler Constructions disclosing them as a result of informal discovery.

308 Ms Clarke gave evidence in her reply affidavit that she "went through [her] emails on [her] computer again with one of [her] legal representatives on 30 August 2024 and confirmed that [she] received no email from Xero, or emails from Beiler Constructions attaching pay slips, until 2 June 2023".

309 In cross-examination, Ms Clarke accepted that Beiler Constructions had been corresponding with her via the email address she had provided. Counsel for the Beiler respondents pressed Ms Clarke for both failing to provide evidence that she checked her email address, including checking her spam mailbox, at the time she alleges she did not receive the pay slips. Ms Clarke initially stated that she "believe[d] she did" check her email address, and that she had also done so with her lawyer "alongside of [her]", although she ultimately agreed that her affidavit evidence did not contain any specific evidence to support this. Ms Clarke was then asked

whether she was aware that she "could have had [her] account forensically assessed to determine whether emails were received by [her] account" to which she responded that she was "not aware of that".

310 Mr Beiler annexed to his affidavit screenshots showing that the email address recorded in Xero against Ms Clarke's employee record was the email address which Ms Clarke had provided for the purpose of receiving pay slips. The evidence did not establish when that screenshot was taken, or whether the record had been changed at any time after it was first created. Mr Beiler also annexed to his affidavit screenshots from Xero which showed a tick against Ms Clarke's name in the column headed "Payslips". I take this record to indicate that pay slips for Ms Clarke were sent out in respect of each of the pay periods between 25 March 2023 and 19 May 2023. The screenshots establish the date and time when each pay slip was sent (and in each case it is the date one would expect that pay slip to have been sent) but they do not show the email address to which each pay slip was sent. Although the Xero system appears to show that pay slips were sent by email from Mr Beiler's email, Beiler Constructions did not produce any evidence of the sent emails to which the pay slips were attached.

311 Ms Clarke was asked whether she received pay slips from her previous employer, Felmeri (which were not in evidence). Ms Clarke responded "potentially", and when asked if it was the case that she just did not recall, she responded, "Without having a look on my phone, I can't recall, but I've also just recently been hacked as well." The respondents submit that Ms Clarke cannot rely on being "hacked" while still denying receipt of pay slips and that such inconsistencies undermine the reliability of her evidence, particularly when Mr Beiler gave evidence that pay slips were sent via an automated payroll system and Ms Clarke acknowledged that she received other employment documents to her email address. The timing and consequences of any "hacking" were not further explored, and I do not regard Ms Clarke's comment as a basis to treat her evidence about the receipt of pay slips as unreliable.

312 Considering all the evidence, I find that it is more probable than not that Ms Clarke did not receive pay slips for work performed in the pay periods between 25 March 2023 and 19 May 2023.

313 In my view, it is improbable that Ms Clarke would send the text message to Mr Beiler in the terms that she did if she had been receiving pay slips to her email, or if she had not checked her email address. I accept that it is *possible* that Ms Clarke failed to check her email thoroughly at that time, and that she was mistaken in telling Mr Beiler that she had not received pay slips,

but that is quite improbable. I do not accept the Beiler respondents' criticism that Ms Clarke's affidavit evidence did not expressly state that she had checked her email for pay slips at around the time when they were sent, and I do not accept the suggestion that this was a fabrication on the part of Ms Clarke, invented for the first time under cross-examination. On a fair reading of Ms Clarke's affidavit, her statement that she did not receive pay slips to her email address at least strongly implied that she had checked her emails for pay slips. In any case, it is simply improbable that she would send a message stating that she had not been receiving pay slips without having checked her email. The fact that she revealed in cross-examination that she maintained multiple email accounts does not cause me to think it is more probable than not that she was mistaken about not receiving pay slips.

314 Ms Clarke's evidence in her reply affidavit (which was not directly challenged, and which I accept) – that, upon checking her email account with her lawyers for the purpose of the proceeding, she found that she had records of pay slips sent from 2 June 2023 onwards, but not before – tends to confirm these conclusions.

315 However, I do not find that Mr Beiler's evidence on this topic was dishonest. The provision of pay slips and the setting up of the system for them to be emailed to employees was not something that could be expected to have been particularly memorable to Mr Beiler. His evidence, which was not challenged, was that he may have done that himself or may have had administrative assistance.

316 Although the evidence does not explain what, if anything, occurred after Mr Beiler received Ms Clarke's text message, the issue with Ms Clarke not receiving pay slips was rectified at a point in time after she sent Mr Beiler the message. The system established by Beiler Constructions was designed to provide for the automatic provision of pay slips to all employees. The Beiler respondents' evidence of the records of the Beiler Constructions computer system establishes that pay slips for Ms Clarke were indeed generated and sent, but not that they were sent to the correct email address for Ms Clarke. The computer system records do not indicate, one way or the other, which email address the pay slips up until 2 June 2023 were sent to, or whether the email address on file for Ms Clarke was ever changed. If, as I have found is probably the case, Ms Clarke was not sent pay slips to the correct email address at the commencement of her employment, that was probably because there was an administrative error in the initial entry of Ms Clarke's email address in the system. The fact that Ms Clarke then received pay slips after she raised the issue with Mr Beiler indicates that any such issue

was quickly fixed, and the likelihood is that that was done either by Mr Beiler or by an administrative assistant at his direction, once he was informed by Ms Clarke that she had not received pay slips.

317 The Beiler respondents submit that Ms Clarke should have had her emails forensically assessed to determine whether relevant emails were received by her account. I do not accept this criticism. While it would have been possible for her to do so, and doing so might have produced better evidence (or, alternatively, might have produced evidence that disproved her claim), to have done so would arguably have been quite disproportionate to a claim that she did not receive pay slips for a period of around eight weeks. In any case, this issue must be determined on the balance of probabilities on the evidence that is actually before the Court and, for the reasons I have given, based on the evidence that is before the Court, I find on balance that Beiler Constructions inadvertently failed to supply pay slips to Ms Clarke for work performed between 25 March 2023 and 19 May 2023.

Mr Beiler's involvement in the failure to provide pay slips to Ms Clarke

318 Ms Clarke contends that Mr Beiler was knowingly involved in the non-provision of pay slips by reason of s 550(1) of the FW Act. She submits that the following matters establish Mr Beiler's knowing involvement in the contravention of s 536(1) of the FW Act by Beiler Constructions:

(1) Mr Beiler is the sole director of Beiler Constructions since March 2010 and has employed over 100 apprentices; this suggests he is familiar with the applicable industrial instruments, including the FW Act and the Award.

(2) Mr Beiler was aware of the terms of [Ms Clarke's] employment and was responsible for employing her.

(3) Ms Clarke sent a message to Mr Beiler notifying him that she had not received her pay slips.

319 In practical terms, in order to establish that Mr Beiler was knowingly concerned (for the purpose of s 550(2)(c) of the FW Act) in the contravention of s 536(1) by Beiler Constructions, Ms Clarke would need to establish that Mr Beiler had knowledge that the system used to generate and send pay slips was not delivering them to her email address, and that, despite this knowledge, he allowed pay periods to pass without ensuring that pay slips were provided to Ms Clarke.

320 For the reasons already explained, I find that the failure of Beiler Constructions to provide pay slips to Ms Clarke was accidental and did not arise from any deliberate decision to enter an incorrect email address for Ms Clarke into the automated system. Therefore, until Mr Beiler received the text message from Ms Clarke in which she stated that she had not been receiving pay slips, there is no basis to find that Mr Beiler was aware that the pay slips that were being generated and sent by the automated system were not being delivered to the correct email address for Ms Clarke.

321 However, after Ms Clarke sent Mr Beiler a text message drawing his attention to the fact that she was not receiving pay slips, Mr Beiler was aware of that fact. Given that Mr Beiler was involved in the establishment of the pay records and was Ms Clarke's point of contact in respect of them, it follows, in my view, that, in relation to the payments of wages made to Ms Clarke on each of 29 April 2023, 6 May 2023, 12 May 2023 and 20 May 2023, Mr Beiler was "in any way, by act *or omission*, directly or indirectly, knowingly concerned in" Beiler Constructions' contravention of s 536(1) of the FW Act.

322 For these reasons, I find that Ms Clarke has established on the balance of probabilities, pursuant to s 550 of the FW Act, that Mr Beiler was knowingly involved in Beiler Constructions' contravention of s 536(1) of the FW Act, in respect of the payments of wages made to Ms Clarke on each of 29 April 2023, 6 May 2023, 12 May 2023 and 20 May 2023.

Failure to provide Fair Work Information Statement

323 Ms Clarke contends that Beiler Constructions contravened s 125 of the FW Act by failing to provide her with a copy of the Fair Work Information Statement before, or as soon as practicable after, Ms Clarke started her employment.

324 Mr Beiler's affidavit evidence was that he did "not recall giving [Ms Clarke] a Fair Work Information Statement during her employment" but that "they are readily available within our worksites and office and online". In cross-examination, Mr Beiler accepted that he did not provide Ms Clarke with a Fair Work Information Statement because he "didn't get around to doing it". In their closing submissions, the Beiler respondents accepted, and I find, that Beiler Constructions failed to comply with s 125 of the FW Act.

325 Section 61(3) of the FW Act provides that Divs 3 to 12 of Pt 2-2 of Ch 2 of the FW Act constitute the NES. Section 125 is in Div 12. Section 44 of the FW Act is a civil remedy provision which provides that an employer must not contravene a provision of the NES. It

follows that Beiler Constructions' non-compliance with s 125 of the FW Act amounts to a contravention of s 44.

Failure to make payment in full

326 Ms Clarke contends that Beiler Constructions contravened s 323(1) of the FW Act by failing to make payment to her in full of the amounts to which she was entitled under the Award. This alleged contravention of s 323(1) is based on the same facts that are said to give rise to the following Award contraventions:

(a) cl 16 – failure to pay Ms Clarke the full amount for ordinary hours worked between 17 June 2023 and 23 June 2023 and between 24 June 2023 and 30 June 2023;

(b) cl 20.3 – failure to make payments to Ms Clarke on the Thursday of each week during the Employment period;

(c) cl 22 – failure to pay Ms Clarke an industry allowance;

(d) cl 25.6 – failure to pay Ms Clarke for travel time to and from Kangaroo Island;

(e) cl 26.1(a) – failure to pay Ms Clarke a fares and travel pattern allowance while Ms Clarke worked in and around Adelaide;

(f) cl 18.3 – failure to provide Ms Clarke with rest breaks when she worked on sites in and around Adelaide;

(g) cl 21.1(a) – failure to pay Ms Clarke a tools allowance;

(h) cl 21.1(d) – failure to reimburse Ms Clarke for the cost of safety boots;

(i) cl 20.6 – failure to make payment of the full amount of Ms Clarke's accrued but unused annual leave upon termination of employment; failure to pay Ms Clarke's wages on 3 July 2023; and failure to make payments in lieu of notice for the period from 4 July 2023 to 7 July 2023;

(j) cl 31.2(b) – failure to pay Ms Clarke's annual leave loading on accrued annual leave upon termination of employment; and

(k) cl 28.2(a) – failure to pay the additional superannuation contribution due to Ms Clarke on account of the superannuation contribution that was paid being calculated without reference to the other entitlements to additional pay under the Award.

ALLEGED CONTRAVENTIONS OF THE AWARD

Failure to pay for all ordinary hours in three identified periods

327 Ms Clarke claims that Beiler Constructions failed to pay her for her full ordinary hours for three distinct periods, namely:

(a) between 17 June 2023 and 23 June 2023 (first period);

(b) between 24 June 2023 and 30 June 2023 (second period); and

(c) on 3 July 2023 (third period).

328 The parties agree that Ms Clarke's ordinary hours of work as a full-time employee were 38 hours per week.

The first period – events of 22 June 2023

329 For the first period, Ms Clarke claims that she was only paid for 34.5 hours in the week, and that she was entitled to be paid for 38 hours (being full-time hours under the Award). The shortfall occurred on 22 June 2023. In relation to that day, Mr Beiler alleges in his affidavit evidence that Ms Clarke left the worksite at 10.00am and did not explain why she was absent from the site, and that she was therefore not paid.

330 In her reply affidavit, Ms Clarke deposes:

> … I was directed by Horse to leave the Belair worksite because it was raining and too wet to continue work. Horse told Jed and I to leave Belair and go to the Greenhill site instead. Jed and I left and worked with Horse on the Greenhill site for the rest of the day. I have now been told by my legal representatives that there may be a claim for payment due to inclement weather.
>
> …
>
> On Thursday 22 June 2023, I worked all day. I remember specially that I was working on the Belair site that day, but the weather was so bad that Horse directed Jed and I to leave and travel to the Greenhill site instead. Jed, Horse and I worked at the Greenhill site for the rest of that day. … As Horse would do all of the clocking on and off, if me working at the Greenhill site wasn't recorded, that would have been because Horse failed to clock me on there.

331 The reference to the "Greenhill" site is a reference to a site on Greenhill Road in Wayville.

332 Although Mr Widmer (that is, Horse) was called as a witness for the Beiler respondents, his affidavit evidence included no evidence about the events of 22 June 2023. Likewise, although Mr Gauci (that is, Jed) was called as a witness for the Beiler respondents, he did not address the events of 22 June 2023 in his affidavit evidence.

333 Neither party asked any questions of any witness in relation to the events of 22 June 2023, and the respective cases were not put to any witness in cross-examination.

334 Ms Clarke's evidence was not directly challenged, except by a general assertion in Mr Beiler's affidavit. However, it is apparent that Mr Beiler's evidence on this issue is not based on direct experience of the relevant events but, rather, relies on inference from the time records available to him, and is directed to explaining why the payments he made accord with those records. If Ms Clarke's evidence that she worked all day on 22 June 2023 at a different site, or her evidence that Mr Widmer was responsible for "clocking her on" at that site, were to be disputed then I would have expected that Mr Widmer would have given evidence about those matters. Ms Clarke's evidence about the factual circumstances that unfolded on 22 June 2023 was not contradicted by the Beiler respondents, and I accept it on the balance of probabilities. In circumstances where Ms Clarke's position was clear from her affidavit evidence, and the Beiler respondents did not adduce any evidence from the witnesses they called who could have spoken to what happened on 22 June 2023, I do not consider the failure by Ms Clarke's counsel to put her version of events to Mr Widmer and Mr Gauci in cross-examination precludes me from accepting her evidence on this topic.

335 For these reasons, I find that there was an underpayment of wages by Beiler Constructions to Ms Clarke in respect of the week which included 22 June 2023, as alleged by Ms Clarke. I accept that this underpayment was evidently inadvertent as far as Mr Beiler was concerned, because Ms Clarke was paid in accordance with a record kept by Beiler Constructions, which mis-recorded the hours worked by Ms Clarke on that day.

The second period – characterisation of what occurred on 28, 29 and 30 June 2023

336 The shortfall of ordinary hours in the second period is alleged to have occurred when Ms Clarke left the work site on 28 June 2023 following the Iron Sheet Incident. Ms Clarke alleges that she was sent home by Mr Widmer and was not permitted to return to work by Mr Beiler until after their conversation on 30 June 2023.

337 I have made some general observations at [193]-[210] above regarding the competing versions of the conversation between Mr Widmer and Ms Clarke following the Iron Sheet Incident, in the context of considering the second adverse action claim. As indicated there, I proceed on the basis that the conversation between Mr Widmer and Ms Clarke was generally to the effect of Mr Widmer's evidence, though I am not prepared to make specific findings about the exact words that were used.

338 Relevantly, Ms Clarke became upset during the conversation. Mr Widmer's evidence is that he said to her words to the effect that she could "go if [she] want[s]", whereas Ms Clarke's evidence is that he said words to the effect that she "might as well fucking go home". Again, I am not able to make a finding as to the exact words that were used. Both Mr Widmer and Ms Clarke agree that it was Mr Widmer who raised the prospect of Ms Clarke going home.

339 An issue that arises is whether what Mr Widmer said amounted to a direction to Ms Clarke to go home, or merely an offer to allow her to go home if she wished. As a near contemporaneous record referring to the conversation between Mr Widmer and Ms Clarke, the text message sent by Ms Clarke to Mr Beiler at 8.52pm on 28 June 2023 is relevant to the determination of that issue. It is convenient to set out the terms of that text message again:

> Sorry to bother you but I'm just wondering what am I doing tomorrow? Also I left my impact driver onsite. Horse said that Jed has it but I have no way to contact Jed? I'm just looking for some guidance, horse said not come to site till I had spoken to you.

340 Ms Clarke's message asked Mr Beiler what she was to do on 29 June 2023, on the basis that – as she said in the message – she had been told by Mr Widmer not to "come to site" until she had spoken to Mr Beiler. This confirms that Ms Clarke's contemporaneous subjective understanding, at least, was that Mr Widmer had directed her not to return to work. I accept that it is probable – and I find on the balance of probabilities – that the effect of Mr Widmer's communication to her was that she was not to return to work until she had spoken to Mr Beiler.

341 Mr Gauci's statutory declaration made on 16 August 2023 (and adopted as accurate in his affidavit evidence) also has some relevance to this issue. Mr Gauci, speaking of the evening of 28 June 2023, states:

> After our shift ended Elisa called me at night as she left one of her tools on site and I picked it up, during the phone call she asked me if she thinks Scott Beiler our boss would let her return to work as she said she had acted out of line on the worksite before she left mid shift.

On balance, this aspect of Mr Gauci's evidence – in particular, the fact that Ms Clarke asked him whether he thought Mr Beiler would allow her to return to work – tends to support the conclusion that Ms Clarke had been told by Mr Widmer not to return to work until she had received Mr Beiler's approval.

342 A direction to the effect that Ms Clarke was not to come to work again until she had spoken to Mr Beiler was more consistent with Mr Widmer having directed Ms Clarke to go home, as opposed to his merely offering her an opportunity to go home. Although I do not make a finding

about the precise words used, I do find, on the balance of probabilities, that, on the afternoon of 28 June 2023, Mr Widmer said to Ms Clarke words to the effect that she was not to return to the work site until she had spoken to Mr Beiler. Objectively assessed, the effect of that statement, coupled with the suggestion (however it was framed) that Ms Clarke go home, amounted to a direction that she discontinue working at the site, and that she not return until she had spoken to Mr Beiler and he had told her that she could return.

343 Against that background, the effect of the text message sent by Mr Beiler to Ms Clarke on 28 June 2023 was that she was not to attend the site to work on 29 June 2023 (but was, rather, to stay home and look after Lachlan Clarke). In his affidavit evidence, Mr Beiler accepted that Ms Clarke took 30 June 2023 off for the same purpose. The significance of this is, first, that Mr Beiler had approved Ms Clarke's being absent from work for that particular purpose, and secondly, that she was effectively given no choice but to do so in light of the earlier direction from Mr Widmer. Mr Beiler's statement therefore amounted to a direction that Ms Clarke was not to attend the work site on 29 June 2023.

344 On 29 June 2023, Mr Beiler did not direct Ms Clarke to attend work the following day, and she remained subject to the direction given by Mr Widmer. On 30 June 2023, Mr Beiler did not tell Ms Clarke that she was permitted or required to return to the site to perform work – rather, he arranged for her to meet with him and have a conversation. The effect of that conversation was that Ms Clarke's employment was to be terminated and that she could work out a notice period, commencing from 3 July 2023.

345 While I accept that Ms Clarke was included on the roster to work on each of 29 and 30 June 2023, that did not mean that she was provided with work or was required to work on those days, in circumstances where the roster had been superseded by other directions.

346 Having regard to this whole sequence of events, the appropriate characterisation of what occurred is as follows.

(1) Ms Clarke was directed by Mr Widmer to leave the work site on 28 June 2023. She was entitled to be paid ordinary hours for the whole of that day.

(2) Ms Clarke was directed by Mr Beiler not to work on 29 June 2023. Although this direction can be regarded as partly compassionate, in that Mr Beiler told Ms Clarke to take the day off to care for her son, she had not sought any form of leave for that day. Accordingly, she was entitled to be paid ordinary hours for 29 June 2023.

(3) As to 30 June 2023, Ms Clarke was subject to a direction from Mr Widmer that she not return to the work site until she had spoken to Mr Beiler. On 30 June 2023, Ms Clarke spoke to Mr Beiler and he did not tell her that she could or should attend work on that day. Instead, he informed her that her employment was to be terminated and that she could work a notice period, commencing on the next weekday, 3 July 2023.

(4) Therefore, considering the natural meaning of Mr Widmer's direction, objectively assessed, Ms Clarke was not to attend the work site unless and until Mr Beiler permitted her to do so, and he permitted her to return to work from 3 July 2023.

347 Ms Clarke was entitled to be paid her ordinary hours for the whole of the week which included 28, 29 and 30 June 2023. Ms Clarke was entitled to be paid 38 hours ordinary time in that week. The effect of the arrangement which was put in place (at Ms Clarke's request, but based on a failure to appreciate her Award entitlements) was that she was instead paid for 19.25 hours of ordinary time and 22.8 hours which were treated as annual leave.

348 It follows that there was an underpayment arising from the payment of wages made to Ms Clarke in respect of the week which included 28, 29 and 30 June 2023, and that Beiler Constructions contravened cl 16 of the Award in respect of the period.

The third period – Ms Clarke's final day of work for Beiler Constructions

349 The third period of work for which Ms Clarke claims she was not paid ordinary hours comprises the last day that Ms Clarke performed work for Beiler Constructions, 3 July 2023. Ms Clarke pleads in the 2FASOC that, on this day, the following events occurred:

> On or about 3 July 2023:
>
> (a) while performing work at a property in Sturt, Mr Widmer told Ms Clarke that she had not "done it properly" and that he doesn't "know why [she] even bothered fucking coming to work" after being unhappy with the way she had cut noggins;
>
> (b) Ms Clarke called Mr Beiler during which, inter alia:
>
> i. she made a complaint saying that "its happening again" or words to this effect and that she needed his help with Mr Widmer…;
>
> ii. Mr Beiler retracted the three weeks' notice period and reinstated the one week notice period … ;
>
> (c) Mr Beiler said he would call Ms Clarke back regarding the situation with Mr Widmer but he never did; and
>
> (d) Ms Clarke recut the noggins and left the Sturt property.

350 The details of the mistake admittedly made by Ms Clarke are not important. Ms Clarke states in her affidavit evidence that she worked from 6.45am until 2.00pm or 3.00pm on that day and was not paid at all.

351 In cross-examination, Mr Beiler accepted that Ms Clarke worked on 3 July 2023 and that she had not been paid for that day. In his further affidavit dated 7 April 2025, filed after the close of oral evidence, Mr Beiler accepted that Ms Clarke was entitled to be paid for 6.5 hours of work – from 7.00am to 2.00pm, inclusive of a 30-minute unpaid break.

352 The evidence suggests that employees were in fact given a 45-minute unpaid lunch break on sites in the Adelaide area (as to which, see also the discussion at [385]-[397] below). Accepting Ms Clarke's conservative estimate that she worked until at least 2.00pm on 3 July 2023, both Ms Clarke and Mr Beiler effectively accept that Ms Clarke should be paid for six hours and 45 minutes' work, even though they base this on differing start times and break lengths. It is unnecessary to resolve these discrepancies.

353 I find that Ms Clarke was underpaid in this period, and has established an entitlement to be paid for six hours and 45 minutes of ordinary hours on 3 July 2023.

354 The parties should attempt to reach agreement on the net amount of the underpayments arising in each of the three periods, having regard to the need to re-credit Ms Clarke with the annual leave that was deducted in the second period (which was then to be paid out at the end of her employment on 3 July 2023).

Failure to pay tools allowance, industry allowance and annual leave loading

355 During the period when she was employed by Beiler Constructions, Ms Clarke was paid a "flat rate" of $25 per hour in respect of ordinary hours of work. She was paid higher rates, calculated by reference to the $25 flat rate, for overtime hours worked.

356 The parties agree that Ms Clarke was entitled, under the Award, to be paid both a "tools allowance" and an "industry allowance". Clause 22 of the Award provides that the industry allowance is $45.16 per week for an employee working in the residential building and construction industry. For an employee like Ms Clarke who was working full time, for 38 hours per week, that equates to $1.188 per hour. Clause 21(a) of the Award provides that the relevant tools allowance is $34.87 per week, which, for Ms Clarke, would amount to 91.7c per hour. Clause 31.2(b) provides for the payment of annual leave loading at the rate of 17.5%.

357 Ms Clarke's primary contention is that the $25 hourly rate that was agreed upon was not inclusive of any amount in respect of the tools allowance, the industry allowance, or annual leave loading, as provided for in the Award.

358 Beiler Constructions contends that, at the point when Ms Clarke was engaged to work for Beiler Constructions, Mr Beiler (on behalf of Beiler Constructions) and Ms Clarke agreed that the $25 per hour "flat rate" was to be inclusive of the tools allowance, the industry allowance and annual leave loading.

359 Ms Clarke's alternative contention is that, even if, contrary to her primary position, it had been agreed that the $25 flat rate was to be inclusive of the tool allowances, industry allowance and leave loading, the flat rate of $25 was insufficient to cover the wages for ordinary hours of work to which Ms Clarke was entitled under the Award, as well as the amounts she was entitled to by virtue of the tools allowance, the industry allowance and annual leave loading.

360 Beiler Constructions initially denied this, and maintained its position until the close of oral evidence. However, in his affidavit dated 7 April 2025, filed after the close of oral evidence, Mr Beiler accepted that the flat rate of $25 was not sufficient to cover Ms Clarke's base rate of pay as well as the tools allowance, industry allowance and annual leave loading. In particular, he accepts that Beiler Constructions underpaid Ms Clarke because, he says, "the base rate I understood applied was below the rate that should have been paid".

361 It is still necessary to determine whether the contractual arrangement between Beiler Constructions and Ms Clarke was such that the "flat rate" which they agreed should be paid to Ms Clarke was to be inclusive of the tools allowance, industry allowance and annual leave loading. (I note that the Beiler respondents now accept that Beiler Constructions was required to pay other allowances or amounts payable under the Award, such as the allowance relating to travel. These are addressed below.)

362 In Ms Clarke's affidavit evidence, she describes the conversation in which she and Mr Beiler discussed and agreed on the rate of pay in terms that include the following:

> On 20 March 2023, at approximately 12:30pm, I called Mr Beiler. During this phone call, Mr Beiler told me that he had work available and that the rate of pay would be $25 per hour. …

363 In Mr Beiler's affidavit evidence, he explains why he offered Ms Clarke $25 per hour, as follows:

> I offered Elisa $25.00 an hour because the building and construction award rate was around $23.00 and to me, that is not a large amount for a (42-year-old) mature aged apprentice. I was told she had children and a house in previous conversation with James Cursley so I was trying to do the right thing by offering her more (which I'm assuming [Felmeri] did the same but unfortunately, I could not match their amount). …

364 Mr Beiler's affidavit evidence was that he spoke to Ms Clarke on the phone again around a week after their initial conversation, and that it was in the course of that conversation that Ms Clarke said that she was willing to accept $25 per hour. Mr Beiler deposes:

> I think it was a week later after my initial conversation with Elisa that I reconvened with her over the phone. In that conversation, Elisa told me that "I am willing to take $25 an hour" or words to the effect of.
>
> … I did say to Elisa that, "the $25 per hour would include the standard allowances such as tool allowance, and industry allowance" or words to the effect of.

365 Notably, the way Mr Beiler's affidavit is expressed, he appears to claim that he specifically referenced "tool allowance" and "industry allowance" as examples of "standard allowances" which he was saying were "included" in the $25 per hour rate. The addition of the expression "words to the effect of" creates some ambiguity in Mr Beiler's affidavit evidence. However, the explicit inclusion of the two examples of allowances within the quotation marks suggests that he meant to claim a specific awareness of the obligation to pay those allowances, and that he mentioned those two particular allowances to Ms Clarke.

366 In Ms Clarke's reply affidavit, she responds to Mr Beiler's affidavit evidence about the agreement to the flat rate of $25 and whether it included "standard allowances", stating:

> In reply to [the relevant paragraph of Mr Beiler's affidavit], during our initial phone conversation, Mr Beiler asked me what hourly rate I was on at Felmeri … . I told him I was on $30 per hour at Felmeri. Mr Beiler did not refer to or discuss any modern awards or allowances at any time during that conversation. In reply to [the relevant paragraphs], Mr Beiler offered to pay me $25.00 per hour during our initial phone call, and I agreed to it during that same phone call. This did not happen in the second phone call.
>
> In reply to [the relevant paragraph], I deny that Mr Beiler told me that the pay rate of $25.00 per hour included standard industry allowances and tools allowance. Mr Beiler did not mention allowances or annual leave loading, and whether these were included in the $25.00 per hour rate, during this conversation or any conversation I had with him either before or during my employment. In the second phone call I had with Mr Beiler on around 27 March 2023, he told me that "because the Southern Ocean Lodge is providing accommodation, [I] don't have to provide financial reimbursement for accommodation" or words to this effect. However, there was no mention of the

> industry or tool allowances. This conversation was probably no more than about 10 minutes.

367 There is disagreement between Mr Beiler and Ms Clarke as to whether they agreed on the rate of $25 per hour in their first telephone conversation, or whether Mr Beiler proposed that rate in the first conversation but agreement was reached in the second. It is not especially surprising that there should be some difference in recollection about the sequence of the conversations, what was agreed when, and the precise terms of the conversations. I do not think it is necessary to resolve this difference.

368 It is unfortunate that the important terms of Ms Clarke's contract were not recorded in writing and that, if Mr Beiler did indeed propose to Ms Clarke that the flat rate of $25 should be inclusive of allowances of some description, the records kept by Beiler Constructions and the pay slips created by it did not record the arrangement, as was required by law: see *Fair Work Regulations 2009* (Cth) (**FW Regulations**), regs 3.33(3) and 3.46(1)(g). The consequence of this is that Beiler Constructions bears the onus of establishing that it did not fail to comply with the requirement to pay the tools allowance, industry allowance and annual leave loading: FW Act, s 557C(1).

369 Mr Beiler claims that he and Ms Clarke agreed that the $25 "included" the "standard allowances such as tools allowance, and industry allowance" – or words to that effect. It is not clear what a reference to the "standard" allowances would include. On any view, the $25 could not lawfully "include" the tools allowance and industry allowance, because the amount paid to Ms Clarke was not sufficient to cover the full amount to which she was entitled under the Award. However, I am conscious that "it is not an invalidating characteristic of an attribution clause in an employment situation that payments made under it which purport to discharge award entitlements may not completely discharge those entitlements": *Fair Work Ombudsman v Woolworths Group Ltd* (2025) 343 IR 340; [2025] FCA 1092 (***Woolworths***) at 356 [54].

370 In any event, a reference to "the standard allowances" would not seem to be a sufficiently clear reference to "annual leave loading", which is not even in the nature of an allowance, which is not described in the Award as an allowance, and which is payable upon the taking of annual leave, and not in such a way that it could obviously be "included" in a flat hourly rate. An employer who wishes to contractually bind an employee to accept that over-award hourly payments can be set off against amounts due under other provisions of an award must do so clearly. I find that Mr Beiler's proposal to Ms Clarke, even if it was expressed as he claims,

did not result in a contractual agreement between them that the flat rate of $25 should be inclusive of annual leave loading.

371 Both Ms Clarke and Mr Beiler were cross-examined about what was said in relation to Award allowances or entitlements. Each adhered to their recollection of the conversation(s) (or lack thereof) as to whether the flat rate of $25 was expressed by Mr Beiler to be inclusive of "standard allowances" such as the tools allowance and industry allowance.

372 It was put to Ms Clarke that Mr Beiler "made it clear to you that that was an all-inclusive rate" and that "[h]e told you it covered all Award allowances". Notably, neither of those propositions was precisely consistent with Mr Beiler's own evidence that he had told Ms Clarke that the flat rate included "standard allowances such as tools allowance, and industry allowance". Ms Clarke denied both the propositions that were put to her.

373 The Beiler respondents point to Ms Clarke's text message to Mr Beiler, sent on 23 April 2023 (and set out at [304] above), in which she said that the pay she had received seemed "very big", as evidence that she had agreed that the $25 hour rate would be inclusive of allowances under the Award. Ms Clarke's text message reflected the fact that she was apparently pleasantly surprised by the amount of pay she had been receiving in her bank account, but does not to my mind suggest that she believed she was being paid too much by reference to her oral agreement with Mr Beiler.

374 Mr Beiler confirmed in cross-examination that his position was that, in a telephone conversation with Ms Clarke, he had said that "the industry allowance and tool allowance" were "included in the $25". He then said that he could not recall "whether I explained it exactly the way that I've just explained it right now, but I believe that I said that the allowances are in the $25". Mr Beiler did not accept that it was possible that he did not say that "the industry allowance and tool allowance" were "included in the $25".

375 Mr Beiler's evidence that he specifically agreed with Ms Clarke that the $25 flat rate would include "standard allowances" including specifically the tools allowance and industry allowance is somewhat problematic.

376 First, it is difficult to reconcile with his own affidavit evidence that he chose the rate of $25 in order to be generous to Ms Clarke, believing that the Award rate "was around $23.00" and that that was "not a large amount for a (42-year-old) mature aged apprentice". To offer $25 per hour inclusive of allowances (which, as it turns out, he now accepts was not sufficient even to

cover Ms Clarke's actual award entitlements) would have defeated Mr Beiler's professed reason for nominating a rate above $23 per hour.

377 Secondly, the content of the pay slips created by Beiler Constructions and issued to Ms Clarke include features which suggest that the $25 flat rate was a payment for ordinary hours of work, and did not relate to allowances under the Award. Each of the pay slips included a line labelled "Ordinary Hours", which identified the number of hours worked by Ms Clarke in the relevant period, the rate of $25, and the total, arrived at by multiplying the number of ordinary hours by $25. The characterisation of the $25 rate as "Ordinary Hours" is consistent with its being a rate paid in respect of ordinary hours, not including the tools allowance and industry allowance. By regs 3.33(3) and 3.46(1)(g) of the FW Regulations, pay records and pay slips are required to separately identify any allowance paid. One would expect that, had the flat fee of $25 per hour covered the tools allowance and the industry allowance, this would have been stated on Ms Clarke's pay slips.

378 Having regard to the circumstances discussed above, I consider that the factual issue of what was said by Mr Beiler and agreed to by Ms Clarke is fairly finely balanced. Having regard to the general concerns I have about the reliability and credibility of Ms Clarke's evidence (including, in particular, her tendency to be somewhat loose about evidence of conversations relating to her employment), I am not prepared to make findings on the balance of probabilities on the basis of her evidence of the conversation in circumstances where it is directly contradictory to Mr Beiler's evidence and where there is little or no objective support, one way or the other, as to what exactly was said.

379 For these reasons, I find, on the balance of probabilities, and not without some doubts, that Mr Beiler did tell Ms Clarke that she was to be paid a $25 rate that was inclusive of the tools allowance and the industry allowance.

380 In *Woolworths*, Perram J concluded that a consequence of s 323(1) of the FW Act is that, even where there is a contractual agreement that "over-award" payments may be offset against other particular award entitlements such as allowances, it is not permissible to offset "overpayments" in one pay period against shortfalls in another pay period. It follows that, in circumstances where Ms Clarke's pay period was weekly, the amount of any underpayment of the tools allowance or the industry allowance cannot be determined simply by identifying the total of the amounts payable under the Award and deducting the total amounts that were paid, across the whole period of Ms Clarke's employment.

381 I am satisfied that, at least in some weeks, the $25 flat rate was insufficient to cover the total amount that Beiler Constructions was required to pay Ms Clarke in order to cover the base wage that she was entitled to be paid under the Award as well as the tools allowance and the industry allowance. The parties will need to determine the extent of the underpayment (if any) in each week, in accordance with these reasons, and attempt to reach agreement about the total underpayment resulting from the fact that Beiler Constructions paid a flat rate of $25 which was capable of absorbing the tools allowance and industry allowance, but which was not sufficient to cover the entire amount payable to Ms Clarke in every week of her employment.

382 In at least some weeks, the amount actually paid to Ms Clarke will have been sufficient to cover the hours worked by her at base rate, as well as the amount payable pursuant to one or other, but not both, of cll 21(a) and 22. The agreement which I have found to have existed between Beiler Constructions and Ms Clarke did not specify the order in which any excess over the base rate was to be applied to the two allowances which it was said to "include". Consequently, in circumstances where (due to its failure to keep records as required by law) Beiler Constructions bears the onus of proving that it complied with cll 21(a) and 22 of the Award, I am not able to find that Beiler Constructions consistently complied with either of those provisions in respect of all pay periods over the period of Ms Clarke's employment.

383 For these reasons, I find that Beiler Constructions contravened both cll 21(a) and 22 of the Award.

384 For the reasons explained at [370] above, even on Mr Beiler's account of the relevant conversation with Ms Clarke, what he said to Ms Clarke (and what Ms Clarke accepted as the basis on which she was to be paid) was not apt to create a contractual agreement that the annual leave loading payable under the Award should be included within the $25 flat rate. It follows that I accept that Ms Clarke has established, on the balance of probabilities, that Beiler Constructions contravened cl 31.2(b) of the Award, by failing to pay her annual leave loading in respect of periods of annual leave taken by her, and in relation to the accrued annual leave paid out to her upon the termination of her employment.

Failure to permit Ms Clarke to take paid morning rest breaks

385 Clause 18.3(a) of the Award provides:

> **18.3 Rest periods and crib time**
>
> **(a)** A paid rest period of 10 minutes must be allowed between 9.00 am and 11.00 am.

386 Clause 18.3(a) is not prescriptive about the manner in which breaks must be "allowed". It does not require that there be a formally fixed period when all employees are to take a break. It is consistent with employees being permitted to take a rest break of up to 10 minutes, should they wish to do so, at any time between 9.00am and 11.00am, or (at their election) at another time during the day. It was not entirely clear whether Ms Clarke's case was that she was not permitted to take breaks in the morning at all, or whether her case was based on an assumption that cl 18.3(a) requires an employer to direct employees to take a designated period as a break.

387 Ms Clarke accepts that a rest break was taken each morning, between 9.00am and 11.00am, when she was working on the Kangaroo Island site. She contends that no rest break was provided for her when she was working on sites in the Adelaide area. It was put to her in cross-examination that she took morning breaks in Adelaide, and she "did exactly the same thing in Adelaide that [she] did on Kangaroo Island, which is have the two sets of breaks" – the "two sets" being a morning rest break and a lunch break. In re-examination, Ms Clarke was asked whether she was ever "directed to take a 10-minute break" in Adelaide, and stated that she was not.

388 In his affidavit evidence, Mr Beiler stated the following in relation to breaks in Adelaide:

> … not only is it compulsory, but I also encourage employees to take their breaks. While Elisa was working in Adelaide, she took multiple rest breaks throughout the day because she was a smoker. Elisa had lunch breaks. I know this because I saw Elisa take her rest breaks and lunch break when she was working at a renovation project for my house in Glenelg North. I also spoke to Ben [Widmer] and he confirmed Elisa took additional breaks (more than other employees) whilst she was at the Wayville site VAILO HQ.

389 Mr Beiler was cross-examined about the taking of breaks on Adelaide sites, as follows:

> Q: And when she was working in Adelaide, you didn't provide [Ms Clarke] with a 10-minute rest break between 9 and 11 each day, did you?
>
> A: No, that's incorrect. It's not set out that we have a designated 10-minute break at a certain time. You just – each employee would have a little rest break throughout that period of working day before lunch or after lunch.
>
> Q: So you did provide an afternoon break, is that what you're saying?

A: Well, it depends on when they wanted to have a rest. They could have a rest in the morning before lunch or have a rest in the afternoon. I don't really specify exactly when you need to take your rest break. You know, if it's a hot day, you might want to try and work while it's a bit cooler and then take your rest break in the afternoon when the heat is more - - -

Q: - - - So the times that when you worked with her, because there were occasions when you worked with her, weren't there?

A: Yes, that's correct.

Q: You didn't allocate a break between 9 and 11 each day, did you?

A: No.

Q: You didn't allocate a 10-minute break between 9 and 11 each day?

A: No, I didn't allocate, no.

Q: … You didn't give a direction to Mr Widmer to say, "Between 9 and 11 everybody must have a break of 10 minutes"?

A: No.

390 In answer to questions in re-examination, Mr Beiler reaffirmed that "we didn't give specific rest breaks" but that "people were still able to take rest breaks throughout the period of work, just there was no designated like set time to take a rest break". Mr Beiler also gave evidence that he had worked with Ms Clarke on a couple of days and had seen her take rest breaks on those days, and that he and the other employees had similarly taken breaks.

391 Mr Widmer and Mr Gauci were the other two witnesses called by the Beiler respondents who had worked with Ms Clarke in the Adelaide area. Mr Widmer's affidavit evidence on the issue of breaks was limited to the following:

> When I was on site in Adelaide, I directed all employees including Elisa to stop for lunch breaks. The lunch breaks were generally 45 minutes long where we ate lunch together.

392 In cross-examination, Mr Widmer was asked about the provision of breaks as follows:

Q: But you were aware, weren't you, that you only had to give them a 30 minute break for lunch?

A: Yes.

Q: And you say you generally gave them 45 minutes. Yes?

A: Yes.

Q: And that's because you did not give them a morning break between 9 am and 11 am?

A: That was just what we always did.

Q: So it's correct then that you did not give them a morning break between 9 am and 11 am?

A: Yes.

Q: Yes. You did not tell them to stop work for 10 minutes in the morning?

A: No.

Q: You do not tell the Beiler Construction employees that you worked with, including Elisa, that they could stop work between 9 am and 11 am - - -?

A: No.

Q: - - - or stop work. You did not tell them, including Elisa, that they could stop work in the morning - - -?

A: No.

Q: - - - for 10 minutes. And so you only provided those employees with one break. Is that right?

A: Yes.

393 Mr Gauci's affidavit evidence on the issue of breaks was limited to the statement, "We have 45-minute break daily. I saw Elisa take breaks like we all did."

394 In cross-examination, Mr Gauci's evidence was as follows:

Q: Okay. In terms of break, Mr Gauci, it's correct, isn't it, that whilst you were hosted by Beiler Constructions back in 2022 and 2023, you usually received one 45 minute break per day?

A: Yes.

Q: And you weren't given a morning break between 9 am and 11 am?

A: We had breaks but not like - - -

Q: But you just - - -?

A: We would stop and have a smoke or – but we're not – it wasn't like a set in stone break time. No.

Q: So it was a break that you decided to take yourself in the morning?

A: Well, we would – yes. People would have a break and have a smoke or - - -

Q: I'm only asking about what you did, Mr Gauci?

A: Sorry. Yes. I would have.

Q: And you were only told to take one break per day by - - -?

A: Told by who?

Q: Someone more senior, so for example ..... he would only tell you to drop tools for one break per day, 45 minute break. Yes?

A: Yes.

Q: He did not tell you to drop tools in the morning for a 10 minute break, did he?

A: No.

395 The way the Beiler respondents' case was put to Ms Clarke was not consistent with the evidence ultimately given by the witnesses called by them. Moreover, neither Mr Widmer nor Mr Gauci addressed the issue of rest breaks (as opposed to meal break) in their affidavit evidence in chief, as might have been expected. This provides some cause for hesitation.

396 Despite this, on balance I accept the general effect of the evidence of Mr Widmer and Mr Gauci, namely that employees on the Adelaide sites were able to, and did in fact, take short breaks during the day. I also accept, on balance, the evidence that Ms Clarke took casual breaks to smoke, outside of the lunch break. While it is not established clearly that these breaks lasted ten minutes, nor is it established that they did not. I accept that employees were not *directed* to take a break between 9.00am and 11.00am, nor was a formal break scheduled in this period of time. However, I am satisfied that the workers on site, including Ms Clarke, were permitted to take short breaks during their paid employment, including between those hours, and were not prevented from taking a break of up to ten minutes. There is no evidence that Ms Clarke was directed not to take breaks, or not to take a break between 9.00am and 11.00am on any particular day.

397 I am not satisfied that Beiler Constructions did not permit Ms Clarke to take a break each morning between the hours of 9.00am and 11.00am when she wished to do so. No contravention of cl 18.3 of the Award is established.

Failure to payment of ordinary hours for time travelling to and from Kangaroo Island

398 Ms Clarke alleges that she was not paid ordinary hours in respect of periods of time spent travelling when she was required to travel to and from Kangaroo Island for the purpose of working on the site there. In her affidavit evidence, Ms Clarke deposes to working on Kangaroo Island on a fly-in, fly-out basis and that Beiler Constructions arranged and paid for Ms Clarke's flights to and from Kangaroo Island. Ms Clarke deposes that the flight time to Kangaroo Island plus the travel time to the site was about an hour and a half each way. She was not paid for travel time to and from Kangaroo Island, a total of six journeys in all.

399 Clause 25.6 of the Award provides for the payment of wages in respect of travel time when an employee is required to travel for "distant work" (meaning "construction work at such a distance from the employee's usual place of residence or any separately maintained residence

that the employee cannot reasonably return to that place each night". Ms Clarke was engaged in distant work when she was working and staying on Kangaroo Island.

400 Clause 25.6 of the Award relevantly states:

> **25.6 Travelling expenses**
>
> …
>
> **(a) Forward journey**
>
> **(i)** An employee must:
>
> - be provided with appropriate transport or be paid the amount of a fare on the most appropriate method of public transport to the job and any excess payment due to transporting tools if such is incurred; and
> - be paid for the time spent in travelling, at ordinary rates up to a maximum of 8 hours per day for each day of travel; …
>
> **…**
>
> **(b) Return journey**
>
> **(i)** An employee will, for the return journey, receive the same payments provided for the forward journey (see clause 25.6(a)). …
>
> **…**
>
> **(c) Travelling time calculations**
>
> For the purpose of clause 25.6, travelling time will be calculated as the time taken for the journey from the central or regional rail, bus or air terminal nearest the employee's usual place of residence to the locality of the work (or the return journey, as the case may be).

401 In his affidavit dated 7 April 2025, filed after the close of oral evidence in the proceedings, Mr Beiler accepts that Beiler Constructions failed to make payments to Ms Clarke in respect of travel time as required by cl 25.6 of the Award. As I understand Mr Beiler's evidence in this affidavit, he accepts that Ms Clarke is entitled to be paid at her ordinary rate for travel time spent on journeys to Kangaroo Island, but is not entitled to payment in respect of travel time on return journeys to Adelaide. The reason for this is not explained beyond an assertion, in a letter from the Beiler respondents' solicitors to Ms Clarke's solicitors, that "[t]he travel time from Kangaroo Island to Adelaide is not payable as [Ms Clarke] was not travelling to work".

402 As I understand cl 25.6(b)(i) of the Award, Ms Clarke was entitled to be paid ordinary hours for the time spent travelling on the return journey from Kangaroo Island to Adelaide at ordinary rates, up to a maximum of eight hours for each day of travel. Therefore I reject the position taken by Mr Beiler.

403 The evidence regarding the travel time to Kangaroo Island (and, for example, whether that time includes periods during which Ms Clarke was required to be at the airport before catching a flight) is imprecise. I note that Mr Beiler accepts that the travel time to Kangaroo Island, inclusive of the time when Ms Clarke was directed to be at the airport ahead of her flight, was two hours. In relation to travel to Kangaroo Island, it is appropriate to act on Mr Beiler's concession. I find that Beiler Constructions contravened cl 25.6 of the Award by failing to pay Ms Clarke "at ordinary rates" for a total of six hours of travel *to* Kangaroo Island.

404 In relation to travel *from* Kangaroo Island to Adelaide, the airline tickets annexed to Mr Beiler's affidavit of 23 September 2024 indicate that, the return flight from Ms Clarke's first swing, on 24 April 2023, the return flight from her second swing, on 10 May 2023, and the return flight from her third swing, on 24 May 2023, were all scheduled to arrive in Adelaide at 3.45pm. There is no evidence that these flights did not arrive in Adelaide as scheduled. I infer that they did. The records of Beiler Constructions show that Ms Clarke was paid for ordinary hours until 3.00pm on each of 24 April, 10 May and 24 May 2023. It follows that Ms Clarke was underpaid for 45 minutes on each of 24 April, 10 May and 24 May 2023.

405 In total, Ms Clarke is owed pay for 8.25 ordinary hours in respect of travel to and from Kangaroo Island.

Failure to pay travel pattern allowance for days worked in the Adelaide area

406 Clause 26.1 of the Award provides:

> **26.1 Fares and travel pattern allowance**
>
> **(a)** In recognition of the travel patterns and costs peculiar to the industry, which include mobility in employment and the nature of employment on construction work, an employee is to be paid an allowance of $20.32 per day for each day worked when the employee starts and finishes work on a construction site, or is required to perform prefabricated work in an open yard and is then required to erect or fix on-site.
>
> **(b)** An employee will not be entitled to the allowance in clause 26.1(a) on any day where the employer:
>
> **(i)** provides or offers to provide transport free of charge from the employee's home to the place of work and return; or
>
> **(ii)** provides a fully maintained vehicle free of charge to the employee.

407 Ms Clarke alleges that Beiler Constructions failed to pay her the allowance on days when she worked on construction sites in and around Adelaide. In its defence, Beiler Constructions denies this allegation.

408 In his affidavit dated 7 April 2025, I understand Mr Beiler now to accept that Beiler Constructions has contravened cl 26.1 of the Award, by failing to make payments to Ms Clarke of the allowance in accordance with cl 26.1(a) on days when Ms Clarke was working in the Adelaide area. According to Mr Beiler, the records of Beiler Constructions establish that there were 32 days on which Ms Clarke started and finished work at a construction site in the Adelaide area. This is the best evidence of the number of days for which the allowance was payable.

409 I find that this contravention is established and Ms Clarke was not paid the allowance of $20.32 per day that was due to her in respect of 32 days.

410 In his affidavit dated 7 April 2025, I also understand Mr Beiler to accept that Beiler Constructions contravened cl 26.2 of the Award, by failing to pay Ms Clarke the allowance provided for in that clause, in relation to days on which Ms Clarke was required to travel between sites in the Adelaide area, using her own vehicle. However, an allegation that Beiler Constructions contravened cl 26.2 forms no part of Ms Clarke's pleaded case, she advances no submission about it and seeks no remedy in respect of it. In those circumstances, I make no finding of contravention in respect of cl 26.2 of the Award.

Payment not made on Thursdays

411 Clause 20.3 of the Award, so far as relevant, provides that "payments must be paid and available to the employee not later than the end of ordinary hours of work on Thursday of each working week".

412 The evidence establishes that, during the period of her employment with Beiler Constructions, Ms Clarke generally received payments of her wages into her bank account once per week. Most of the payments were made on Saturdays, but Ms Clarke was also occasionally paid on a Thursday or Friday. In his affidavit dated 7 April 2025, filed after the close of oral evidence in the trial, Mr Beiler states that he now understands that payment on Thursdays is required by the Award. Implicitly, he accepts that Beiler Constructions failed to comply with cl 20.3, and he states that he is prepared to pay any pecuniary penalty that is awarded.

413 Consistently with the evidence and Mr Beiler's concession, I find that Beiler Constructions contravened cl 20.3 of the Award.

Failure to reimburse Ms Clarke for the purchase of boots

414 Ms Clarke alleges that Beiler Constructions contravened cl 21.1(d) of the Award by failing to reimburse Ms Clarke for the cost of steel toe capped safety boots which she purchased. In her affidavit evidence, Ms Clarke deposes to the fact that Mr Beiler told her that she was required to wear steel toe capped safety boots. On 29 April 2023 (approximately one month after she had commenced work for Beiler Constructions), Ms Clarke paid for a pair of boots which she later wore while working for Beiler Constructions. She had produced a copy of the invoice for those boots and I accept that she purchased them. Beiler Constructions pleads in its defence that Ms Clarke never sought reimbursement for the purchase of the boots. Mr Beiler's affidavit evidence is to the same effect. Ms Clarke in her reply affidavit agrees that she did not seek reimbursement for the boots during her employment with Beiler Constructions.

415 Clause 21.1(d) of the Award states:

> **(d)** Where employees are required either by the employer or by legislation to wear steel toe capped safety boots the employer will reimburse employees for the cost of purchasing such boots on commencement of work. Subject to fair wear and tear, boots will be replaced each 6 months if required and sooner if agreed.

416 This provision is to be interpreted sensibly. The concept of "reimbursement" implies both that the employee in fact purchased boots at their own expense and that the employer was made aware of the purchase and the amount to be "reimbursed". Even though the amount is to be reimbursed "on commencement of work", I do not regard cl 21.1(d) as creating an obligation on an employer to reimburse an employee for the purchase of boots where the employee has not sought reimbursement and has not provided the employer with information or evidence about the expense to be reimbursed.

417 It follows that I find that Beiler Constructions did not contravene cl 21.1(d) of the Award by failing to reimburse Ms Clarke for the purchase of boots for which she did not seek reimbursement during the period of her employment.

Failure to pay out the full amount of Ms Clarke's accrued annual leave on termination

418 Ms Clarke contends that Beiler Constructions failed to make payment of the full amount of Ms Clarke's accrued but unused annual leave upon termination of employment. This claim arises from Ms Clarke's contention that she was entitled to be paid ordinary hours for the period between 28 June 2023 and 30 June 2023 (when, having gone home having been told by Mr Widmer not to return to work until she had spoken to Mr Beiler, she was directed by Mr Beiler not to attend work and then was not told that she could or should return to work until

3 July 2023). Ms Clarke's annual leave balance was reduced by reference to that period of time being accounted for as annual leave.

419 I have accepted that Ms Clarke was entitled to be paid her ordinary hours between the time that she left work on 28 June 2023 until 30 June 2023 (22.80 hours). It follows that there was a corresponding reduction in her accrued annual leave that should not have been made, and that the accrued annual leave paid out to her at the end of her employed should have been greater than it was by 22.80 hours.

Failure to pay Ms Clarke's wages in lieu of the notice period from 4 to 7 July 2023

420 Ms Clarke contends that she was entitled to be paid wages for the remainder of the one-week notice period to which she was entitled under cl 20.6 of the Award and s 117 of the FW Act. In particular, Ms Clarke claims to be entitled to four days' ordinary wages for the period from 4 to 7 July 2023. This claim rests on Ms Clarke's submission, advanced in closing, that:

> [Ms Clarke] had every intention of working her notice period. Ms Clarke's evidence is that but for Mr Beiler not assisting her to resolve the conflict with Mr Widmer she would have continued working and had every intention to do so as evidenced by her message to Mr Fay.

421 Mark Fay is, according to Ms Clarke's evidence, a lecturer in carpentry at TAFE SA. On 30 June 2023, at 3.32pm, Ms Clarke sent a message to Mr Fay which read, "Just got sacked." On 1 July 2023, following an exchange of text messages with Mr Fay, Ms Clarke wrote a message that said:

> I will make a start today. Also my thought is to show Scott how much I'm worth by absolutely smashing it these next couple of weeks.

422 Ms Clarke's message reflects her subjective intention to work out her notice period, as at 1 July 2023. However, I accept the Beiler respondents' submission that Ms Clarke's text message sent to Mr Beiler on 3 July 2023 amounted to the "abandonment" of her employment, or bringing it immediately to an end, at that time. As mentioned at [18] and [249] above, Ms Clarke informed Mr Beiler by text message that she was "done" at a point where she had raised the issue of her treatment by Mr Widmer with Mr Beiler, and he had told her that he would call her back to speak to her further about the issue. Although Ms Clarke may well have had some cause to be upset by the way Mr Widmer had spoken to her, I do not accept that Mr Widmer's comment to her amounted to constructive dismissal of Ms Clarke or otherwise entitled her to be paid for the remainder of the week if she did not make herself available to work.

423 For these reasons, I do not accept that Ms Clarke has established that she was entitled to be paid for the period from 4 to 7 July 2023 inclusive. Therefore, Beiler Constructions has not been shown to have contravened s 117 of the FW Act.

Superannuation contributions

424 Clause 28.2(a) of the Award provides that "[a]n employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee".

425 The consequence of my findings that there have been certain underpayments to Ms Clarke, including in respect of ordinary hours, is that Beiler Constructions has also failed to pay Ms Clarke certain superannuation contributions in accordance with the Award. This is because the superannuation contributions that were made were calculated by reference to the wages that were in fact paid to Ms Clarke.

426 It follows that Beiler Constructions has contravened cl 28.2(a) of the Award. The parties should attempt to reach agreement on the amount of any underpayment in respect of superannuation contributions.

SUMMARY OF CONCLUSIONS IN RELATION TO CONTRAVENTIONS

427 For the reasons given above, I have reached the following conclusions:

(1) Ms Clarke has established, on the balance of probabilities, that Mr Emmerson contravened s 527D of the FW Act by sexually harassing her by asking her a question about whether Mr Stott had a "sweaty dick".

(2) Ms Clarke has established, on the balance of probabilities, that Mr Emmerson contravened s 527D of the FW Act by sexually harassing her by asking whether she would give him oral sex.

(3) Beiler Constructions is vicariously liable for the conduct of Mr Emmerson amounting to sexual harassment pursuant to s 527E of the FW Act.

(4) Ms Clarke has not otherwise established that she was sexually harassed as alleged.

(5) Ms Clarke has not established that Beiler Constructions engaged in adverse action against Ms Clarke in contravention of s 340 of the FW Act.

(6) Ms Clarke has not established that Beiler Constructions discriminated against Ms Clarke by removing her from working on Kangaroo Island because of her sex, in contravention of s 351(1) of the FW Act.

(7) Ms Clarke has not established that Mr Emmerson advised, encouraged or incited Beiler Constructions to take adverse action against Ms Clarke for a prohibited reason.

(8) Ms Clarke has not established that Mr Beiler contravened s 345 of the FW Act by knowingly or recklessly making a false or misleading representation to Ms Clarke about her entitlement to be paid ordinary hours for the period between 28 June 2023 and 30 June 2023.

(9) Ms Clarke has established, on the balance of probabilities, that Beiler Constructions contravened s 45 of the FW Act by reason of its having contravened each of the following provisions of the Award:

   (a) cl 16 of the Award, by failing to make payment of Ms Clarke's wages in full, in respect of each of:

      (i) the week that included 22 June 2023;

      (ii) the week that included 28, 29 and 30 June 2023; and

      (iii) 3 July 2023;

   (b) cl 20.3 of the Award, by failing to make payment to Ms Clarke each week on or before the end of Thursday;

   (c) cl 21(a) of the Award, by failing to pay Ms Clarke the tools allowance in full in respect of all pay periods over the period of her employment;

   (d) cl 22 of the Award, by failing to pay Ms Clarke the industry allowance in full in respect of all pay periods over the period of her employment;

   (e) cl 25.6(a)(i) and (b)(i) of the Award, by failing to pay Ms Clarke for a total of 8.25 hours at ordinary rates, for periods of travel to and from Kangaroo Island;

   (f) cl 26.1(a) of the Award, by failing to pay Ms Clarke the travel pattern allowance in respect of 32 days when she started and finished work on a construction site, working in the Adelaide area;

   (g) cl 28.2(a) of the Award, by failing to make superannuation contributions to Ms Clarke, calculated by reference to the wages which were lawfully required to be paid to her, not only those that were in fact paid to her; and

(h) cl 31.2(b) of the Award, by failing to pay Ms Clarke annual leave loading in respect of periods of annual leave taken by her, and in relation to the accrued annual leave paid out to her upon the termination of her employment.

(10) Ms Clarke has not established that Beiler Constructions contravened cl 21.1(d) of the Award by failing to reimburse her for the purchase of boots.

(11) Ms Clarke has not established that Beiler Constructions contravened cl 18.3 of the Award by failing to permit her to take paid morning rest breaks.

(12) Ms Clarke has established, on the balance of probabilities, that Beiler Constructions contravened s 323(1)(a) of the FW Act by failing to make payment of Ms Clarke's wages in full, in respect of each of:

(a) the week that included 22 June 2023;

(b) the week that included 28, 29 and 30 June 2023; and

(c) 3 July 2023,

noting that the conduct constituting this contravention is the same as that constituting the contravention of cl 16 of the Award.

(13) Ms Clarke has not established that Beiler Constructions contravened s 117 the FW Act by failing to pay her ordinary hours for the period 4 to 7 July 2023 inclusive.

(14) Ms Clarke has established, on the balance of probabilities, that Beiler Constructions failed to provide her with pay slips for several pay periods, in contravention of s 536(1) of the FW Act.

(15) Ms Clarke has established, on the balance of probabilities, that Mr Beiler was "involved" (in the relevant sense and by reason of s 550(1) of the FW Act) in the contravention by Beiler Constructions of s 536(1) of the FW Act, in respect of the payments of wages made to Ms Clarke on each of 29 April 2023, 6 May 2023, 12 May 2023 and 20 May 2023.

(16) Ms Clarke has established, on the balance of probabilities, that Beiler Constructions contravened s 44 of the FW Act by failing to provide Ms Clarke with a copy of the Fair Work Information Statement as required by s 125 of the FW Act.

CONCLUSION

428 It is appropriate to make declarations in respect of each of the contraventions of the civil remedy provisions of the FW Act by Beiler Constructions and Mr Emmerson which I have

found that Ms Clarke has established. It will be necessary to hear from the parties further in relation to whether orders for compensation or pecuniary penalties should be made in respect of some or all of those contraventions, and if so, the amount of any compensation or penalties to be imposed. To that end, the matter will need to be listed for a case management hearing.

I certify that the preceding four hundred and twenty-eight (428) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McDonald.

Associate:

Dated: 12 June 2026

SCHEDULE OF PARTIES

SAD 185 of 2023

Respondents

Fourth Respondent:	JAMES EMMERSON
Fifth Respondent:	JULIEN LENEPVEU