FEDERAL COURT OF AUSTRALIA

Australian Rail, Tram and Bus Industry Union, NSW Branch v Metro Trains Sydney Pty Ltd [2019] FCA 546

File number:	NSD 536 of 2019
Judge:	**ROBERTSON J**
Date of judgment:	18 April 2019
Catchwords:	**INDUSTRIAL LAW** – termination of employment – interlocutory application for reinstatement
Legislation:	*Fair Work Act 2009* (Cth) ss 340, 346, 361, 545
Cases cited:	*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Blue Star Pacific Pty Ltd* [2009] FCA 726; 184 IR 333 *Police Federation of Australia v Nixon* [2008] FCA 467; 168 FCR 340
Date of hearing:	10 April 2019
Registry:	New South Wales
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	65
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Solicitor for the Applicants:	Mr T Warnes of Australian Rail, Tram and Bus Industry Union
Counsel for the Respondent:	Mr S J Wood AM QC with Mr J Darams
Solicitor for the Respondent:	Seyfarth Shaw Australia

ORDERS

NSD 536 of 2019

BETWEEN:	**AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, NSW BRANCH** First Applicant
	ROBERT FELIX CAR Second Applicant
AND:	**METRO TRAINS SYDNEY PTY LTD (ABN 54 600 820 737)** Respondent

JUDGE: **ROBERTSON J**

DATE OF ORDER: **18 APRIL 2019**

THE COURT ORDERS THAT:

1. On the respondent giving an undertaking to pay the second applicant the wages that he would have received pending a trial in July 2019, the application for an interim injunction is refused.

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

REASONS FOR JUDGMENT

ROBERTSON J:

Introduction

1 This application came before me as duty judge. The applicants claim in this Court the following final relief:

> a. A declaration that the Respondent took adverse action against the Second Applicant by terminating his employment because he engaged in industrial activity, namely the preparatory work for a majority support determination application in contravention of section 346(b) of the *Fair Work Act 2009*.
>
> b. Further, or in the alternative, a declaration that the Respondent took adverse action against the Second Applicant by terminating his employment because of his membership of the First Applicant in contravention of section 346(a) of the *Fair Work Act 2009*.
>
> c. Further, or in the alternative, a declaration that the Respondent took adverse action against the Second Applicant by terminating his employment for exercising a workplace right, namely participating in the process of developing a majority support determination application under the *Fair Work Act 2009* in contravention of section 340(1)(a)(ii) of the *Fair Work Act 2009*.
>
> d. Further, or in the alternative, a declaration that the Respondent took adverse action against the Second Applicant by terminating his employment to prevent him from exercising his workplace right, namely the process of developing a majority support determination application under the *Fair Work Act 2009* in contravention of section 340(1)(b) of the *Fair Work Act 2009*.

2 The applicants also sought the following interlocutory relief:

> … an interim injunction, pursuant to section 545(1) and (2)(a) of the *Fair Work Act 2009* (Cth) that orders that until the hearing and determination of the Application or further order, the Respondent treat as null and void the termination of the employment of the Second Applicant and reinstate the Second Applicant to his former employment with the Respondent on the terms and conditions which applied to him immediately prior to 27 March 2019.

3 The application was not accompanied by a certificate issued by Fair Work Commission under s 369 of the *Fair Work Act 2009* (Cth) on the basis that, pursuant to s 370(b), the general protections court application to this Court included an application for an interim injunction.

The facts

4 In broad terms, the facts on this interlocutory application were as follows.

5 Mr Robert Car, the second applicant, commenced employment with the respondent, Metro Trains Sydney Pty Ltd (**Metro Trains**) on 1 March 2019, working as Customer Journey

Coordinator – Stations at Rouse Hill. Subject to these proceedings, the employment ended on 27 March 2019. Immediately prior to his employment with the respondent, Mr Car had been employed by Metro Trains Melbourne in the same role at the same location. His employment by Metro Trains Melbourne commenced on 5 November 2018.

6 Mr Car's evidence was that prior to his dismissal and apart from one single issue with a particular manager, his employment record was clean. His general experience at his workplace was very positive. His evidence was he was generally well liked and had no negative comments or aspersions made about his employment abilities or attitude.

7 On 4 March 2019, he commenced a training course known as "CJC-T Upskilling" which was designed to upskill Customer Journey Coordinator – Stations employees to Customer Journey Coordinator – Trains. He was selected as 1 of 36 people to do the course. Entry into this course was very competitive and candidates were assessed are against very strict selection criteria. Being selected to be upskilled to a Train Operator was a sign to him that he was widely regarded as a good worker.

8 Mr Car deposed that on 11 February 2019 he joined the first applicant union. On or around 5 March 2019 he became the union delegate. He deposed to some remarks made by the General Manager Customer at a training course on 8 March 2019 stating that he was disappointed about the union's membership growing.

9 Mr Car deposed to his beginning to distribute a majority support determination (**MSD**) petition amongst co-workers on Monday, 25 March 2019. He said he gave the petition to a fellow employee working on the trains. He had around seven conversations with different people about the purpose of the petition and the goal which the union was trying to achieve by it. He said that by Wednesday, 27 March 2019 he had achieved approximately 35 signatures on the petition.

10 He deposed to what occurred at the meeting at which his employment was terminated. He said that the meeting was conducted by Mr Nicholas Dickinson, Chief Staff Officer – MTS. He deposed to the following being said:

Dickinson:	"*I would like to get straight to the point...*"
Car:	"*Is this about the RTBU?*"
Dickinson:	"*No, this is about your rail medical...we have conflicting information based on your medicals from Sonic; one has you saying one thing the other has you saying another thing.*"

Car: "*I'm completely unaware of what you're talking about. Please show me what you mean...*"

11 Mr Car's evidence was that Mr Dickinson then proceeded to show him two documents which Mr Car had completed, one from a Category 2 Rail Medical, and one from a Category 1 Rail Medical. The Category 2 Rail Medical (which preceded the Category 1 Rail Medical) indicated that Mr Car had sleep apnoea (which he does) and the Category 1 Rail Medical indicated that he did not have sleep apnoea.

12 The central part of the conversation at the meeting was deposed to by Mr Car as follows:

Car: "*I've obviously misticked the box on my category 1 Medical*"

Dickinson: "*No, you've been dishonest.*"

Car: "*I was negligent, rather than dishonest.*"

Dickinson: "*This is a black and white issue, this is clear dishonesty. You've breached our trust and we have no option but to terminate your employment.*"

Car: "*Surely not, this is a bad joke...*"

Dickinson: *"If we knew you had sleep apnoea we wouldn't have upskilled you!!!" "you are unfit for your role and you've lied about it!!!*" (spoken in a raised voice).

Car: "*What you've just said is wrong on so many levels" many people in CJC-T upskilling have treatable sleep apnoea just like myself and have been deemed "fit for duty", "also if I was really unfit for my role, why am I not demoted to a CJC-S and no longer be a seconded CJC-T?*"

Dickinson: "*I apologise, I shouldn't have said that.*"

Car: "*I want someone else in the room for this conversation, I was unaware that I was even going to be speaking to Nick, I believe I am being framed and feel extremely intimated by Nick yelling at me*"

Dickinson: "*Everything in this conversation is between yourself and I…this is for safety!*"

Car: "*You have no claim that this is about safety...this is a simple misunderstanding*"

Dickinson*:* *"It's an unforgiveable breach of trust*"

Hoffman: "*May I say something*"

[spoke generally about the Waterfall train disaster and its links with sleep apnoea]

Car: "*I know for a fact that Alex Claasens [RTBU State Secretary] wrote the Category Medical Reports, I spoke to him in depth about it with witnesses.*

The forms are not binding of your fitness for a role, they are an initial (sic) diagnosis of medical conditions to treat them appropriately and the medical supplier determines fitness for role...may I see the letter from Sonic?"

…

Car: "*If you say no I will take it anyway*"

Dickinson: "*Yes, you may read all of it*"

Car: "*Your entire initial conversation with me was dishonest from the start, and I felt intimated*"

Dickinson: "*That doesn't matter, you have breached our trust and it is black and white!*"

Car: "*I am convinced that you are aware of the wrongness of what you are doing. This is an honest mistake and you are doing this because I am an RTBU delegate.*"

Dickinson: "*Your involvement with the union has nothing to do with this.*"

13 Mr Car deposed that prior to his termination, he was the only union delegate at Metro Trains. Previously the first applicant union had tried to bargain for an enterprise agreement at Metro Trains, but Metro Trains had refused. As such, the union needed to obtain a MSD to commence bargaining for an enterprise agreement with Metro Trains.

14 He deposed that he was committed to exercising his rights in the workplace, and committed to assisting the first applicant union in obtaining a MSD. As he had been terminated from Metro Trains, he no longer had access to his work colleagues, and could not exercise his workplace rights to obtain signatures in support of a MSD application.

15 The other affidavit filed on behalf of the applicants on this interlocutory application was made by Mr Toby Warnes, employed as the Director of Organising by the first applicant union. He deposed that in mid-March 2019, the union made a decision to pursue a MSD under s 236 of the *Fair Work Act*. On 22 March 2019, the union had finalised the petition required to achieve a MSD. On the same day a meeting was held with some of the union's members employed by the respondent at the Ettamogah Hotel in Kellyville Ridge. At that meeting, officials of the union provided Mr Car with copies of the petition and instructions on their purpose, use, and distribution.

16 Mr Warnes deposed that Mr Car was (and is) an integral piece of the strategy of the union as he had access to most employees within the proposed scope of the MSD and was willing and motivated to negotiate the workforce's terms and conditions of employment with the respondent.

17 Since the termination of Mr Car, the union had been forced to stall its MSD campaign as Mr Car was no longer employed by the respondent, could not access employees of the respondent, and was an integral part of the MSD campaign.

18 The respondent read two affidavits which I summarise as follows.

19 The affidavit of Georgia Simmonds, solicitor employed by Seyfarth Shaw Australia, goes mainly to the question whether Mr Car was a probationary employee. I accept for present purposes that Mr Car's initial six-month probationary period under his employment contract with Metro Trains Melbourne continued to run. In other words, there was to be no further probationary period in relation to his employment on transfer to Metro Trains.

20 Mr Dickinson also affirmed an affidavit. In that affidavit, Mr Dickinson deposed to events surrounding the health assessments of Mr Car. He deposed that the sole reason Mr Car's employment was terminated was Mr Dickinson's belief that Mr Car had been dishonest in completing documentation as a part of his health assessment. Mr Dickinson deposed that, in the circumstances where he believed there was "extremely serious" dishonesty on the part of Mr Car and he was still within his probation period, he made a decision to terminate Mr Car's employment on the basis that he had been dishonest. None of the reasons asserted by the applicants were said to have formed part of Mr Dickinson's reasons for the decision to terminate Mr Car's employment.

21 Mr Dickinson deposed to the sequence of events in relation to Mr Car's medical forms. I return to this central issue below.

The submissions of the parties

22 The applicants submitted that, although s 361(2) provides that the reverse onus in s 361(1) does not apply in relation to orders for an interim injunction, that does not mean the reverse onus is irrelevant in assessing whether there is a serious question to be tried: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Blue Star Pacific Pty Ltd* [2009] FCA 726; 184 IR 333 at [24]. Account could be taken of the ultimate availability of the presumption in s 361(1) in assessing the strength of the case of an applicant seeking interlocutory relief: *Police Federation of Australia v Nixon* [2008] FCA 467; 168 FCR 340 at [69].

23 The applicants submitted there was no doubt that the conduct of Metro Trains toward Mr Car constituted "adverse action" for the purposes of s 342 of the *Fair Work Act* in that

"dismissal" of an employee was an identified form of adverse action in item 1(a) of the table in s 342(1). The applicants submitted that there was also a serious question to be tried that the conduct undertaken by Metro Trains was undertaken for reasons that included that Mr Car was a delegate and/or he engaged in industrial activities, or exercised workplace rights.

24 Mr Car was a delegate of the first applicant union. Accordingly, pursuant to s 12, Mr Car was an "officer" of an organisation for the purposes of s 346(a). The applicants submitted the protection afforded by s 346(a) was not confined to the mere status of a delegate. The dismissal of a delegate may be for a proscribed reason if the employer was motivated by dislike of the manner in which the delegate has performed his or her duties as a delegate, or of the activities carried out by the delegate: *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* [2000] FCA 627; 100 IR 383 at [37].

25 The applicants submitted the actions of Mr Car from 25 to 27 March 2019 in distributing the MSD petition and having conversations with Metro Trains employees at the request of the first applicant union constituted an "industrial activity" at least for the purposes of ss 347(b)(i)-(v). The actions of Mr Car also, the applicants submitted, constituted the exercise of workplace rights for the purposes of s 341. As a delegate, Mr Car had a role or responsibility in distributing a MSD petition for the purposes of evidence for a MSD under s 236 and doing so involved participation in a process under a workplace law.

26 Although it was not set out in Mr Car's termination letter, the reason for dismissal given by Metro Trains at the meeting on 27 March 2019 was that Mr Car was "dishonest" about his sleep apnoea on his Category 1 rail medical assessment. The applicants submitted there was at least a serious question to be tried as to whether that was the true reason or whether, in addition, the reasons for the dismissal included the proscribed reasons identified in the application, in light of:

a. The timing of Mr Car's termination in that he was dismissed immediately after his success, in the role of union delegate, in obtaining a large number of signatures for the MSD petition and his involvement in the union campaign intensifying.

b. The dismissal occurred in circumstances in which comments had been made to Mr Car and other employees by managers critical of the union and its delegates, critical of the union's campaign and discouraging membership of the RTBU.

c. The reason given was weak in that an error in the completion of form for the purposes of a medical assessment was unlikely to be considered justification for termination of employment, particularly where the medical condition was

previously disclosed.

d. The timing of the termination in that MTS was on notice for at least seven days that Mr Car had incorrectly filled out his Category 1 Rail Medical but did not act to terminate his employment until after Mr Car's involvement in circulating the MSD petition.

27 The applicants submitted there was a serious question as to whether, following cross-examination and discovery, a finding of fact will be made that at least one of the reasons for the conduct of Metro Trains against Mr Car was that he was a delegate, engaged in industrial activity and/or exercised workplace rights: see the approach adopted in *G & K O'Connor Pty Ltd* at [32].

28 The applicants submitted the balance of convenience favoured the granting of the interlocutory relief sought, including for the following reasons:

a. The obvious consequence of dismissal was that Mr Car was unemployed and without income and will suffer financial and personal hardship of meeting his personal living expenses without the earnings he derived from employment. Further, Mr Car derived a great sense of pride in working with MTS and, prior to his termination he had turned down other work to continue working with MTS.

b. Mr Car was on a training course known as "CJC-T Upskilling" which will allow him to work as a Customer Journey Coordinator – Trains. This course is the only one of its kind at present and deprivation of the opportunity to complete the course will inhibit his career progression and skill development.

c. Mr Car was unable to continue to exercise his workplace rights at MTS as an RTBU delegate, a role in which he enjoys and wishes to continue pursuing. The RTBU is presently seeking to make an enterprise agreement with MTS and its industrial presence and ability to continue campaigning for a MSD has been significantly curtailed by the termination of its delegate.

d. There was no prejudice to MTS if the injunction were granted. The obligation to pay wages to Mr Car could lead to no hardship to MTS in circumstances where it will gain the benefit of Mr Car continuing to perform work should his employment be continued: *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* (2000) 100 IR 383 at [57].

29 Damages in this matter were not an adequate remedy, the applicants submitted. The termination of his employment were, it was submitted, likely to have a personal and psychological impact on Mr Car as a result of his forced unemployment: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Electrix Pty Ltd* [2018] FCA 1879 at [32]. Further, the applicants submitted that Mr Car was likely to lose the benefit of participating in the training course, and that the damage to the position of the first applicant union within the workplace, and its campaign, were not able to be remedied by any final relief available in the proceedings.

30 The applicants submitted the Court should not be reluctant to make the interlocutory order sought. The courts were no longer set against the making or orders which have the effect of reinstating an employee on an interim basis: *Quinn v Overland* [2010] FCA 799; 199 IR 40 at [95]-[104]; *Transfield Construction Pty Ltd v Automotive Food, Metal, Engineering, Printing and Kindred Industries Union* [2002] FCA 1413 at [28]; *DP World Melbourne Limited v Maritime Union of Australia* [2014] FCA 275 at [42].

31 The respondent submitted Mr Car's employment was terminated, within the probation period of his employment, because the respondent formed the view that he was dishonest in completing crucial health assessment documentation which had to be completed in respect of his employment. The respondent submitted that the applicants' case for final relief was extremely weak, that the balance of convenience did not support an order reinstating the employment relationship pending a final determination of the proceedings, and that the interim application should therefore be dismissed.

32 The respondent submitted that Mr Dickinson was the decision maker and it was his reasons for terminating Mr Car's employment that the Court needed to consider.

33 The respondent accepted that for the purposes of this application the availability of s 361 on a final hearing is a matter to consider in assessing the strength of the applicants' prima facie case: *Construction Forestry Mining and Energy Union v Anglo Coal (Capcoal Management) Pty Ltd* [2016] FCA 1582; 266 IR 185 at [77]-[78].

34 However, in light of the objective evidence – including the fact that the February questionnaire was completed differently to the January questionnaire – and Mr Car's own evidence that he is "not sure why" he completed the questionnaires differently, Mr Dickinson's evidence on this issue was plausible and otherwise not inherently improbable. In those circumstances, there was no real reason to doubt that it would not be accepted by the Court at a final hearing; in which case the respondent would discharge its burden and rebut the presumption under s 361 of the *Fair Work Act*: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; 248 CLR 500 at [44]-[45] and at [126]-[128].

35 The respondent submitted the evidence also demonstrated that the link between Mr Car's protectable interests under the *Fair Work Act* and the termination of his employment was

extremely weak. In that regard it was submitted Mr Dickinson did not know of any of the following matters until after Mr Car's employment had been terminated:

a. that Mr Car was a member or delegate of the RTBU;

b. that the RTBU and the respondent's employees were seeking a MSD and that Mr Car was involved in compiling a petition for that purpose; or

c. that there was a meeting on 22 March 2019 between Mr Car, Trent Hunter and Alex Claassens of the RTBU.

(Footnotes omitted.)

36 Moreover, the respondent submitted, none of the evidence the applicants relied on demonstrated a link between these matters and Mr Dickinson. The highest the evidence rose was Mr Car's own statements in the meeting on 27 March 2019 touching upon these kinds of matters. These matters were immediately denied by Mr Dickinson.

37 Accordingly, the respondent submitted, it was difficult to sustain an argument that Mr Dickinson was motivated to terminate Mr Car's employment based on matters he did not know. That simply served to further demonstrate the plausibility of Mr Dickinson's evidence.

38 The respondent submitted the issue was whether Mr Dickinson *believed* that Mr Car had been dishonest: *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* [2015] FCAFC 157; 238 FCR 273.

39 On the basis of the current evidence, the respondent submitted, the applicants' prima facie case was extremely weak and was likely to be easily met at a final hearing.

40 The respondent accepted for the purposes of the current application that the longstanding reluctance on the part of courts to order specific performance of employment contracts had eased somewhat with the introduction of statutory provisions such as s 545 of the *Fair Work Act*: see *Communications, Electrical, Electronic, Energy, Information, Postal and Allied Services Union of Australia v Dee Vee Pty Ltd* [2012] FCA 988 at [27] (citing *Transfield Construction Pty Ltd* at [28] and *Quinn v Overland* at 59-61).

41 However, the respondent submitted, there were strong reasons why the Court should not order reinstatement even on an interim basis.

42 First, the respondent's reason for the termination of Mr Car's employment was due to his dishonesty. That dishonesty has resulted in a breakdown in trust and confidence; a matter of

significance in considering whether reinstatement was an appropriate remedy (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) IR 186 at 191).

43 Second, there were no matters that Mr Car pointed to in his evidence that could not be remedied by an award of damages, or for which he must be employed by the respondent in order to carry out. In that regard, the respondent submitted Mr Car did not give evidence that:

> a. he could not make the payments he identifies in paragraph [44] without pay from the respondent (noting that most significant appeared not to be an expense, but a saving);
>
> b. he could not find alternative employment, or even that he had applied for such employment and had been rejected; or
>
> c. he could not assist the RTBU in its attempts to obtain an MSD notwithstanding that his employment had terminated and/or if it was not reinstated on an interim basis. There was no evidence to demonstrate that Mr Car could not "obtain signatures" outside the workplace. Mr Car's own evidence was that arrangements had been made at times outside the workplace to discuss the matters related to the MSD.

44 Third, there were no matters that the first applicant union pointed to that demonstrated that it could not continue to pursue its MSD with respect to the respondent. The evidence demonstrated no issue with access to the respondent's workplace. There was no evidence from the union that demonstrated that another of its members employed by the Respondent at the workplace was not willing to perform the tasks that it said Mr Car was performing, either generally or because Mr Car's employment was terminated and "they fear the same."

45 Fourth, and in any event, on the evidence there was little or no utility in the first applicant union seeking a MSD. The respondent's workforce, including those performing the work Mr Car was doing, was already covered by an enterprise agreement that expired on 22 August 2022. Under s 58 of the *Fair Work Act*, only one agreement can apply to an employee at a particular time.

Consideration

46 I turn first to consider whether there is a serious question to be tried as the evidence now stands. It is not possible to come to any final view given that what is before me is the bare affidavit evidence and no oral evidence either in chief or in cross-examination. There has as yet been no discovery of documents. I accept the submission that the reverse onus is relevant in assessing whether there is a serious question to be tried: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v*

Blue Star Pacific Pty Ltd. I take account of the ultimate availability of the presumption in s 361(1) in assessing the strength of the case of the applicants' claim for interlocutory relief: *Police Federation of Australia v Nixon*.

47 In my opinion there is a serious question to be tried. In reaching this conclusion I take into account the strength and content of Mr Dickinson's views but I regard his reasons, including his motives, as open to challenge. The reasons of Mr Dickinson just referred to are his summary conclusion as to Mr Car's dishonesty and whether or not he knew that Mr Car was a union delegate and had conducted union activities at the time of Mr Dickinson's decision on 27 March 2019.

48 In my opinion, there is a serious question to be tried in relation to the conclusion of dishonesty by Mr Dickinson, given the following sequence of events.

49 On 12 December 2018 Mr Car was reviewed by Dr Collett. The results of this review, referring to Mr Car's history of obstructive sleep apnoea, was forwarded to Dr Cecilia Mudbidri of Sonic HealthPlus. Thus it was clear, contrary to what I understood to be the submissions on behalf of the respondent, that Mr Car did undertake a relevant medical examination in December 2018.

50 On 4 January 2019 Mr Car attended Sonic HealthPlus for a medical examination. On this occasion the form shows that Mr Car answered "yes" to the question whether he had ever been told by a doctor that he had a sleep disorder, sleep apnoea or narcolepsy. A handwritten annotation under the heading "Doctor Comments" states "Sleep apnoea – treated appropriately with note from sleep physician". The risk category was Category 2.

51 Mr Car attended Sonic HealthPlus for a further medical assessment on 22 February 2019. The risk category was Category 1. In this instance Mr Car circled "no" to the question whether he had ever been told by a doctor that he had a sleep disorder, sleep apnoea or narcolepsy. The assessment was that Mr Car was fit for duty unconditional.

52 Mr Car attended a still further medical assessment at Sonic HealthPlus on or around 7 March 2019 in respect of Category 1. Again, the doctor was Dr Cecilia Mudbidri. The assessment was that Mr Car was fit for duty, subject to review by a specialist report by a sleep physician. Although the evidence is unclear because the assessment in evidence does not contain the same questionnaire, it would appear that the misstatement by Mr Car in the February form had not been repeated. The recommended date for review was 12 December 2019.

53 In these circumstances there is an arguable tension between, on the one hand, Mr Dickinson's asserted conclusion of dishonesty and, on the other hand, circumstances of which Mr Dickinson may have been aware which suggested a mere mistake by Mr Car in completing the questionnaire for the February 2019 assessment. Those circumstances include that the December 2018 assessment was sent to Dr Mudbidri of Sonic HealthPlus, that she was also the doctor who signed the paperwork in respect of the 22 February 2019 assessment, and that the misstatement was apparently corrected for the March 2019 assessment. On the evidence of Mr Dickinson himself, he was aware as at 27 March 2019 that Mr Car had been assessed as fit for duty subject to review as a result of the March 2019 assessment, a fact he deposes to having been made aware of on or around 7 March 2019.

54 I place no reliance for present purposes on Mr Car's references at different times to whether the misstatement was his mistake or his negligence or that he did not know why he answered the questionnaires differently. These are different ways of denying dishonesty.

55 In my opinion, there is also a serious question to be tried in relation to whether Mr Dickinson knew that Mr Car was a union delegate and was undertaking union activities at the time of his decision on 27 March 2019, and so could not have terminated Mr Car for that reason. There is an apparent inconsistency between Mr Dickinson's assertion that the first time he "became aware that Robert may be an RTBU delegate was when I saw a Facebook post … on 28 March 2019" and his evidence, appearing earlier in his affidavit, that during the meeting of 27 March 2019 Mr Car had said the following: "Is this about my union activities?"; "Is this because I'm a union delegate?"; and "Alex [Classens] has offered me a job with the RTBU". The significance of this apparent inconsistency in terms of whether Mr Dickinson was aware *before* the meeting of Mr Car's union activities is a matter which may be explored further at trial, after discovery and cross-examination, but I note in this respect that the evidence before me did not suggest Mr Dickinson reacted to or was surprised by Mr Car's comments.

56 A further aspect of the matter is the close relationship of the dates of the important events. The date of the letter to Ms Patel from Sonic HealthPlus was 20 March 2019, and Mr Dickinson's evidence was that he was made aware of its contents by Ms Patel on that date. This letter dealt with the earlier disclosure and later nondisclosure by Mr Car of his known medical condition. Yet no steps were taken by the respondent employer until a week later. It was during that week that the process of obtaining a majority support determination and Mr

Car's involvement in it progressed, in the circumstances in the workplace to which he deposed.

57 I put to one side the question of Mr Car's training, in light of the evidence given by Mr Dickinson that catch-up training has been implemented in other cases and that competency is not based on attendance.

58 I conclude that there is a serious question to be tried whether the conduct undertaken by Metro Trains was undertaken for reasons that included that Mr Car was a delegate, engaged in industrial activities, or exercised workplace rights.

59 I next consider the balance of convenience. The first respondent union undertook that it would compensate the respondent for any loss incurred as a consequence of the interim reinstatement of Mr Car's employment.

60 The respondent was prepared, if the Court could accommodate an early trial date, to relieve the detriment in terms of Mr Car's financial position by undertaking to pay him the wages that he would have received pending the trial. So far as the Court is concerned, it is possible to accommodate a final hearing of the matter in the first half of July 2019.

61 But for the respondent's proposed undertaking I would have found the balance of convenience was in favour of the grant of the interlocutory relief sought by the applicants. One of the matters weighing in that balance is the potential damage to the position of the first applicant union within the workplace, and its campaign. Another matter is the loss or harm to Mr Car.

62 I put to one side the issue raised as to public safety as I accept for present purposes that all the medical reports suggested that Mr Car was fit either for a Category 1 or a Category 2 role, subject to a review to occur later in 2019.

63 As things stand, however, on the respondent giving an undertaking in the above terms as to Mr Car's remuneration pending the trial in July 2019, although I find there is a serious question to be tried, I find the balance of convenience does not favour treating the termination of the employment of Mr Car as null and void and reinstating him to his former employment on the terms and conditions which applied to him immediately prior to 27 March 2019.

Conclusion and orders

64 For these reasons, I refuse the interlocutory relief sought by the applicants.

65 The final hearing will be expedited and dates by which the necessary interlocutory steps are to be taken will be fixed accordingly.

I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson.

Associate:

Dated: 17 April 2019