Federal Court of Australia

Martires v Endura Paint Pty Ltd (No 1) [2021] FCA 178

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| Appeal from: | *Martires v Endura Paints Pty Ltd (No 2)* [2020] FCCA 717 |
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| File number: | WAD 125 of 2020 |
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| Judgment of: | **JACKSON J** |
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| Date of judgment: | 9 March 2021 |
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| Catchwords: | **APPEAL AND NEW TRIAL** - appeal from decision of Federal Circuit Court of Australia - appellant self-represented - procedural fairness - duty of judge to apprise appellant of rules of evidence and procedure - appellant presented with new evidence going only to credibility while being cross-examined at trial - appellant not told of right to object or ask for adjournment - possibility that outcome could have been different - appellant denied procedural fairness - appropriateness of ordering new trial - appeal allowed |
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| Legislation: | *Evidence Act 1995* (Cth) ss 102, 103, 106, 570*Fair Work Act 2009* (Cth) ss 340, 341, 343, 344*Federal Circuit Court of Australia Act 1999* (Cth) s 28*Uniform Civil Procedure Rules* (NSW) r 51.53(1) |
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| Cases cited: | *AMF15 v Minister for Immigration and Border Protection* [2016] FCAFC 68; (2016) 241 FCR 30*Australian and Overseas Telecommunications Corporation Ltd v McAuslan* (1993) 47 FCR 492*Balenzuela v De Gail* (1959) 101 CLR 226*Blenkinsop v Wilson* [2019] WASC 77*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500*Canturi Corporation Pty Ltd v Gagner Pty Ltd* [2008] NSWDC 151; (2008) 8 DCLR (NSW) 17*Conway v The Queen* [2002] HCA 2; (2002) 209 CLR 203*Dietrich* *v The Queen* (1992) 177 CLR 292*Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337*Gambaro v Mobycom* [2019] FCAFC 144; (2019) 271 FCR 530*Government Insurance Office (NSW) v Bailey* (1992) 27 NSWLR 304*HT v The Queen* [2019] HCA 40; (2019) 374 ALR 216*John v Rees* [1970] Ch 345*Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113; (2019) 271 FCR 461*Kioa v West* (1985) 159 CLR 550*Martires v Endura Paints Pty Ltd (Judicial Review)* [2021] FCA 179*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273*Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57*Nobarani v Mariconte* [2018] HCA 36; (2018) 265 CLR 236*Orr v Holmes* (1948) 76 CLR 632*Rajski v Scitec Corporation Pty Ltd* (Unreported, New South Wales Court of Appeal, 16 June 1986)*Re F (Litigants in Person Guidelines)* [2001] FamCA 348; (2001) 27 Fam LR 517*Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208; (2005) 3 DDCR 1*Stead v State Government Insurance Commission* (1986) 161 CLR 141*Stokes v The Queen* (1960) 105 CLR 279*Stone v Braun* [2015] WASCA 103; (2015) 13 ASTLR 444*SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146; (2013) 216 FCR 445*Tomasevic v Travaglini* [2007] VSC 337; (2007) 17 VR 100*Whall v Stamp* [2019] NSWCA 163*Windoval v Donnelly* [2014] FCAFC 127; (2014) 226 FCR 89*WZASS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 856 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 91 |
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| Date of hearing: | 28 January 2021 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondent: | Ms KS Michael |
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| Solicitor for the Respondent: | Aherns Lawyers |

ORDERS

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|  | WAD 125 of 2020 |
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| BETWEEN: | EDMUND RICARDO MARTIRESAppellant |
| AND: | ENDURA PAINT PTY LTDRespondent |

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| order made by: | JACKSON J |
| DATE OF ORDER: | 9 MARCH 2021 |

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The decision of the Federal Circuit Court of Australia made on 20 April 2020 is set aside.
3. The proceedings are remitted to the Federal Circuit Court of Australia for a new trial by a different judge.

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

REASONS FOR JUDGMENT

JACKSON J:

1. On 7 May 2018 the respondent, Endura Paint Pty Ltd, dismissed the appellant, Edmund Martires, from his employment with the company. Mr Martires made an application to the Federal Circuit Court on the basis that he had been fired for having workplace rights or proposing to exercise them. The alleged workplace rights were the right to rest after six hours' continuous work, the right to 'always think and practice work safely', and the right to issue 'Safety Violation letters to co-employees and company directors'.
2. The primary judge heard the application on 25 March 2020 and gave judgment dismissing it on 20 April 2020. Mr Martires now appeals from that dismissal. He also commenced separate proceedings for judicial review of the primary judge's decision, which were heard at the same time as the hearing of the appeal. My reasons for decision in the judicial review application, to be published immediately after these reasons, are *Martires v Endura Paints Pty Ltd (Judicial Review)* [2021] FCA 179.
3. The appellant was self-represented in both proceedings and it was not always easy to understand his various contentions. There are four grounds in the notice of appeal. Three of them allege, in effect, a denial of procedural fairness. The remaining ground is a broad assertion that the primary judge relied on 'improbable or dubious' evidence.
4. I have concluded for the following reasons that Mr Martires was not accorded procedural fairness. As a result it is necessary to order a new trial. This means it is neither necessary nor appropriate to determine Mr Martires's challenges to the primary judge's factual findings.

## Background

1. Endura Paint is in the business of manufacturing and supplying paint and protective coatings. It is a wholly owned subsidiary of a Canadian company.
2. Mr Martires commenced employment as a Production Assistant with Endura Paint on 18 September 2017. There was a written contract of employment. His role involved assisting in the manufacture of paint, installation of infrastructure within Endura Paint's manufacturing facility, packing, delivering, collecting and purchasing goods and other works as directed from time to time.
3. On 11 April 2018 Aaron Soos, a director of Endura Paint, gave Mr Martires a 'Performance Improvement Plan' (**PIP**) letter referring to a meeting between the two men which took place on 9 April 2018. According to the letter, serious breaches by Mr Martires of company policy and occupational health and safety requirements were discussed, as well as concerns about Mr Martires's performance. Mr Martires signed the PIP, and so committed to achieving certain improvement goals and acknowledged that dismissal was one possible outcome if he failed to do so.
4. On 2 May 2018 there was an incident in which another director at Endura Paint, Michelle Cleary, alleged to Mr Soos that Mr Martires was working in the factory at a time when water from a hose was being discharged onto the factory floor, and at the same time electrical work was going on.
5. On 3 May 2018 Mr Martires and another employee were sent to a client's property to perform some work on a pool. At one point while there, Mr Martires took his shoes off and took a nap on the client's outdoor furniture. These basic facts are common ground, although Mr Martires denies that they constitute any wrongdoing on his part.
6. On 4 May 2018 Mr Martires sent text messages to Mr Soos which Mr Soos says were unsolicited. The messages proposed wording which Mr Soos could use in relation to another claim from another former employee of Endura Paint. The suggested wording would have accused the former employee of bullying Mr Martires to such an extent as to cause Mr Martires to suffer mental health issues and to require him to see a psychiatrist. While Mr Martires gave evidence to the effect that those things were at least partially true, he accepted that he had not in fact been referred for psychiatric help.
7. On 4 May 2018 Mr Martires gave Mr Soos what purported to be a report about the incident on 2 May 2018 which alleged that it was Ms Cleary who had violated safety rules.
8. On 7 May 2018 Mr Soos gave Mr Martires a letter terminating his employment with Endura Paint with one week's pay in lieu of notice. The letter gave reasons for the termination. In summary the reasons were the water incident in the factory of 2 May 2018, Mr Martires's unwillingness to follow directions from Ms Cleary, the nap on 3 May 2018 and the text messages of 4 May 2018.
9. Mr Martires commenced proceedings in the Perth registry of the Federal Circuit Court on 5 July 2018. The primary judge, who was based in the Melbourne registry of that court, heard it on 25 March 2020. Both Mr Martires and the solicitor for Endura Paint appeared by telephone from what appears to have been different locations in Perth.

## The primary judge's decision

1. Mr Martires's originating application sought orders pursuant to s 340, s 343 and s 344 of the *Fair Work Act 2009* (Cth) (***FWA***). But it became clear that there was no evidence capable of supporting any claim under s 343 (coercion to exercise or not exercise a workplace right) or s 344 (undue influence or pressure to make or not make certain agreements). The issue was whether Endura Paint had breached s 340 which, broadly speaking, prohibits adverse action against a person because the person has a workplace right or has (or has not) exercised a workplace right or proposes to (or proposes not to) exercise a workplace right. There was no issue that the termination of Mr Martires's employment was adverse action; the issue was why the adverse action had been taken.
2. In relation to the incident on 2 May 2018 involving the discharge of water, Mr Martires claimed that the water was 'gushing', not 'flooding' as Endura Paint claimed, saying that there was 'a big difference'. He claimed that it was Ms Cleary who had violated safety policies by entering the production area without safety shoes.
3. As to the nap he took on 3 May 2018, Mr Martires justified this by saying that he was entitled to a work break after six hours of continuous work and was entitled to stagger his work break as mandated by the *Manufacturing and Associated Industries and Occupations Award 2010*.
4. Mr Martires claimed he was terminated for reasons including the complaint he made against Ms Cleary about the events of 2 May 2018.
5. The primary judge recounted the evidence of Mr Soos, which stated that Mr Martires had engaged in a range of unsafe and unacceptable work practices during his employment with Endura Paint, set out other complaints about Mr Martires's productivity and compliance with housekeeping requirements at the factory, and recounted the imposition of the PIP and the events of 2 to 4 May 2018 leading up to Mr Martires's dismissal on 7 May 2018. His Honour noted that Mr Martires denied all allegations regarding his conduct and performance.
6. The primary judge also considered an issue about whether, as Mr Martires claimed, Mr Soos had solicited information to be used against the other former employee, being the information Mr Martires had proffered in the text messages of 4 May 2018. Mr Soos denied that he had and his Honour accepted that evidence.
7. The primary judge also recounted evidence that Ms Cleary gave about unacceptable and unsafe practices she had seen Mr Martires engage in, and his complaint about her on 4 May 2018 and her perception that he was unwilling to follow her directions unless Mr Soos backed them up.
8. The basis of the primary judge's decision was simply that he accepted the evidence adduced on behalf of Endura Paint, in particular Mr Soos's evidence, that Mr Martires had not been terminated because of the exercise of any workplace right, but for the reasons which Mr Soos gave and which were given in the letter notifying of his termination.
9. His Honour set out the terms of s 341 of the *FWA* and summarised the principles governing its application which emerge, in particular, from the decision of the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v* ***Barclay*** [2012] HCA 32; (2012) 248 CLR 500. Neither party has criticised his Honour's summary of the law.
10. His Honour then made the following findings:

[42] In this case, I accept that there was adverse action taken by the respondent in the form of the termination of the applicant's employment. However I do not find that the action was taken in breach of section 341 of the FW Act.

[43] Mr Soos gave direct testimony of his reasons for the termination of the applicant's employment and I accept that the reasons for the termination of employment were those as set out in the letter of termination.

[44] I also accept that, over a period of time, there had been significant issues with the applicant's performance in the workplace and, in particular, his failure to follow instructions and directions provided to him by Ms Cleary.

[45] I accept that Mr Soos did not terminate the applicant's employment for a reason that included that the applicant was exercising a workplace right when he took a break and slept on a client's outdoor furniture or because the applicant raised a complaint regarding Ms Cleary.

1. But the primary judge did not stop there. His Honour went on to discuss an email chain, seeming to have come from Mr Martires, which had been forwarded in the early hours of the morning before the hearing, to Landon Goudreau, the Canadian president of Endura Paint's parent company and a director of Endura Paint. Mr Martires denies any part in the email chain, and his Honour's treatment of the first email in the email chain is central to Mr Martires's assertions of error. That first email purports to be from an officer of the Australian Human Rights Commission (**AHRC**) named David Morgan (**AHRC Email**). It appears to have been sent on 17 February 2020. The addressee is shown on it as 'Edmund Martirez' [sic]. The subject heading is: 'Approval of Your AHRC matter: Edmund Ricardo Martirez [sic] vs Endura Paints Pty Ltd'. The text of the AHRC Email (all errors in original) is:

Dear Edmund,

Good day. Regarding our phone call discussion this morning.

As discussed, The Commission has accepted your complaint against Endura Paints Pty Ltd. In the Commissions view, Endura Company has committed many violation of your Human Rights thus we have the duty to investigate and file the appropriate court proceedings towards the Respondent.

AHRC is now conducting its thorough investigation and doing the necessary steps towards a complete resolution on this case matter. We are also in coordination with our Canadian Human Rights Commission counterpart for them to file the appropriate case against Endura Company in Canada for their Human Rights Violation which the CHRC has a jurisdiction.

I will inform you of further actions by the President's Delegate, who acts and decides on the issues on this case matter.

1. The AHRC Email seems to have been forwarded by 'Edmund Martirez' to various Canadian email addresses of Endura Paint personnel, including Mr Goudreau. This second email in the chain (**Martirez Email**) has the subject line, 'BULLYING, RACISM & DISCRIMINATION IN ENDURA PAINTS COMPANY CONDONED BY OWNER LANDON GEAUDREAU' [sic]. It contains a series of vociferous complaints about the conduct of Endura Paint, including complaints of bullying, racism, discrimination and illegal termination of the apparent author's employment. It is not necessary to set it out. It is only necessary to describe two aspects of it. One is that it contains a number of details specific to Mr Martires's employment and his case against Endura Paint. This includes reference to the incident of 3 May 2018 concerning the nap on a client's outdoor furniture. The second is that it relies on the AHRC Email, which it forwards, apparently for the purpose of telling Mr Goudreau that he and his companies will be 'indicted with Human Rights Violation' in both Australia and Canada. It is signed, 'Edmund Martirez'.
2. The primary judge, after expressing his conclusion quoted above that Mr Soos did not dismiss Mr Martires because of the exercise of a workplace right, said (at [47]):

In the course of the hearing, Mr Martires was questioned about an email that had been forwarded on 24 March 2020 to a Canadian director of the respondent under the name 'Edmund Martirez', noting the only difference between the applicant's name and the name in the email was the letter Z. That email repeats many of the allegations that are made in the course of the affidavits filed by the applicant in this proceeding. There are details of the proceeding which would only be known to the applicant or the respondent. The applicant did not suggest that anyone from the respondent had created and forwarded the document. The document included statements calculated to embarrass Mr Soos and Ms Cleary.

1. The primary judge's reasons then quoted the contents of the AHRC Email, as I have done, and proceeded as follows:

[49] The applicant disclaimed any knowledge of the email purporting to have been sent from the AHRC and was adamant that he had not forwarded that email or was responsible in any way for producing that email.

[50] The email has plainly been concocted by someone other than any person from the AHRC. Whilst I am not required to make a definitive determination on this point, I think it is more probable than not that the applicant is in fact the author of these documents and forwarded the documents to the parent company in Canada in order to seek to produce a response from the company to encourage settlement of the proceeding in the applicant's favour.

[51] This is a case where there are matters of credit raised and where there is a difference between the accounts given by the applicant and those given by the witnesses for the respondent.

[52] I accept the evidence of the witnesses for the respondent. Where there have been errors in the dates provided in the respondent's affidavit material, I do not regard those errors as evidence of deceit or an attempt to mislead the Court and those errors have been explained satisfactorily in the affidavit material.

[53] I do not accept that the applicant has established that he had a workplace right to take a particular break when he chose to recline on a customer's outdoor furniture on 4 May 2018. I also do not accept that the existence of that right (or the exercise of the right in any way) informed the respondent's decision to terminate the applicant's employment.

[54] Furthermore, I do not accept that the correspondence which was forwarded by the applicant to the company's director formed any reason for the termination of employment.

[55] For these reasons, I dismiss the application.

## The grounds of appeal

1. The grounds of appeal are as follows:

1. The Judge breached the fundamental principle of the common law '*Presumption of Innocence*' under article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and also breached articles 14(1), 14(3)(b) of the ICCPR during and after the course of the trial against the Applicant/Appellant.

2. The Judge based his decisions by relying on improbable or dubious evidences and negligent misstatements submitted by the Respondent.

3. The Judge denied the Applicant/Appellant his basic right to prove his innocence under article 14(2) of the ICCPR by not ascertaining the origins of the evidence which was hastily submitted by the Respondent only at the start of the trial that was beyond the evidence submission deadline issued by his chamber. An ambush trial was committed against the Applicant/Appellant and was allowed by the Judge.

4. The Judge acted as a Trial or Defense lawyer for the Respondent and his lawyer along the course of the trial. The Judge, as part of his obligation should had followed the ethical standards of neutrality to both the Applicant/Appellant and the Respondent and not support and help the side of the Respondent during the trial. He should had given a fair trial to both parties.

1. Two misconceptions should be cleared away immediately. First, the primary judge was not required to make any presumption of innocence. He was presiding over a civil trial, not a criminal one, and the person now invoking the presumption of innocence was the applicant who was seeking to prove the case against the respondent.
2. Second, the *International Covenant on Civil and Political Rights*, done at New York City on 16 December 1966 (**ICCPR)** is an international treaty which does not confer any rights directly on any person in Australia, nor has it been adopted as an operative and binding part of Australian law: *Minister for Immigration and Ethnic Affairs v* ***Teoh***(1995) 183 CLR 273 at 286‑287; *Dietrich* *v The Queen* (1992) 177 CLR 292 at 305. If the conduct of the trial was not in accordance with that treaty that would not, by itself, be appealable error. In the circumstances of this case, it is not necessary to consider the view expressed in ***Tomasevic*** *v Travaglini* [2007] VSC 337; (2007) 17 VR 100 at [72] that the ICCPR has an independent and ongoing legal significance in Australian domestic law. No submission was made that the ICCPR somehow affected the proper construction of any relevant statute: see *Teoh* at 287 (Mason CJ and Deane J).
3. Nevertheless, the point of grounds 1, 3 and 4 is clear enough. The 'evidence which was hastily submitted by the Respondent only at the start of the trial' to which ground 3 refers is evidently the email chain discussed above containing the AHRC Email and the Martirez Email (**Email Chain**). It was not introduced to the trial until it was put to Mr Martires in cross‑examination. Grounds 1 and 3 appear to assert a denial of procedural fairness by reason of the primary judge failing to give Mr Martires a reasonable opportunity to prove that he was not the author of the Email Chain. Ground 4 asserts actual or apprehended bias on the part of the primary judge.
4. Ground 2 is vague and harder to understand, but under its rubric Mr Martires appears to wish to advance various challenges to the primary judge's factual findings. Since it will not be necessary for me to determine those challenges, it is not necessary to describe them further.

## Consideration - procedural fairness and the Email Chain

1. In *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113; (2019) 271 FCR 461 at [93] the Full Court said that where 'an appeal involves grounds involving allegations of apprehended bias or denial of procedural fairness along with other substantive or discrete grounds, the appeal court should first deal with the issues of bias or procedural fairness': see also *Gambaro v Mobycom* [2019] FCAFC 144; (2019) 271 FCR 530 at [48]. I will take that approach here.
2. The primary judge was obviously correct to say that the AHRC Email was concocted by someone other than any person from the AHRC. Mr Martires does not suggest otherwise. His complaint of error arises out of his Honour's observations as to authorship of the email. It includes a complaint that he was denied a reasonable opportunity to prove that he was not the person who fabricated the AHRC Email.
3. In oral submissions in the appeal, Mr Martires said he was not given 'a fair amount of time to investigate'. He also said that the email was 'not supposed to be included' but it nevertheless 'became on evidence', and that the primary judge 'included [the Email Chain] in the judgment, when it's not supposed to be'. I take him by this to be alluding to an impression which the primary judge arguably gave that his Honour was not going to have regard to the AHRC Email for the purposes of his decision on liability (as distinct from costs), which I will address further below. As I have set out, his Honour then nevertheless took the Email Chain into account in his decision.
4. Mr Martires submitted, in effect, that taking the Email Chain into account caused the primary judge to take an adverse view of his credibility, causing his Honour to 'judge me as a liar, as a gold digger, everything'. He complained that the primary judge did not grant the 'chance to prove myself with that email', and that this was unfair.
5. It is a fundamental principle of our system of justice that all courts, whether superior or inferior, are obliged to accord procedural fairness to parties to a proceeding: ***HT v The Queen*** [2019] HCA 40; (2019) 374 ALR 216 at [17] (Kiefel CJ, Bell and Keane JJ). An obligation to afford procedural fairness to the parties who are the subject of the exercise of the judicial power of the Commonwealth is an incident of that power. Mr Martires was entitled to a hearing that afforded him procedural fairness: *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146; (2013) 216 FCR 445 at [55].
6. The particular content of the rules of procedural fairness depend upon the nature of the power being exercised, and the factual circumstances in which the power is to be exercised: *Kioa v West* (1985) 159 CLR 550 at 584‑585 (Mason J), 612‑614 (Brennan J). In *HT v The Queen* at [18], Kiefel CJ, Bell and Keane JJ said:

Whilst stated as principles or rules deriving from the more general principle of procedural fairness, these rules do not have immutably fixed content. The content of procedural fairness may vary according to the circumstances of particular cases. Procedural fairness is not an abstract concept; rather, it is essentially practical. The concern of the law is the avoidance of practical injustice. It is that consideration which guides a court in deciding whether its procedures should be adapted to meet difficulties which may arise.

1. Since the question arises here in the context of a formal courtroom setting, the standard of procedural fairness to be observed is a high one: see *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57 at [31].
2. Here, one important circumstance was that Mr Martires was self-represented. In *Stone v Braun* [2015] WASCA 103; (2015) 13 ASTLR 444, Beech J (as he then was, Buss and Mazza JJA agreeing) summarised the court's duty to facilitate the conduct of the case in that circumstance as follows (most citations omitted):

[62] The challenges in the role of trial judge are increased when one (or more) of the litigants is not legally represented.

[63] I adopt and apply the observations of Pullin, Newnes and Murphy JJA in *Moleirinho v Talbot & Olivier Lawyers Pty Ltd* [[2014] WASCA 65 at [51]]:

What a judge ought do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case: *Abram v Bank of New Zealand* [1996] FCA 635; (1996) ATPR 41-507, 31; *Tobin v Dodd* [2004] WASCA 288 [14]. The boundaries of intervention are flexible but the lodestar is a fair and just trial. It is clear, however, that a judge must not intervene to such an extent that he or she cannot maintain a position of neutrality or as to give an unrepresented litigant a positive advantage over another party. The advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which that litigant will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which the adversarial procedure offers to the unwary and untutored: *Rajski v Scitec Corporation Pty Ltd* [1986] NSWCA 1, 14; *Minogue v Human Rights and Equal Opportunity Commission* [1999] FCA 85; (1999) 84 FCR 438 [26]-[29].

[64] Many cases have recognised the dilemma and delicate balance created by the need to diminish the disadvantages suffered by a self-represented litigant while maintaining the court's neutrality.

[65] Depending on the circumstances, the court may need to take appropriate steps to ensure, so far as possible, that a self-represented litigant has sufficient information about the practice and procedure of the court to mean that there is a fair trial. This duty does not extend to advising the self-represented litigant as to how his or her rights should be exercised. Further, a duty to provide information in order to attempt to overcome the procedural disadvantages faced by a self-represented litigant is not a duty to run the case for him or her.

…

[68] In communicating with a self-represented litigant, the court must be careful to ensure that things said by the court do not inadvertently mislead the self-represented litigant, including by reinforcing a misapprehension, about the applicable substantive or procedural law, or about the way in which the case is to be conducted. That is illustrated by *Moleirinho* and *Downes v Maxwell* [*Richard Rhys & Co Pty Ltd (in liq)* [2014] VSCA 193; (2014) 313 ALR 383 at [101]-[102], [127]].

[69] Views may often reasonably differ as to where the line is to be drawn. That is illustrated by the fact that there were dissenting opinions in both *Uszok* [*v Henley Properties (NSW) Pty Ltd* [2007] NSWCA 31 at [145]-[155]] and *Downes v Maxwell*.

1. It is necessary to ensure that the litigant has not, because of a lack of legal skill, failed to claim rights or put forward arguments: *Rajski v Scitec Corporation Pty Ltd* (Unreported, New South Wales Court of Appeal, 16 June 1986) at 27 (Kirby P, Samuels and Mahoney JJA), cited with approval by the High Court in ***Nobarani*** *v Mariconte* [2018] HCA 36; (2018) 265 CLR 236 at [47]. While a judge is not obliged to provide advice about the right to object to inadmissible evidence on each occasion that particular questions or documents arise (see *Re F (Litigants in Person Guidelines)* [2001] FamCA 348;(2001) 27 Fam LR 517, cited in *Tomasevic* at [136]), circumstances may arise where it is necessary to inform the litigant of the ability to object in order to eliminate the disadvantage he or she faces as a result of lack of legal qualifications and so ensure a fair trial.
2. As I have said, the Email Chain was introduced into the proceeding when counsel for Endura Paint put it to Mr Martires in cross‑examination on the day of the hearing. Mr Martires says that means that the trial was unfair. An evaluation of whether that is correct is context and fact dependent, meaning it is necessary to examine the transcript of the hearing before the primary judge in some detail.
3. About half-way through the hearing, Ms Michael, who was appearing as counsel for Endura Paint, had mostly finished cross‑examining Mr Martires, and said she wished to add 'a final part'. She referred to the AHRC Email without at that stage showing it to Mr Martires (recall that both parties were appearing by telephone) and asked Mr Martires whether he had received it. After checking his emails (evidently he had access to a computer), Mr Martires said he had not.
4. When asked whether he had forwarded the AHRC Email to a number of Endura Paint personnel in Canada, Mr Martires denied it. Then, at the primary judge's invitation, Ms Michael read out the AHRC Email and asked Mr Martires whether he had ever received it. Mr Martires asked Ms Michael to forward it to him because he had his email open. But his Honour pressed Mr Martires to answer the question and Mr Martires denied again that he received the email and again asked whether counsel could forward it to him. The following exchange with his Honour ensued:

HIS HONOUR: Did you write that email, Mr Martires?---No, sir, because I'm confused. I don't know what we are talking about and I did not receive that email. It's being given to me now. I - I didn't write that email. I was - this morning, I sent an email to the associate, copied with Ms Michael - all the copies of my payslip and everything, sir.

Yes, we're not talking about the payslips. We're talking about this correspondence which purports - - -?---No, sir. That's why if she can - - -

- - - to be from David Morgan?---If she can forward me the email so - because I didn't receive the - that one.

No. No. You've heard the email. It has been read to you?---No, sir. I didn't receive that.

1. Mr Martires's confusion at this point is understandable. While it seems he was at a location which had access to a computer, the fact that he was appearing by telephone meant that putting documents to him was not straightforward. He did not have the email in front of him (or at least, for present purposes his implicit assertion to that effect must be assumed to be correct). From his point of view, a reasonably involved email several paragraphs long had been read out to him by a disembodied voice. His request that it be forwarded to him was reasonable.
2. But it was not forwarded at this point. Instead, the primary judge directed counsel for Endura Paint to put to Mr Martires the recipients to whom the Martirez Email had been sent and when it was sent. She gave him the name and email address of one of the recipients (Mr Goudreau) and Mr Martires once again denied sending it. He pointed out that his email address, used for correspondence with the court, was different to the one used to send the Martirez Email. He denied having created a different email address.
3. At that point, the primary judge acceded to a request from Ms Michael that she be permitted to send the Email Chain to Mr Martires and to the court. His Honour said, 'This is a serious matter, Mr Martires, if what's being alleged is true' and Mr Martires agreed and said that was why he needed to see a copy.
4. The primary judge then stood the matter down for what turned out to be just over 15 minutes, so that Mr Martires (and his Honour) could read and consider the emails. When court resumed, Mr Martires continued to deny being the sender of the Martirez Email. He pointed out that his name is spelled with an 's' at the end, not a 'z'. After further denials, counsel for Endura Paint said that she had no further questions. But his Honour asked more about the emails, eliciting further denials from Mr Martires of any prior knowledge of or involvement in them, in the course of which was the following question and answer:

So, you're giving sworn evidence to the - just confirming, you're giving sworn evidence to the court that you did not - you're not the author of this email and you didn't send it?---Yes, sir, because I don't know the emails - I don't know the contact details of Landon. And there's a lot of people there, I don't know them, sir.

1. The primary judge then moved on from that topic, asking Mr Martires whether he wanted to give any more evidence and explaining:

And now you have an opportunity to provide some further evidence now arising from the questions that you're being asked or you can alternatively proceed to close your case and allow the respondent's witnesses to give evidence and you can ask them questions. Now do you wish to give - - -?---So, now I can ask them questions, sir.

All right. So - all right, so you close your case - you've got no further questions - you wish to give no further evidence. All right.

1. Endura Paint then opened its case with evidence from Ms Cleary and Mr Soos, both of whom Mr Martires cross‑examined. Endura Paint's case closed, Mr Martires made closing submissions, counsel for Endura Paint did the same and his Honour gave Mr Martires the opportunity to reply. The Martirez Email and the AHRC Email were not mentioned in any of those submissions until, at the end of Mr Martires's brief reply, his Honour asked, 'on the issue of credibility, Mr Martires, how should the court - what should the court do in relation to this email from Edmund Martines [sic] - from that email address to Mr Landon Gudrow [sic]?'. Mr Martires answered with further denials of any knowledge of the emails before the hearing. He said, 'But I'm - since I'm - what I can say, sir, as - they can have it investigated, sir. There's always - you know, people can find ways - they have the money to have it investigated and show proof. But this is the first time I read this email, sir'.
2. Then the primary judge, after saying he would reserve his decision, returned to the topic of the email as follows:

… But Mr Martires, can I just say.

MR MARTIRES: Yes, sir.

HIS HONOUR: That I would have thought that - I would expect that this email will be investigated.

MR MARTIRES: Yes, sir. Yes, sir. They have the money, sir. They can do that. I don't have any money, sir, so I cannot promise anything, sir. But I can - I'm not sure, sir - here there's a polygraph test. I can do, sir. I can come whenever you want to, sir.

HIS HONOUR: Okay. All right. So, I will reserve my decision …

1. But before the court adjourned, Ms Michael raised the question of the costs of the proceeding. His Honour indicated he would give an opportunity to make submissions on costs after delivering his decision. He then said:

HIS HONOUR: But I must say - I must say, if I make a finding that this affidavit -this document that was forwarded is in fact the work of Mr Martires, well that will obviously affect the issue of costs.

MS MICHAEL: Yes, your Honour. Okay.

HIS HONOUR: Do you - are you wanting me to make any findings about that or leave it to one side - or what's the?

MS MICHAEL: If your Honour is in a position to make a finding in relation to that material - that email, at this stage, that would be fine with us. Having only received it only yesterday - - -

HIS HONOUR: Yes. Look I think it might be - - -

MS MICHAEL: Yes.

HIS HONOUR: I will consider it, but it might be safer from all positions if it was simply noted that it was part of the material. But without going into the detail of it. I think the decision can be made without necessarily dealing with that or referring to it, but it's a matter for your client - perhaps it's more a matter for your client to make decisions as to what it wishes to do.

MS MICHAEL: Yes.

HIS HONOUR: And it might take the view that it might be an expensive waste of time.

MS MICHAEL: Yes.

HIS HONOUR: I don't want to involve - I don't want to involve your client in further expense - either in a court or through other proceedings.

MS MICHAEL: Yes.

The court then adjourned.

1. I will assume, without deciding, that Mr Martires had not seen the emails before. Since his complaint is that he was denied the opportunity to prove that he had not seen them, this court cannot proceed on the basis that he was their author. Making that assumption, Mr Martires's submissions raise the following concerns about this course of events:
2. It seems that Mr Martires came to Australia from the Philippines. Although there was no direct evidence of his educational background or qualifications, it can be inferred from the way that he presented in writing and in court, and from his work history as disclosed in the evidence, that English is not his first language and that he has limited knowledge of the law and the legal process.
3. The primary judge gave Mr Martires a broad explanation of the way the hearing would proceed and some specific information about closing his case (to which I have referred) and cross‑examining Endura Paint's witnesses. But his Honour did not give Mr Martires any general explanation of the need for material to be admitted into evidence before it could be relied on or his ability to object to evidence on available grounds.
4. The existence of the Email Chain was not disclosed to Mr Martires until cross‑examination. That is not a criticism of anyone; there was evidence adduced in the appeal by leave, in affidavits of Mr Soos and Ms Michael, to the effect that Endura Paint only received the emails very early on the morning of the hearing (Perth time) and that Ms Michael only received them from Endura Paint less than an hour before the hearing commenced. Again, to decide whether that is so or whether, as Mr Martires now claims, Endura Paint concocted the emails, would be to beg the very issue which gives rise to the questions of procedural fairness: who was responsible for creating the Email Chain? For present purposes, I must assume that Endura Paint did not have the emails before the time they say they did, which was in the early hours of the morning of the hearing, Perth time. Therefore the fact that the emails only emerged in cross‑examination is not itself evidence of 'ambush'; it is simply the basis for understanding what followed.
5. Mr Martires was appearing by telephone. His inability to see the cross‑examiner or the judge, and the difficulty of showing him the Email Chain, contributed to a sense of confusion on his part about what was going on. In that context, he was questioned about the Email Chain in some detail without it being shown to him. That is likely to have added to his confusion.
6. In view of that confusion, of Mr Martires's background and qualifications, and of what must be assumed to be his lack of prior knowledge of the emails, it is doubtful that 15 minutes was long enough for him to read them, examine them closely, collect his thoughts, and decide what he wanted to do about them.
7. At no point were the emails tendered into evidence and Mr Martires was not given an opportunity to object to their admission into evidence, for example under s 102 of the *Evidence Act 1995* (Cth) because they went only to his credibility. He was not told of his ability to do so.
8. The primary judge did not advise Mr Martires that it was open to him to apply for a further adjournment of the hearing, whether for a relatively short time to allow him to prepare cross‑examination on the emails, or for a longer time so that he could, for example, seek discovery on the topic from Endura Paint. Rather, the advice his Honour gave (see [48] above) indicated only two alternatives: to provide further evidence there and then arising out of the questions he had been asked, or to close his case. So while Mr Martires did not apply for an adjournment or allege that Endura Paint had concocted the emails (he now alleges that on appeal), it is doubtful that he was given sufficient time or advice to consider those possibilities: cp. *AMF15 v Minister for Immigration and Border Protection* [2016] FCAFC 68; (2016) 241 FCR 30 at [47(c) and (g)].
9. Neither the primary judge nor counsel for Endura Paint made clear to Mr Martires the potential significance of the emails for the case. No specific submission was made in closing that Mr Martires had concocted the AHRC Email or had authored the Martirez Email and that this reflected poorly on his credibility. While, during the cross‑examination of Mr Martires, the primary judge called the emails a serious matter if true, he did not explain why that might have been significant for the case: see [46] above. And although his Honour made a brief reference to credibility at the end of Mr Martires's reply submissions (see [46] above), his comments at the very end of the case were liable to create the contrary impression that, while potentially serious, the emails were a matter which was liable to be investigated outside the context of the proceeding: see [50] above. His Honour could have been understood as saying that the only possible significance of the emails to the proceeding was in connection with costs: see [51] above. He indicated that he would probably not deal with the emails in his substantive decision as to liability and again suggested that it was a matter for Endura Paint as to whether it took it further, implicitly outside the proceeding: see [51] above. The impression that the emails were not going to be important to the decision was likely to have been reinforced by the fact that they had not been tendered or received into evidence.
10. And yet, in the end, the primary judge did quote from the AHRC Email and dealt with the Email Chain in his Honour's decision on liability. The extent to which it was significant to that decision will be considered below.
11. Endura Paint made three main submissions against the proposition that in these circumstances, Mr Martires had not been given procedural fairness so as to vitiate the primary judge's decision. First, it submitted that Mr Martires did not ask for an adjournment. As to that, it may be accepted that in general, a self-represented litigant will sometimes understand that he or she can ask for more time (whether in legal terminology or not). But it cannot be assumed that he will appreciate that is possible even in the middle of a trial. Here, the confusion Mr Martires seems to have experienced may have prevented him from appreciating that he should or could ask for an adjournment, or that there would have been any utility in doing so. In any event, there were other factors here which mean that this answer is not sufficient, including the manner in which the primary judge prompted him to close his case, and the fact that he was not advised of his ability to object to the admission of the email or of the part that it might have played in the primary judge's assessment of his credibility.
12. Endura Paint relied on ***Blenkinsop*** *v Wilson* [2019] WASC 77 at [187]‑[189], where Corboy J observed, as part of his reasons for finding that there had been no denial of procedural fairness in a case involving the production of emails at trial, that the appellant had not asked for an adjournment. But that was part of Corboy J's reasons only; also relevant in that case were the fact that at least one of the emails was part of a chain which the appellant had received earlier, there was nothing in the content of the emails that suggested that the appellant would have been taken by surprise, a review of the trial transcript did not indicate that he was in fact surprised or prejudiced by references to the email chain, and it could not be said that excluding the email chain would have affected the magistrate's reasoning in any material respect. *Blenkinsop* is an illustration of how, in this area, relying on selected similar facts in other cases is usually of limited value.
13. Second, Endura Paint submitted that Mr Martires did not demonstrate any desire or need to be given more time, because from the outset he swiftly, consistently and adamantly denied being the author of the Email Chain. But this overlooks the possibility that, had he been given more time, he may have been able to adduce evidence and make submissions in support of his denials, a subject to which I will return shortly.
14. Third, Endura Paint submitted that the Email Chain had no bearing on the primary judge's decision. That decision was, it submitted, based solely on his Honour's assessment of the evidence as to why Mr Martires was dismissed and his application of the law as laid out in *Barclay*. That is a submission that, even if procedural fairness had been accorded, it could have made no difference to the outcome. This engages the principle enunciated in ***Stead*** *v State Government Insurance Commission* (1986) 161 CLR 141 at 147 (affirmed in *Nobarani* at [38]):

All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result.

1. In my view, Mr Martires has shown that the denial of procedural fairness did deprive him of the possibility of a successful outcome here. There are two aspects to the issue. The first is whether the Email Chain had such a bearing on the primary judge's decision that it could be said that if he had excluded it, or placed no weight on it, the outcome could possibly have been different. The second is to consider what Mr Martires could have said or done to make it possible that his Honour would have excluded or placed no weight on the Email Chain.
2. As to the first, it is true that, as Endura Paint submitted, most of his Honour's decision was taken up with consideration of the competing evidence in order to answer the central question posed in *Barclay* at [44]: 'why was the adverse action taken?' As I have indicated, by [46] of his decision, the primary judge appeared ready to give an answer unfavourable to Mr Martires without reference to the Email Chain. But then he turned to the Email Chain. And immediately after addressing that, his Honour said (at [51]), 'This is a case where there are matters of credit raised and where there is a difference between the accounts given by the applicant and those given by the witnesses for the respondent'.
3. While there is no express link between the primary judge's discussion of the Email Chain and his previous and subsequent conclusions that Endura Paint's evidence was preferable, the place of the discussion of the Email Chain in the reasons suggests that his Honour's view that Mr Martires had concocted it was material to his views about his credibility as a witness. There is no other explanation for why the discussion of the Email Chain appeared in the reasons at all. The explanation advanced by Endura Paint, that his Honour wanted to exonerate the AHRC from having written the email, is not persuasive, as no one suggested that Mr Morgan or anyone from the AHRC did write it, and had it not been referred to in the reasons, it would not have been exposed to the view of anyone other than the parties. It is also relevant that his Honour gave no other explanation for why he preferred the evidence of Endura Paint's witnesses to that of Mr Martires; he did not, for example, comment on demeanour or internal inconsistencies in Mr Martires's evidence. All these things mean it is more likely than not that the Email Chain and his view as to its authorship was material to his Honour's decision.
4. The second aspect of the inquiry is to consider what Mr Martires could have done had he been given more time. He articulates possibilities in the particulars document he filed on appeal. He claims that at a mediation that was held, he handed Mr Soos a printed copy of an email conversation between Mr Martires and the AHRC (this may be exempt from the without prejudice privilege and the prohibition on leading evidence of anything said or of any admission made at a mediation conference because it is not an admission and is not something that was said). He claims that it was impossible for him to send any email to Mr Goudreau because his computer was not functioning at the time. These are all matters which might have made a difference if Mr Martires had been given the opportunity to adduce evidence in relation to them. It may have been open for him to do so.
5. That this would have required a potentially lengthy and involved inquiry into collateral matters only focusses attention on a different sequence of events that would have been possible had Mr Martires been advised of his rights to object, thus eliminating the disadvantage he suffered because he was not legally represented. The Email Chain only went to his credibility. Prima facie, then, it was not admissible: *Evidence Act* s 102. To permit cross‑examination on it, the primary judge needed to be satisfied that the evidence adduced in cross‑examination could substantially affect the assessment of Mr Martires's credibility: s 103(1). Mr Martires having denied authorship of the Email Chain, it could only have been admitted into evidence if the primary judge had given leave to adduce it: s 106(1)(b). No such leave was sought or given here, and it is doubtful that any of the exceptions to that requirement applied: see s 106(2). His Honour's comments about the email at the very end of the hearing suggest that he was doubtful as to its relevance and may well have excluded it had objection been taken. All these potential complications point to another possible outcome if Mr Martires had been given the opportunity to object: that the Email Chain and the questions about it may have been excluded from evidence and played no further part in the proceeding.
6. Ms Michael quoted from a New South Wales District Court case, ***Canturi*** *Corporation Pty Ltd v Gagner Pty Ltd* [2008] NSWDC 151; (2008) 8 DCLR (NSW) 17 at [12], which in turn cited ***Seltsam*** *Pty Ltd v Ghaleb* [2005] NSWCA 208; (2005) 3 DDCR 1 at [225] as authority for the proposition that 'a party complaining of an "ambush" must lead evidence of being misled or disadvantaged'. But that relies on a passage from the dissenting judgment of Basten JA in *Seltsam*, which was in any event considerably more nuanced than the quote from the *Canturi* suggests: see *Seltsam* at [224]‑[226]. *Seltsam* had some similarity with this case, to the extent that both involved a trial judge indicating (more or less clearly) that he did not intend to determine a case on a particular basis and then (arguably) proceeding to do so. Ipp JA, with whom Mason P agreed, held that in that situation, '[i]t will not ordinarily be necessary to lead evidence to prove that the denial of procedural fairness had the potential to affect the outcome; in most cases the facts will speak for themselves' at [79]. *Seltsam* is authority contrary to the proposition which counsel sought to extract from it.
7. Here, the primary judge was doing his best to manage a difficult situation, of which he had no prior warning, in a busy court. Nevertheless, I respectfully consider that his Honour did not accord procedural fairness when he treated the Email Chain as evidence material to his decision, which hinged on credibility. Not only did Mr Martires not have clear notice of the possibility that the Email Chain would be taken into account as evidence against him, the primary judge's comments left the impression that it probably would not be. It is true that this was right at the end of the trial, after closing submissions had been made. But the problems in the conduct of this case went beyond that statement by his Honour. Advice was not given to Mr Martires as to the procedural options available to him to resist adverse findings on the basis of the emails, including the option of objecting to the receipt of the Email Chain into evidence. It was thus a trial where he was permitted to remain in ignorance of a fundamental procedure which, if invoked, could have proved favourable to him. It follows that he was denied a proper opportunity to deal with the Email Chain and the cross-examination of him on it, and so did not receive a fair trial.
8. It may be, that on the face of the emails, the explanation that Mr Martires concocted them is the least unlikely of a number of unlikely possibilities. But the point is that Mr Martires was denied the opportunity to go beyond the face of the emails, or to exclude consideration of them altogether. As Megarry VC observed in *John v Rees* [1970] Ch 345 at 402:

… the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

1. For those reasons ground 3, interpreted as alleging a denial of procedural fairness based on the primary judge's receipt and consideration of the Email Chain, is upheld.
2. Ground 1, relying as it does, on the ICCPR, is not upheld. I also do not uphold ground 4, which appears to allege either actual bias or a reasonable apprehension of bias against the primary judge. Taking the latter of those as the allegation which is generally easier to establish, the test is whether a fair-minded lay observer might reasonably apprehend that the primary judge might not have brought an impartial mind to the resolution of the question he was required to decide: *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [6]. Mr Martires relies on the fact that the primary judge asked him a number of questions about the Email Chain. I do not consider that demonstrates bias or that a fair-minded observer would have any concern that his Honour was other than impartial. His Honour was simply trying to get to the bottom of the matter and Mr Martires's position on it.
3. As for ground 2, if a new trial is going to be ordered, it will not be appropriate to go into the factual merits of the case by determining that ground.

## Should a new trial be ordered?

1. The power of the Federal Court to grant a new trial in its appellate jurisdiction is conferred by s 28(1)(f) of the *Federal Court of Australia Act 1976* (Cth). Unlike equivalent provisions in some other jurisdictions, it is not confined by specific express conditions, such as that a substantial wrong or miscarriage has been occasioned: see e.g. *Uniform Civil Procedure Rules* (NSW) r 51.53(1). Section 28(1)(f) merelyprovides that a new trial may be ordered 'on any ground on which it is appropriate to grant a new trial'.
2. *Nobarani* indicates that where a denial of procedural fairness is alleged, the question of whether it could have made a difference to the outcome figures in two stages of the inquiry. The first is whether the denial of procedural fairness is material in the sense that it deprived the party of the possibility of a successful outcome. If not, then a new trial will not be ordered: see *Nobarani* at [38]‑[39]. The second is that if a material denial of procedural fairness has been established, then (at [39]):

[u]nless the other party can show some reason for the exercise of discretion not to order a new trial, the power will be exercised to order a new trial. One reason that might sometimes be sufficient, and upon which the respondent relied, is where no useful result could ensue because a properly conducted trial will not make a difference.

1. It appears that in the context of appeals to this court, the second part of the inquiry concerns the power in s 28(1)(f). In *Whall v Stamp* [2019] NSWCA 163 at [10], however, Basten JA observed that it was difficult to discern a practical difference between the first 'test', of materiality, and the example then given of a criterion warranting discretionary refusal of a new trial. But his Honour had no need in the case before him to resolve 'the apparent dilemma': see [11].
2. I have already indicated why I consider that the denial of procedural fairness was material in the sense that it denied Mr Martires the possibility of a successful outcome. But on the discretionary question of whether a new trial should be ordered, Endura Paint relied on the judgment of Miles J in *Australian and Overseas Telecommunications Corporation Ltd v* ***McAuslan***(1993) 47 FCR 492. That was a case where the trial judge had regard to a standard diagnostic manual for psychiatric disorders known as DSM-III-R as a basis to reject the evidence of an expert psychiatrist, without notifying the parties of his intention to do so. The court was unanimous in holding that this was a denial of natural justice. But after considering *Stead* (and *Government Insurance Office (NSW) v Bailey* (1992) 27 NSWLR 304 at 316), Miles J said (at 516):

The rule, although enunciated in *Stead* in strong terms, is not absolute. With respect, I do not take the High Court to be saying that, where there is a denial of opportunity of making submissions on a question of fact, a new trial must be ordered unless there is no possibility that a new trial would make any difference. That would be to impose an unrealistically heavy burden on a respondent, as it is difficult to imagine circumstances in which all possibility of a different result must be excluded. The concept is surely one of reasonable possibility. That is to say, unless the respondent shows that there is no reasonable possibility that a new trial would bring about a different result, the denial of natural justice must result in a new trial.

1. The other member of the majority, Foster J, did not consider or adopt that formulation, although his Honour did recognise that an evaluation as to the possibility of a different outcome was still required. At 519 his Honour said:

There can be no doubt that this rule is a very strict one. However, it is not to be applied automatically. The overriding question must always remain whether the breach had any bearing on the outcome of the case. No doubt the party seeking to uphold a decision claimed to have been vitiated by such a breach must shoulder a heavy burden. He must satisfy an appellate court that the result of the trial would necessarily have been the same notwithstanding the breach.

1. Miles J and Foster J both concluded that a new trial was not required in the case before them. Miles J expressed his conclusion in emphatic terms which suggests that his Honour did not need to apply any test of reasonableness. His Honour also took into account the fact that the appellant had not articulated how the result may have been different. At 516 he said:

Given that his Honour accepted the respondent as a witness of truth who suffered the symptoms that she said she suffered and described them without exaggeration, the case for rejecting the opinions of Dr Roberts was very strong, almost overwhelming. It would have mattered not whether DSM-III-R was taken into consideration or ignored. Moreover, no argument was put in this court about how further questioning of Dr Roberts on DSM-III-R by counsel for the appellant would have strengthened his evidence in any way, or how any further address to the trial judge might have led to a finding that Dr Roberts' opinion should be accepted and the respondent found not to be a witness of truth who had on the balance of probabilities made out her case on damages as well as on liability.

1. Foster J's conclusion (at 521) was as follows:

I have come to the conclusion, not without some hesitation because of the strictness of the principle in *Stead*, that this is a case where it can properly be said that the result would have been the same if the breach of the rules of natural justice had not occurred. I am of the view that there was ample material in the case upon which Higgins J could have and would have concluded that he preferred the testimony favouring the authenticity of the respondent's injuries and resulting disabilities as against Dr Roberts' countervailing views, without his needing to have recourse to considerations based upon the passages from DSM-III-R which were not in evidence before him.

1. However, Burchett J dissented on the result and showed no disposition to qualify the apparent strictness of the approach required by *Stead*: see 496‑497. This illustrates how different minds may come to different conclusions on such questions.
2. Does *McAuslan* require that the apparent strictness of the test in *Stead* be modified by reference to some standard of reasonableness? The answer to that question could make a difference here, given the unpersuasive way in which Mr Martires, self-represented as he was, presented his case below.
3. Since Miles J was the only judge on the Full Court to adopt the qualification that the possibility of a different outcome must be a reasonable one, I do not understand *McAuslan* to be Full Court authority requiring the application of that standard. But the terminology of reasonableness has also been employed in other cases. One of those is ***Balenzuela*** *v De Gail* (1959) 101 CLR 226. There, at 234‑235, Dixon CJ said:

the true view, it may be suggested, is that at common law it was necessary to grant a new trial unless the court felt some reasonable assurance that the error of law at the trial whether in a misdirection or wrongful admission or rejection of evidence or otherwise was of such a nature that it could not reasonably be supposed to have influenced the result or because, in any case, as a matter of law the same result must have ensued, while under the judicature rule the burden is the other way.

1. However despite the references to 'reasonable assurance' and whether an error 'could not reasonably be supposed to have influenced the result', I do not read Dixon CJ here as stating any different test from that subsequently put in *Stead*. His Honour was speaking only of errors of law, not denial of procedural fairness. And the key part of the standard he enunciated was that 'as a matter of law the same result *must* have ensued' (emphasis added). In *Stead* the High Court enlisted *Balenzuela* as authority for the approach it took: see 147.
2. There is also a line of authority specifically concerning s 28(1)(f) of the *Federal Court of Australia Act* in which the terminology of reasonableness figures as part of the relevant criteria. In ***Conway*** *v The Queen* [2002] HCA 2; (2002) 209 CLR 203, the joint judgment of Gaudron A‑CJ, McHugh, Hayne and Callinan JJ surveyed the history of the common law concerning the grant of new trials as an aid to understanding what is a 'ground upon which it is appropriate to grant a new trial' in s 28(1)(f). The focus of their Honours' inquiry was whether an accused person in a criminal trial was entitled to a new trial as of right if evidence was wrongly admitted at trial. At [16] their Honours said (footnotes removed):

A verdict might be set aside on the ground that it was contrary to the evidence, or evidence had been improperly rejected or admitted in the trial, or the jury had been misdirected or had misbehaved, or the accused had been taken by surprise. Speaking generally, once an error or wrong of any of these kinds was identified, the court would order a new trial of the charge unless it could not reasonably be supposed that the error or wrong had influenced the result. It may be that at common law the onus was on the accused to show that the wrong or error affected the result. But however that may be, long before the enactment of the common form statutes, the King's Bench had jurisdiction to order a new trial after a criminal conviction but would not do so if it was unreasonable to suppose that the wrong or error had affected the result.

1. But their Honours also commented on the position in civil trials. At [27] they referred to *Balenzuela*, before concluding (at [29]) that 'it seems clear enough that at common law a new trial would not be ordered in a civil cause if the error - whatever it was - could not reasonably be supposed to have affected the result of the trial': see also *Stokes v The Queen* (1960) 105 CLR 279 at 284‑285. At [36], their Honours said that the power in s 28(1)(f):

is expressed in wide terms and should be given a liberal construction. It is a power that must, of course, be exercised judicially. But there is nothing unjudicial, arbitrary or capricious in refusing to order a new trial when, although error has occurred, no miscarriage of justice has occurred.

At [38], they described the power as one 'to dismiss an appeal on the ground that an identifiable error in the proceedings did not affect the result of the proceedings'.

1. Reading these statements in the context of the question that the High Court was determining, I do not construe them to be adding some requirement that the appellate court superadd some criterion of reasonableness to its assessment of whether the result could possibly be different. The terminology used is whether it could 'reasonably be supposed' that the appealable error affected the result or whether it was 'unreasonable' to think so. It is not a question of assessing whether the probability of a different outcome is a reasonable one. It is a question of whether it is unreasonable to suppose that the result was affected. This is akin to asking whether the possibility is a realistic one, as distinct from far-fetched or fanciful.
2. In ***Windoval*** *v Donnelly* [2014] FCAFC 127; (2014) 226 FCR 89the Full Court (Jacobson, White and Gleeson JJ) brought the two lines of authority represented by *Stead* and *Conway* together. It was a case where the trial judge had overlooked certain evidence. Their Honours held that the rule in *Stead* is analogous to that which informs the power under s 28(1)(f): see [106]. This negatives any suggestion that *Stead* is a stricter test because it concerns the fundamental requirement of a court to accord procedural fairness (see also *Nobarani* at [38]).
3. At [102] of *Windoval*, the Full Court said:

All of the members of the court [in *McAuslan*] accepted that the rule in *Stead* is a very strict one: see at 496 per Burchett J; at 516 per Miles J; at 519 per M L Foster J. However, the majority judges (Miles J and Foster J) observed, at 516 and at 519, that the rule is not absolute.

Their Honours then quoted the above dicta of Miles and Foster JJ with evident approval.

1. In summarising the application of the test to the case before them, their Honours said (at [129]‑[130]):

It follows that any error made by his Honour as to the existence of the evidence now relied upon cannot reasonably be supposed to have affected the result of the trial. If error occurred, no miscarriage of justice has resulted and it is not appropriate to grant a new trial: *Conway* at [36].

Assuming the primary judge to have made the error to which we have referred, we do not consider the error to have had any bearing on the outcome of the case. We are satisfied that the result of the trial would have been the same notwithstanding the error: *Stead* at 145-6; *McAuslan* at 516, 519, 521.

1. Once again, I do not understand *Windoval* to require any different approach than that stated in *Stead*. Whether applying the principle in that case (via *McAuslan*) or applying the principle in *Conway*, the Full Court was, at most, excluding far-fetched or unrealistic possibilities that the evidence that had been overlooked would have affected the result. In my respectful view this is consistent with the course of authority in the High Court, both under s 28(1)(f) of the *Federal Court of Australia Act*, under more prescriptive provisions in other jurisdictions (for example in *Nobarani*), and at common law.
2. For the reasons I have given in upholding ground 3, I do not consider that the possibility that excluding the email chain would have led to a different outcome here is an unreasonable one, in the sense of being far-fetched or fanciful. Endura Paint's submission on this point was to repeat that the email chain had nothing to do with the primary judge's determination in respect of, relevantly, s 340 of the *FWA*. Endura Paint submitted that the email chain was only mentioned because it was, in his Honour's view, a 'serious matter' to concoct the AHRC email. But for reasons I have already given, I do not accept that his Honour's mention of the email chain in his reasons was independent of his assessment of Mr Martires's credibility. In my view it can reasonably be supposed that the email chain affected the outcome. Endura Paint has not established a good reason not to order a new trial.
3. Mr Martires submitted that the appropriate order is not a new trial, but rather that this court should substitute its own judgment allowing his application. But the court has made no determination that his application is well-founded. It has only determined that he was not accorded procedural fairness when the application was dismissed. A new trial must be ordered.
4. I make that order conscious of the wastage which new trials can bring. Endura Paint will no doubt feel that its success in the Federal Circuit Court has been snatched away at the moment of its accomplishment: see *Orr v Holmes* (1948) 76 CLR 632 at 640‑641 (Dixon J), quoting from *Scott v Scott* (1863) 3 Sw & Tr 319 at 322, 326; 164 ER 1293 at 1299, 1300. But where there has been a denial of procedural fairness, the court has breached a fundamental condition of its authority to decide and has not made a decision of the requisite judicial character: see *HT v The Queen* at [17]; *WZASS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 856 at [38]. Where the first trial was not conducted in accordance with that fundamental requirement, a new trial is usually the outcome which justice requires.
5. My Chambers informed Mr Martires that it was open to him to submit that if a new trial was ordered, the matter should be heard by a different judge. He has made that submission. Endura Paint made no submission on the subject. Since there is a real risk that the admission of the email chain has affected the primary judge's assessment of Mr Martires's credibility, and since there is a real possibility that the email chain may not be admitted into evidence on a new trial, it is appropriate to order that the new trial be conducted before a different judge.
6. As Mr Martires has been successful, and is self-represented, and this is a matter under the *FWA* (see s 570), there is no prospect of any order for the costs of the appeal being made so I will make no provision for submissions on that subject.

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| I certify that the preceding ninety-one (91) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson. |

Associate:

Dated: 9 March 2021