



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT MASSON
COMMISSIONER BISSETT**

C2023/2515

s.604 - Appeal of decisions

**Nicholas Williams v KTC Refrigeration & Conditioning Pty Ltd
(C2023/2515)**

Melbourne

10.00 AM, WEDNESDAY, 7 JUNE 2023

PN1

THE ASSOCIATE: The Fair Work Commission is now in session for matter C2515/2023 a section 604 appeal listed for hearing before the Full Bench.

PN2

VICE PRESIDENT ASBURY: Good morning parties. Could we just start by taking the appearances please? Mr Williams, you're representing yourself today?

PN3

MR N WILLIAMS: Yes, I am.

PN4

VICE PRESIDENT ASBURY: Thank you. For the respondent?

PN5

MR M WHITBREAD: Good morning, Vice President. My name is Whitbread and I am a barrister engaged by the respondent seeking permission to appear, initial M.

PN6

VICE PRESIDENT ASBURY: Thank you. Mr Williams, I understand that you object to the respondent being legally represented and you've provided some written submissions in relation to that. Is there anything you wish to add to those submissions?

PN7

MR WILLIAMS: Well, this Mr Whitbread was never asked for permission to appeal, it was their original lawyer, Ash Mola. I didn't even hear about this person until Thursday of last week.

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VICE PRESIDENT ASBURY: Okay. So you have an additional objection, on the basis that Mr Whitbread has not been previously involved in the matter?

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MR WILLIAMS: Yes.

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VICE PRESIDENT ASBURY: Okay. Is there anything else you want to add?

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MR WILLIAMS: No, that's all.

PN12

VICE PRESIDENT ASBURY: Thank you. Mr Whitbread, do you have something you want to say in relation to your submission seeking permission to appear?

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MR WHITBREAD: Well, my instructing solicitor, Mr Mola, has filed a short, one page, submission as to why permission is sought, as to the factors under

596. The matters set out in that are equally applicable, whether I appear or whether Mr Mola were to appear. As to why my name wasn't mentioned in that application, that's because I wasn't briefed at that time. I have received the brief more recently. I have prepared the written submissions, filed in the appeal for the respondent, with Mr Mola, and I have got across the brief.

PN14

The only other submissions I'd like to make, Vice President, is to respond to some matters raised in the appellant's objection to the respondent being represented.

PN15

VICE PRESIDENT ASBURY: Yes?

PN16

MR WHITBREAD: Most of that objection is focused on my instructing solicitor, Mr Mola, and objections on the basis of the way the matter was conducted before Boyce DP. Then, at the end, there's a statement that appears to be a reference to myself, that is, that, 'If there's some second lawyer, then I object for the same reasons'.

PN17

I would submit that the complaints about my instructing solicitor aren't applicable to myself, Vice President, and I'm certainly not intending to be unnecessarily adversarial or cast slurs upon the appellant, in the course of this hearing.

PN18

We say that, principally, the reasons why permission should be granted is in terms of both the efficiency and the capacity of the respondent to effectively represent itself. In terms of efficiency, I would hope that having a legal representative appear for the respondent would improve the conduct of the hearing today, particularly as we are dealing with some, at least procedurally and legally complex matters, in the sense that this is an appeal before the Full Bench and there is an application for fresh evidence and there's some matters to be dealt with in respect of that.

PN19

I would hope that by my appearing today I can assist the Commission to efficiently address the matters that need to be resolved, in respect of that, which I've attempted to do in our written submissions, at least in respect of the question of the appeal points.

PN20

Then as to the capacity of the respondent to represent itself, as Boyce DP found, in the initial hearing, the person instructing me hear today, from the respondent, is Mr Hussein, the sole director of the respondent. It's a small refrigeration business. He instructs me that he has no experience in legal matters of this kind. He has never been through the Fair Work Commission process. He has no HR representative in his business. I think it's fair to say that he would not be in a position to effectively represent the respondent. So, briefly, those are our submissions, Vice President.

PN21

VICE PRESIDENT ASBURY: Thank you.

PN22

Having considered the submissions of the parties in relation to the question of whether permission for the respondent to be legally represented should be granted, we are satisfied that the matter does raise issues of some complexity, particularly we are of the view that having raised issues of fraud, on the part of the respondent, that that would raise some issues of complexity, the request to provide further evidence. And we're also of the view that this matter raises questions about the provisions of the Fair Work Act concerning genuine redundancy and how those inter-relate to the award provision, or relate to award provisions in relation to consultation. So we are satisfied that there are some issues of complexity, in relation to this matter and that it would enable it to be dealt with more efficiently if the respondent was permitted to be legally represented.

PN23

Having made that decision, the Full Bench has no ability to direct as to what representative will represent the respondent. All we can do is grant permission for the respondent to be legally represented and once we are satisfied that the necessary requirements for that are met, we can't determine the identify of the representative. So, on that basis, we are satisfied that those requirements are met and we grant permission for the respondent to be legally represented.

PN24

Are there any preliminary matters that we need to deal with? Mr Williams, I understand you want to provide further evidence. Do you want to address why that should be allowed?

PN25

MR WILLIAMS: This was evidence that I couldn't obtain during the first trial, namely, my actual job at the company. I was dismissed as a third year apprentice electrician where my real job was actually a fourth year air conditioning and refrigeration apprentice, they're completely different jobs. So I've provided evidence to support that claim as well.

PN26

The other evidence is just in response to the emailed evidence in the affidavit.

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VICE PRESIDENT ASBURY: So the purpose of the evidence that you want to call is simply to indicate that the nature of your apprenticeship, what apprenticeship you were undertaking?

PN28

MR WILLIAMS: Yes, what my job title actually was.

PN29

VICE PRESIDENT ASBURY: Is there any contest about that, Mr Whitbread?

PN30

MR WHITBREAD: Thank you, Vice President. No. As we've outlined, in our written submissions, there was an error in the employer's F3 which may have been consequentially picked up by Boyce DP, describing the appellant, I think, as an - sorry, an electrical apprentice but it's actually an air conditioning and refrigeration apprentice. Now, we don't dispute that title and, for the reasons in our written submissions, we don't think that it's a particularly relevant point.

PN31

We do object to all of the remainder - well, I'm not sure that the evidence needs to be adduced to address that point, but we do object to all of the evidence that's been served, by way of further evidence, for other reasons and that is all of these matters about fraud and the further statement from the other witness, the appellant's brother, and I can address that, as to why we object, if the Full Bench would like me to.

PN32

VICE PRESIDENT ASBURY: Are you pressing that evidence, Mr Williams? Are you wanting it admitted?

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MR WILLIAMS: Yes, I do.

PN34

VICE PRESIDENT ASBURY: Okay. So perhaps you can explain what that matter wasn't raised - these allegations of fraud, why they weren't raised at the first hearing. Because, as I understand it they weren't.

PN35

MR WILLIAMS: I wasn't - - -

PN36

VICE PRESIDENT ASBURY: Sorry?

PN37

MR WILLIAMS: I wasn't offered the chance to object to any of their information, except for their witness statements. That was the only thing I was offered the chance to - I'm not a lawyer, I don't know what to bring up and when to bring it up, so that's why these allegations weren't raised. They have been raised with Campbelltown Police though.

PN38

VICE PRESIDENT ASBURY: Yes, I understand that. So you've stated. But it still doesn't explain why, when a document that you allege was fraudulent was appended to the form F3, that you didn't raise that at any point, even in your written submissions or your written statement, because you had it before the hearing at first instance, as I understand it.

PN39

MR WILLIAMS: Yes.

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VICE PRESIDENT ASBURY: So can you explain that?

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MR WILLIAMS: As I said, I'm not a lawyer, I don't know when to bring things up. I was just advised to wait till the very end and if it comes up bring it up and if it doesn't just use it on appeal.

PN42

VICE PRESIDENT ASBURY: Well, Mr Williams, you were pretty fulsome in your material that you filed, in response to the Deputy President's directions, and you had that document, from the get go, so I'm still not clear as to why, if you're going to throw a really serious allegation such as fraud, you would only raise it on the appeal and you wouldn't have raised it at first instance.

PN43

MR WILLIAMS: Because at that time I was just going to go to the police with the matter.

PN44

VICE PRESIDENT ASBURY: Okay. So what's - - -

PN45

MR WILLIAMS: I wasn't even aware that the Fair Work Commission could do anything about fraudulent documents until I looked it up after the case.

PN46

VICE PRESIDENT ASBURY: Okay. So you say the fraudulent document is your signature on an apprenticeship document?

PN47

MR WILLIAMS: Yes, the training contract, correct.

PN48

VICE PRESIDENT ASBURY: So then do you say there was no training contract, that it was void? Because you say, 'I was a fourth year apprentice air conditioning tradesperson' and how does that accord with you saying that you didn't even validly sign a contract to be an apprentice?

PN49

MR WILLIAMS: Well, that would be the case then, yes, it would be void.

PN50

VICE PRESIDENT ASBURY: So what's the point of raising this issue at this point? How is it relevant to the question on whether your dismissal was a case of genuine redundancy and, in the alternative, whether it was an unfair dismissal? How is this issue relevant?

PN51

MR WILLIAMS: Just to be clear, the question you're asking is how is a fraudulent document to the Commission relevant to this case?

PN52

VICE PRESIDENT ASBURY: No, what I'm asking is how, in the circumstances where you're saying, 'I was a fourth year apprentice in this particular trade and I was unfairly dismissed and my dismissal was not a case of genuine redundancy', how is the question of whether this document is or is not fraudulent? Because, let's be clear, Mr Williams, that's an allegation. We don't necessarily accept it and what I'm asking you is, how is it relevant to the question of - because you don't seem to dispute you were a fourth year apprentice, so you must accept, at some point, you entered into an apprenticeship contract in some way, shape or form and you're saying, 'I was unfairly dismissed while I was a fourth year apprentice and my trade was this trade and redeployment wasn't considered, it wasn't a genuine redundancy'. So what I'm not understanding, for my part at least, is how the question of whether this document is or is not fraudulent is relevant to this appeal?

PN53

MR WILLIAMS: The fraudulent document is relevant to the appeal because it goes against every other evidence is submitted. Much more of their evidence is lies.

PN54

VICE PRESIDENT ASBURY: So your assertion is, if this document is fraudulent then all the rest of their evidence is fraudulent. That's the relevance it's got?

PN55

MR WILLIAMS: Yes, that is the possibility.

PN56

VICE PRESIDENT ASBURY: Right. Okay, Mr Whitbread, do you have anything you want to say in response?

PN57

MR WHITBREAD: Yes, we object to all of the further evidence that was served on Friday being allowed in this appeal. The Full Bench, by correspondence from the Vice President's associate, has made it clear to the appellant the matters that would need to be demonstrated for an application for fresh evidence to be entertained, and that was an email of 2 June, in which reference was made to the decision of the Full Bench, in King [2014] FWCFB 4103, which, at paragraph 11 identifies the three principal things that need to be overcome. The first being that:

PN58

It must be demonstrated that the evidence could not have been obtained with reasonable diligence for use at the first instance of the hearing below.

PN59

The submissions that the appellant has just made don't demonstrate that. There is no explanation provided as to why this material could not have been provided before Boyce DP or why this argument couldn't have been advanced earlier.

PN60

We have, in our correspondence, in reply to the Vice President's associate's email, identified the parts of the transcript where no objection was taken to these materials during the hearing before Boyce DP.

PN61

The second aspect of the test there is that why the evidence is such that there must be a high degree of probability that there would have been a different outcome. It's obvious, from the exchange that's just taken place between the Full Bench and the appellant, that that's not the case here.

PN62

If we move through the material, most of the material relates to this alleged forgery of the training contract. That isn't relevant, in any way, to the determination of the issues by Boyce DP or the determination of the alleged errors that give rise to the appeal grounds.

PN63

The only basis the appellant has now submitted is that it's relevant to credibility of the respondent has a whole. But this material that he served doesn't prove, in any way, that any of the respondent's witnesses were involved in any forgery. The material seems to suggest that there was a third party, a training provider, who was arranged in coordinating the training contract, not the respondent directly.

PN64

It's also - it's such a tangential credibility argument that it could not be said to be something that gives a high degree of probability that it would have caused a different outcome before Boyce DP.

PN65

Some of the material doesn't go to this training contract point though, Vice President, and principally that appears to be the short further statement of Benjamin Ross, who I understand to be the appellant's brother or relative. Benjamin Ross gave a short statement in the proceedings before Boyce DP, and this is the further statement that he seeks to give and he appellant seeks to adduce.

PN66

Now this statement is to other matters. It really seems to respond to points that we have made in our appeal written submissions. Notably that the evidence that was referred to by the appellant as giving rise to a potential redeployment position doesn't reach the point that was said. Then a further statement has been given, which is quite similar to the statement Mr Ross gave in the first proceedings, but which goes into a little bit more detail including by describing his position and describing some of the work that he did.

PN67

Again, this statement doesn't overcome the tests in King as to why it couldn't have been adduced earlier. All there is in the statement is an assertion that the witness was very busy at the time, attending to TAFE, so couldn't focus on the statement that he gave on the last occasion. That's not an adequate explanation as to why this evidence wasn't adduced before Boyce DP. And also the statement again, and

to the extent that it differs from the witness's statement before Boyce DP, is not likely to have a high degree of probability that it would affect a different outcome in the proceedings because when you actually look at the - as to this redeployment question, as I understand it, the argument now advanced, and this statement is advanced for this purpose, is that the appellant should have been (indistinct) to the position previously occupied by his brother, by Mr Ross.

PN68

This statement seeks to advance that argument by providing some more detail about the position that Mr Ross occupied and the nature of the work that he did, so as to say, presumably, that it's similar to the work that the appellant did, or is capable of doing.

PN69

That shouldn't be admitted where none of these things were put to the respondent witnesses before Boyce DP. The argument also doesn't really work because in this further statement Mr Ross explains that he was a first year apprentice. The appellant tells us that he was a fourth year apprentice, that's not the same position. Also, in this further statement, or in the evidence in the proceedings more broadly, there's nothing to indicate that after Mr Ross resigned, quit, left his position, that there was actually a position that remained. It's just an inference that the appellant seeks to draw by the fact that he was employed and left around the same time.

PN70

I can point to the evidence before Boyce DP as to what that's not the case. If I just give some references that the Full Bench may wish to note, but in Mr Hussein's statutory declaration, and this is at appeal book page 205 - in Mr Hussein's statutory declaration, in the proceedings before Boyce DP, he explains that, at paragraph 14, page 205 of the appeal book. He explains that, in response to an assertion by the appellant about the number of workers that had been hired in the period shortly following his dismissal, that the respondent only hired one person in the six months prior to this statement being given which, I think, was in February, it was on 21 February this year, and that that one person was a qualified tradesperson. Now, I've been through the transcript of the hearing, that evidence was not challenged by the appellant before Boyce DP.

PN71

On the question of redeployment, the highest challenge the cross-examination of Mr Hussein got is, if we go to appeal book page 52, so this issue about redeployment, what's particularly relevant is the type of work, because Mr Hussein explains in his statement, and in his evidence in the witness box, that he made a decision that the respondent would reduce the type of work that the appellant was doing, being the warranty repair work and that he took all of that work on himself, as it was being reduced, and that the other members of the staff of the business were focusing on the installation work. So if the appellant was to be redeployed it would have had to have been into some installation focused position, and there's evidence about why that isn't reasonable.

PN72

But PN429, on page 52, is really as high as the cross-examination got, about this redeployment point. What it actually resulted in is just the confirmation of the evidence about it:

PN73

You still claim that Nicholas -

PN74

That's the appellant asking Mr Hussein a question, but referring to himself in the third person:

PN75

You still claim that Nicholas couldn't have been redeployed doing installs, even though he has done so previously at KTC?---A hundred per cent. It wasn't proven to me that you could do so and those times that I did see you do installation work I didn't see that you had the experience to do so and you preferred to do warranty work and you actually stated you aren't good at it.

PN76

That's as high as the cross-examination on the redeployment point got. It got nowhere near this suggestion about Mr Ross' position, which was different anyway. So for the reasons that I've given and applying the approach that the Full Bench has previously taken, none of this evidence should be allowed.

PN77

VICE PRESIDENT ASBURY: Thanks, Mr Whitbread.

PN78

Mr Williams, before we consider these submissions, do you have anything else you want to say?

PN79

MR WILLIAMS: No. If that's the argument KTC are going for, I'm more than happy to accept that.

PN80

VICE PRESIDENT ASBURY: Sorry?

PN81

MR WILLIAMS: If that's the argument that KTC are going towards with that evidence, then I'm more than happy to accept that.

PN82

VICE PRESIDENT ASBURY: Accept what, that the evidence won't be admitted?

PN83

MR WILLIAMS: Admitted because it's a different position, yes.

PN84

VICE PRESIDENT ASBURY: All right. Well, Mr Whitbread, there's also an application from the respondent for further evidence to be admitted, do you want to speak to that? An affidavit from Mr Mola?

PN85

MR WHITBREAD: Yes, I can speak to that.

PN86

VICE PRESIDENT ASBURY: We'll deal with both of these issues together, Mr Williams, thanks.

PN87

MR WHITBREAD: If we turn to Mr Mola's affidavit, I'll just get that up, paragraphs 2 to 8 of Mr Mola's affidavit of 2 June, and an annexure referred to therein, or a number of annexures referred to therein, respond to this allegation in relation to the forger of the training contract, based on instructions given to Mr Mola.

PN88

My instructions are that if the Full Bench were to allow the evidence that the appellant seeks adduced, in respect of the training contract, being his statement and all of those documents provided, then the respondent would seek to tender and read those parts of this affidavit to respond to that.

PN89

Now, this was done very quickly last week and it was done as a solicitor's affidavit. I also have with me here the sole director of the respondent and he instructs me that if that evidence is allowed and goes on the record, then he would also like to give evidence, for the purpose of expressly denying the allegation. That would be very brief. But we only seek to do that if this evidence is allowed because if all there is, is an allegation in a notice of appeal and an outline of submissions, there's no evidence to respond to, Vice President, and we just deny it equally in submissions.

PN90

The respondent, because of the serious nature of that allegation, would seek permission to adduce that evidence, if the Full Bench allows the evidence I've referred to and it says that the matters in King - well, it's something - this allegation of forgery has only happened after Boyce DP's decision. It doesn't appear that it will necessarily effect, in any way, any relevant issue to be determined. But if the former is allowed in then we say this needs to be allowed in to allow the respondent to reply, as a matter of procedural fairness.

PN91

As to the other parts of the affidavit, paragraphs 9 to 14, and some annexures referred to therein, this falls in a bit of a different category. So there's also an allegation, in the notice of appeal and in the appellant's appeal submissions, that Boyce DP showed bias. It's not clear if there's an allegation of actual bias, or of apprehended bias, but the alleged ways in which Boyce DP was biased is in, firstly, granting the respondent permission to be represented by a lawyer in the hearing and, secondly, in allowing the respondent to file its submissions late.

PN92

The material in the affidavit, in Mr Mola's affidavit, goes to exactly the circumstances in which the submissions were filed, which happened after the hearing before Boyce DP. So it's just a procedural matter as to these are the emails in which I sought to file the submissions. The first submission, the respondent's closing submission, outline of closing submission, was filed 10 minutes late, by email and the second submission, the respondent's reply, closing submission, the email annexed to the affidavit seems to show it was filed one minute before the deadline, at 3.59 pm, but the email from Boyce DP's associate refers to it being one minute late, so it may not have been received until two minutes later.

PN93

In any event, the only reason we put that material in Mr Mola's affidavit is so that to ensure that the Full Bench would have before it the correspondence that may be relevant to this allegation of bias, in respect of the second way in which it's alleged that Boyce DP showed bias, because we say, just looking at those emails, it doesn't, in any way, demonstrate that there's a bias.

PN94

The respondent is not sure whether the Full Bench otherwise has access to the file and the correspondence between Boyce DP's associate, so as to inform itself of that anyway. So this is a bit of a different category of material, but we do seek that if that material is not otherwise before the Full Bench we do seek to tender and read that part of the affidavit, simply so that it has the relevant correspondence that the appellant appears to be referring to, in relation to the bias allegation.

PN95

VICE PRESIDENT ASBURY: So those emails and those email exchanges are simply matters that would be on the file at first instance in any event?

PN96

MR WHITBREAD: If that's the case then if the Full Bench can obtain it, then we don't need to read that part of the affidavit at all.

PN97

VICE PRESIDENT ASBURY: Yes, we can obtain that. So, really, it's not new evidence it's simply material that would already be on the file at first instance.

PN98

MR WHITBREAD: Yes, that's right.

PN99

VICE PRESIDENT ASBURY: Okay. Mr Williams, do you have anything else you want to say?

PN100

MR WILLIAMS: Besides Arash Mola's full name not being put on the document, or his real name not being put on the affidavit, I've got no objections to it.

PN101

VICE PRESIDENT ASBURY: I don't think we - we might just stand the matter down for a moment while we confer. Just bear with us, thanks.

SHORT ADJOURNMENT

[10.37 AM]

RESUMED

[10.41 AM]

PN102

VICE PRESIDENT ASBURY: Having considered the submissions of the parties we have decided that we are not going to admit the further evidence that the appellant seeks to adduce, on the basis that it's evidence that could have been put before the Deputy President at first instance and it's not determinative of the issues in the appeal. On that basis, Mr Whitbread, with respect to Mr Mola's affidavit, we also don't propose to admit that, on the basis that it responds to matter that are now not in evidence or, alternatively, the documents that are appended to it are all documents that are on file at first instance, in any event, and are a matter of the record on the file. So, on that basis we're not admitting the additional evidence.

PN103

Having dealt with those preliminary matters, Mr Williams, we read your submissions in relation to permission to appeal and the merits of your appeal, is there anything you'd like to add or elaborate on, in oral submissions?

PN104

MR WILLIAMS: Yes. So Boyce has ruled on a job that the applicant did not have, so myself, I did not have the job of a third year apprentice electrician. So in ruling that that job has been made redundant, I don't understand how myself, a fourth year air conditioning and refrigeration apprentice, could possibly have lost my job under genuine redundancy, it does not make much sense.

PN105

KTC have argued, from the very start, that a third year apprentice electrician is no longer required, which you will find at point 25 of the F3 form, page 140 of the appeal book and also in the respondent's submissions, page 161 of the appeal book. Nicholas has never had that job.

PN106

My job, as I say, was a fourth year air conditioning and refrigeration apprentice. That's stated in my applicant response, at page 71 of the appeal book, and further backed up written proof from Training Services NSW.

PN107

Boyce C has heard an argument from KTC about a third year apprentice electrician no longer being required and has made his ruling based on that, shown in point 14 of the decision, page 7 of the appeal book.

PN108

There is no conceivable way that the job of a third year apprentice electrician being made redundant can result in the termination of a fourth year air conditioning and refrigeration apprentice.

PN109

This ruling has caused confusion during the entire case, with the applicant making an argument that his job is still required and the picking him for redundancy, as shown in the first sentence at point 19 in the decision, page 13 of the appeal book.

PN110

COMMISSIONER BISSETT: So, Mr Williams, can I just ask, did you raise that issue during the hearing before the Deputy President?

PN111

MR WILLIAMS: During the hearing - - -

PN112

COMMISSIONER BISSETT: That you were a fourth year apprentice and - - -

PN113

MR WILLIAMS: There were times where I was asking witnesses about fourth year apprentices and is the job still required, which I can find now.

PN114

COMMISSIONER BISSETT: So you're putting a bit of weight on this confusion between the third year apprentice that Boyce DP mentioned in the decision and that you were a fourth year apprentice. So I'm just wondering if that came up during the hearing or if you clarified that during the hearing?

PN115

MR WILLIAMS: It didn't come up during the hearing because during the hearing I believed that we were talking about my job, as a fourth year air conditioning apprentice. It wasn't until the decision was actually published that I realised Boyce C was looking at a completely different job, because I said in my submissions - - -

PN116

COMMISSIONER BISSETT: Was there anything - sorry.

PN117

MR WILLIAMS: Sorry. I said, in my submissions, that I was a fourth year air conditioning and refrigeration apprentice. It was also one of the very last lines in my final submission to Boyce C.

PN118

COMMISSIONER BISSETT: So was there anything before Boyce DP, in the transcript, that I might have missed, where the respondent said that it was a third year apprentice that they made redundant, not you?

PN119

MR WILLIAMS: No, that's just in all their submissions, especially their F3 form, where they - - -

PN120

COMMISSIONER BISSETT: Yes, I understand it's in the F3. Is it in other material that they provided?

PN121

MR WILLIAMS: Yes.

PN122

VICE PRESIDENT ASBURY: So it's in the submission filed on their behalf?

PN123

MR WILLIAMS: Yes. They call me a third year apprentice and then they say that that job is no longer required.

PN124

COMMISSIONER BISSETT: Did you receive a letter of termination, Mr Williams?

PN125

MR WILLIAMS: I believe it's one of the first documents that I submitted. Termination letter, page 70 of the appeal book.

PN126

DEPUTY PRESIDENT MASSON: Sorry, what was that?

PN127

VICE PRESIDENT ASBURY: Page 70.

PN128

So, Mr Williams, you can agree or disagree with this, but it seems that regardless of how your job was described, in terms of the title of your job, so regardless of how the title of your job was described, there was evidence, at the hearing, about what you actually did and you disputed or agreed or - but there was actually evidence about what work the respondent did and what you did, and what's happened here is simply a typographical error describing the title of the job, as opposed to the duties that you performed.

PN129

MR WILLIAMS: Yes. So the duties that I performed are already been shown to be irrelevant to the Commission, it's my job title. Was that job still required? KTC have said the job of a third year electrician was no longer required. The Commission states, 'Is the person's job required?', a fourth year air conditioning and refrigeration apprentice is still required, as shown, as they still have multiple fourth year apprentices.

PN130

DEPUTY PRESIDENT MASSON: Mr Williams, maybe to be clearer, for my part, the work that you were doing, as I understand it, was in the warranty area, correct?

PN131

MR WILLIAMS: That was the majority of my work, yes.

PN132

DEPUTY PRESIDENT MASSON: Right. And the employer gave evidence, which appeared to be relatively unchallenged, that it no longer required a person to be employed in that area, save for the director performing some warranty work. Now, as a consequence, they made a decision to make your position redundant.

PN133

MR WILLIAMS: Well, actually, it was shown that another fourth year has also picked up that duty as well.

PN134

DEPUTY PRESIDENT MASSON: I'm not sure that's entirely correct. I think it revealed that there was some work performed at some point in the past by the other fourth year apprentice.

PN135

MR WILLIAMS: That's what they're claiming, yes.

PN136

DEPUTY PRESIDENT MASSON: Right. But I'm just saying that's what the evidence seems to indicate and it's not clear, on the evidence, when that work was or wasn't performed, in the past, by that apprentice. But you were largely devoted to that work, save for a couple of instances when you performed some onsite work, as I'll call it. So you were largely focused on that work and the employer appears to have made a decision to no longer continue with that position, isn't that a fair summary of what's occurred?

PN137

MR WILLIAMS: No. They've said, straight up, that a third year apprentice electrician was no longer required. So that's - - -

PN138

DEPUTY PRESIDENT MASSON: So coming back to you're placing some weight on the title that was given to your role, as opposed to the work that you were performing?

PN139

MR WILLIAMS: Yes, fourth year apprentice electrician, no not electrician, apprentice air conditioning and refrigeration.

PN140

DEPUTY PRESIDENT MASSON: All right.

PN141

VICE PRESIDENT ASBURY: Thanks. Do you want to continue with your submission, Mr Williams?

PN142

MR WILLIAMS: Yes. The second point is the employee versus employees, in clause 27 of the Award. At no point does it say anything about a single employee

not being covered under this Act I've got on to the Fair Work Ombudsman, they've actually confirmed that a single employee does, indeed, fall under this Act.

PN143

DEPUTY PRESIDENT MASSON: This is (indistinct).

PN144

MR WILLIAMS: Yes. So point 2 of genuine redundancy, I believe it is.

PN145

VICE PRESIDENT ASBURY: Yes. I understand - - -

PN146

MR WILLIAMS: So 29, sorry?

PN147

VICE PRESIDENT ASBURY: I understand your submission. So, essentially, you're saying that the Deputy President was wrong to conclude there wasn't an obligation to consult you because the obligation to consult applies to an individual employee as well as a number of employees.

PN148

MR WILLIAMS: Yes, and there's nothing in the award that states otherwise.

PN149

VICE PRESIDENT ASBURY: I understand, thanks. Do you want to continue, Mr Williams?

PN150

MR WILLIAMS: Well, the last thing is that other apprenticeship job being made available from Benjamin quitting, but I'm not sure how far that's going to go.

PN151

VICE PRESIDENT ASBURY: So do you agree or disagree that was a first year, that Benjamin was a first year apprentice?

PN152

MR WILLIAMS: Well, if you guys are going to say it's a first year apprentice and it's relevant, then me being a fourth year - sorry, if you're saying that me being a fourth year to a third year electrician is irrelevant then the fact that Benjamin was a first year apprentice to me being a fourth year apprentice is completely irrelevant as well.

PN153

DEPUTY PRESIDENT MASSON: We're not saying it's irrelevant, we're just trying to understand your submission.

PN154

MR WILLIAMS: I understand that, but to me it just sounds like you're completely dismissing it. Whether you are or not - - -

PN155

DEPUTY PRESIDENT MASSON: No, no, no. Mr Williams, you'll see, in due course, that the Full Bench will ask questions of both parties in order to understand the submission.

PN156

MR WILLIAMS: No, no, I understand, I'm just - just to me it just sounded like you were, you know - I understand - - -

PN157

VICE PRESIDENT ASBURY: We're simply trying to understand, Mr Williams, whether the job that you did, the work that you actually performed was accurately described in the hearing and whether the issue was just the title of the job was not accurately described or whether you disputed the work that you did, and we've now clarified that by asking you questions. Now we're just trying to understand whether you agree that Ross, is it, was a first year apprentice and your argument is you should have been redeployed into the role of a first year apprentice, is that your argument?

PN158

MR WILLIAMS: Yes. So the apprenticeship role did become available. I have more experience in this role, so experience was no longer an issue. The work this first year apprentice role did was installation work, I have previously done installation work, so there's no argument of whether I could fit into the role.

PN159

VICE PRESIDENT ASBURY: Okay. So notwithstanding it's a first year apprentice and it's doing installation and you're a fourth year apprentice doing warranty work, you say that the respondent should have considered redeploying you into that role?

PN160

MR WILLIAMS: Warranty work was just the majority of what I did, but I've done installation work for years.

PN161

VICE PRESIDENT ASBURY: All right, I understand, thank you. Is there anything else you want to add?

PN162

MR WILLIAMS: Apart from the forged document, no.

PN163

VICE PRESIDENT ASBURY: Thanks, Mr Williams.

PN164

Mr Whitbread?

PN165

MR WHITBREAD: Well, perhaps if I just respond to those points raised by Mr Williams. The point about the third or the fourth year, whether he was a third or a

fourth year apprentice, at the time of dismissal, the respondent says it doesn't matter.

PN166

The evidence, as the Full Bench has just identified, before Boyce DP was that the appellant was the only worker of the business who was primarily focused on warranty repair work. The business made a decision to make a change, that change was a decision to reduce the amount of warranty repair work that it did because it wasn't profitable and because the business had cash flow issues.

PN167

The director of the business decided to absorb the part of that work that remained and decided that the position occupied by the appellant would be made redundant.

PN168

So the disputes then about the hearing, as to any redeployment issue, were primarily about positions in the part of the business that the appellant didn't have experience working in. The duties is what's relevant, not whether he's described as a third or a fourth year apprentice.

PN169

There was evidence that there was, I think, seven or eight workers in the business, so we're not talking about a business with hundreds of workers where there might be 15 third year apprentice positions. It doesn't matter that it was a third or a fourth year, what's relevant is the duties he was performing and the change in the workplace and whether they were required anymore, by reason of the operational change in the workplace and Boyce DP got that factual analysis correct. So this matter doesn't give rise to a significant error of fact or an appealable error.

PN170

COMMISSIONER BISSETT: Sorry, I think I might have just lost the train of what you were saying, my apologies. Did you include the redeployment in that?

PN171

MR WHITBREAD: What do you mean, sorry?

PN172

COMMISSIONER BISSETT: So part of the appeal goes to Mr Williams' claim that he should have been considered for redeployment and that this was a matter not properly considered by the Deputy President in finding he couldn't be redeployed. I understand what you say, with respect to the position that was made redundant and the work that was no longer required, but the other issue is whether Mr Williams should have been considered for redeployment into the vacancy created by Mr Ross leaving.

PN173

MR WHITBREAD: Yes, so that's a separate issue, I can address that now.

PN174

COMMISSIONER BISSETT: Yes.

PN175

MR WHITBREAD: So the questions that were just asked of the appellant about the position of Mr Ross, it's worth noting that there was, in evidence, given that Mr Ross' further statement has not been admitted, there wasn't detailed evidence before Boyce DP about exactly what Mr Ross' position was. It wasn't tendered by the appellant before Boyce DP so he wasn't described, I think, in his initial statement, as a first year apprentice.

PN176

In any event - and there were no challenges made to any of the respondent's witnesses to suggest that it would have been reasonable to redeploy Mr Williams into a position like that, that had been occupied by Mr Ross. So we say that that argument shouldn't be raised, for the first time, on appeal.

PN177

We also say that the Deputy President got the analysis right, in terms of where the onus of proof lies, in respect of 385 and 389 and the issues there.

PN178

In terms of what the evidence actually was, as to whether any type of redeployment into installation work would have been reasonable, what the evidence was, was the paragraph that I took the Full Bench too earlier, that only one position had been hired, and that was a fully qualified tradesperson doing installation work. So there's no dispute, it seems, or evidence, that the appellant was not fully qualified. Additionally, the evidence before Boyce DP, and it wasn't particularly challenged, was that the appellant had limited experience to do installation work.

PN179

DEPUTY PRESIDENT MASSON: Can I just stop you there, Mr Whitbread, how could that be of particular moment, in circumstances where there appeared to have been, I understand, a first year apprentice working in that area? I mean the fact that the first year apprentice, Mr Ross, was working in the area suggests that prior experience or long prior experience wasn't a prerequisite for working in that area, was it?

PN180

MR WHITBREAD: Where is the evidence before Boyce DP that there was a first year apprentice working in that area?

PN181

DEPUTY PRESIDENT MASSON: I'll concede that there's a paucity of evidence from both parties, on matters which are central to the resolution of this application. I note that the respondent chose not to cross-examine Mr Ross.

PN182

MR WHITBREAD: Yes. That's the first point to note. The other point is that even if there was a first year electrical apprentice employed at around the same time who quit, that doesn't mean that the respondent, being in a business who describes its cashflow problems, would have decided to rehire an apprentice in that position at that time.

PN183

VICE PRESIDENT ASBURY: But, Mr Whitbread, there as a paucity of evidence about the respondent's financial position, as I understand the decision. And, secondly, it appears, at least from the final submissions, that the appellant did raise the issue of redeployment into the installation area. The fact that a first year - I mean I guess, from my position or my perspective, in any event, I'm really struggling a little bit with the proposition that the appellant had to prove he should have been redeployed somewhere when, really, the respondent raises the basis that it was a genuine redundancy.

PN184

Why didn't the respondent bear some onus to show that it made reasonable attempts to redeploy the appellant? I mean you can say the appellant gave no evidence about this, well neither did the respondent and, arguably, the respondent should have done that, given it has raised the objection, on the basis of genuine redundancy.

PN185

MR WHITBREAD: I don't think it's right, Vice President, to say that the respondent gave no evidence about this, and there's something in the transcript that I'd like to refer the Full Bench to.

PN186

VICE PRESIDENT ASBURY: Yes, it's basically, 'He's not very good at installing or he doesn't like doing it', the appellant didn't like doing it. But, anyway, yes, where's the reference in the transcript?

PN187

MR WHITBREAD: Yes, just give me a moment and I'll find it. I think that was the part I was - - -

PN188

DEPUTY PRESIDENT MASSON: Is that PN 428?

PN189

MR WHITBREAD: Yes, that's correct. So the question there asked:

PN190

You still claim that Nicholas couldn't have been redeployed doing installs, even though he has done so previously at KTC.

PN191

And there were a number of other questions about the nature of the assistance or work that he did on installation work:

PN192

A hundred per cent it wasn't proved to me that he could do so and those times that I did see you do installation work I didn't see that you had the experience to do so and you preferred to do warranty work and you actually stated that you aren't good at it.

PN193

And there were other witnesses that gave evidence about the points of what the appellant said or didn't say, in terms of his inclination or desire to do installation work. So there was - there was some evidence - - -

PN194

DEPUTY PRESIDENT MASSON: It'd be correct if - sorry.

PN195

MR WHITBREAD: There was some evidence about why the respondent didn't consider him for redeployment into the installation side of the business, and that is the evidence, in cross-examination, of Mr Hussein.

PN196

DEPUTY PRESIDENT MASSON: It'd be correct to observe that there's no evidence, at the point of dismissal of the appellant, there was no discussion with him about potential redeployment or his interest in considering redeployment into, for example, installation work. It seems to have been assumed, on the part of the employer, that that was not appropriate because of the prior views said to have been expressed by the appellant about his disinterest in that work.

PN197

MR WHITBREAD: Yes. There's no - - -

PN198

DEPUTY PRESIDENT MASSON: Yes.

PN199

MR WHITBREAD: Yes. Yes, I think that's correct.

PN200

DEPUTY PRESIDENT MASSON: Yes, all right.

PN201

VICE PRESIDENT ASBURY: Mr Whitbread, if I can also indicate that prior to that passage that you've just taken us to, it seems that Mr Williams was endeavouring to cross-examine another witness about the skills that Mr Ross had in the workplace and he didn't have an ARC licence, and how could he be doing installs. Even if you're a labourer you have to have that licence. So Mr Williams is endeavouring to press that point and Mr Mola objects, on the basis of. 'What's Benjamin got to do with the subject application?'. Well, I would have thought, when it's an issue of redeployment, other employees who were still there and then left were relevant.

PN202

MR WHITBREAD: I'm not sure exactly why those question were being asked by the appellant, but it might have also been that they were being asked, in relation to the one statement that I took the Full Bench to, in Mr Hussein's statutory declaration, to explain that only one fully licenced qualified tradesperson had been hired. So that may have been the relevance of the questions about the qualifications.

PN203

But I accept the gaps in the evidence on both sides before Boyce DP.

PN204

VICE PRESIDENT ASBURY: Well, for my part anyway, I have great difficulty with the proposition that when you have an unrepresented applicant in a proceeding and you have a represented respondent who's arguing a jurisdictional objection, on the basis of genuine redundancy, that some criticism should be levelled at the applicant because they don't call evidence about the possible positions they could be redeployed into, when it's actually the respondent that's required to consider redeployment. It's the employer that's required to reasonably consider redeployment.

PN205

MR WHITBREAD: Well, I think all I can say is that there was evidence about the steps that the respondent took to consider that. I've referred to that. We're not talking about a large business here, we're talking about a business with seven or eight employees, and so it's not the same as where you've got a large employer with hundreds of positions and positions coming and going at different times and there might not be information available to an applicant as to what those positions are or are not. Here I think there is not that disparity of information about the - what redeployment possibilities might look like.

PN206

VICE PRESIDENT ASBURY: But I don't know the appellant can be criticised for not raising a matter that, arguably, the respondent should have raised. 'We're a small business, these are the roles we had, these are the roles that were left after the decision to terminate the applicant's employment and this is why we didn't redeploy him into one of those roles', and it doesn't seem that there's any evidence about, 'This is what we had and this is what we had after the termination and that's why we didn't redeploy, or we couldn't redeploy'.

PN207

MR WHITBREAD: Well, the evidence is not stated in that conclusionary way, Vice President. The evidence is that the applicant was the only worker primarily doing warranty repair work. A decision was made to absorb that work with the sole director. The only other person hired in the period was a qualified tradesperson to do installation work. The applicant had limited experience in doing installation work. The applicant had expressed a desire not to do installation work and, for the reasons that Mr Hussein gives in cross-examination, he didn't think it was reasonable to redeploy the applicant to do installation work. So there was evidence, it just doesn't - it wasn't a statement from an HR manager that concludes, 'Here's all the positions that were going at the time of the termination and none of them were appropriate'. It was evidence that when you put all those things together and reach the conclusion that redeployment wasn't appropriate, even if you don't take the approach that Boyce DP too, which was to put the onus, in respect of that issue, upon the applicant.

PN208

VICE PRESIDENT ASBURY: Well, Mr Whitbread, again, speaking for my part, I'm not accepting the proposition that somehow the Commission would require an

HR manager to put on that evidence. I would have thought, for a small business owner, it would actually be easier to put on that evidence about, 'Here's the people we have and here's the people we didn't have, we had after the decision to make somebody redundant'. I would have thought it'd actually be easier, and I would have thought it would have been a fundamental piece of evidence to be put in a matter where a small business employer is legally represented and is arguing it's a genuine redundancy.

PN209

So I'm not putting some unreasonable step here for any sized business to take. So the proposition that somehow the Full Bench should make an allowance because they didn't have an HR manager to do that. The issue is, really, that the director or owner of the business could have quite easily said, 'I only have 10 employees and now I only have nine and here's what they all do and here's why I didn't deploy the applicant into one of those positions'.

PN210

MR WHITBREAD: Yes, I accept that, Vice President, I understand that. I think my point was more that that is a conclusion. The things that make up that conclusion were in evidence.

PN211

VICE PRESIDENT ASBURY: Yes, I understand your submission. Thank you. Sorry, Mr Whitbread, I interrupted your train of thought.

PN212

MR WHITBREAD: I think that's what I can say on that point.

PN213

VICE PRESIDENT ASBURY: Is there anything further?

PN214

MR WHITBREAD: Just to respond to the appellant's point, I think we've set this out in our written submissions, we don't agree about the employee versus employees distinction, in clause 27 of the award. Clause 27 of the award, throughout, refers to 'employees', plural, so the fact that of course the award and the Act also applies to a single employee is not - doesn't change the construction as to what clause 27 means, in respect of that issue, we say. And, again, we say Boyce DP got that right.

PN215

VICE PRESIDENT ASBURY: It seems though, Mr Whitbread, that that really wasn't a point that was directly argued at first instance.

PN216

MR WHITBREAD: No. No, it wasn't. No.

PN217

VICE PRESIDENT ASBURY: It seems to be a conclusion that the Deputy President's reached, absent an argument to that effect.

PN218

MR WHITBREAD: From the evidence, he's reached that conclusion. Yes, it doesn't appear to have been argued by either party.

PN219

VICE PRESIDENT ASBURY: Thank you. But you say it's, nonetheless, correct?

PN220

MR WHITBREAD: Yes, applying the evidence to the award, it's nonetheless correct.

PN221

VICE PRESIDENT ASBURY: So every time a single employee is made redundant, the fact it's a single employee doesn't trigger the - because the model term, the consultation term is an award term, so it's a standard term. So the effect of that submission is to say that every time it's just a single employee it doesn't trigger any obligation to consult, in terms of a genuine redundancy argument, even though the employee is covered by a modern award. So that's the respondent's submission on the appeal.

PN222

MR WHITBREAD: I don't think that's the analysis of Boyce DP. I think the starting point is looking at 27.1:

PN223

What is the major change in production, program, organisation structure or technology that are likely to have significant effects on employees.

PN224

So you start by identifying - you don't start from the termination, you start by identifying the major change. Here the major change was the decision to reduce the amount of warranty repair work that was done. Then the question is, okay once you've identified the major change, who did that affect and did that have significant effects on employees?

PN225

So it could certainly be the case that you could have a major change that has significant effects on multiple employees, but which only results in one employee being made redundant. You could have a team - say this business had a team of four people doing warranty repair work and it sent through a redundancy selection process and it advised all of them that, 'We're going to reduce the number doing warranty repair work from four to three and we're going to consider who to keep and whose position will be retrenched'. That would be the same major change here but it would be a major change that has significant effects upon plural employees. Even though it results in the dismissal of only one employee, 27.1 would arguably apply.

PN226

The difference here, as Boyce DP found, is that the major change, in this particular instance, didn't have a significant effect upon more than one employee, being Mr Williams.

PN227

DEPUTY PRESIDENT MASSON: Does it follow from that analysis then that if there are - let's say there are an entire department is made redundant, let's say 100 employees, because that business has decided to no longer undertake particular work and that all the 100 employees in a particular department were made redundant but that did not have any impact on any other part of the business, are you suggesting that because no other employees in the business were affected, therefore that could not be described as having significant effects on employees?

PN228

MR WHITBREAD: No. Why wouldn't that have a significant effect on those 100 employees?

PN229

DEPUTY PRESIDENT MASSON: Then I come back to the same point, in relation to Mr Williams. Wasn't the loss of his employment a significant effect on him, or does there have to be more than one.

PN230

MR WHITBREAD: No, it was. But the major change that gave rise to that significant effect only affected one employee. So clause 27.1:

PN231

If an employer makes a definite decision to make major changes that are likely to have significant effects on employees.

PN232

Now, in the example just given, a whole department is taken out, that is likely to have a significant effect upon all of the employees in that department. It may not be likely to have a significant effect on employees in other departments - - -

PN233

VICE PRESIDENT ASBURY: The point is, again, Mr Whitbread, really the argument is that any time it's only one employee that's dismissed - - -

PN234

MR WHITBREAD: Or that's affected, yes.

PN235

VICE PRESIDENT ASBURY: And that's affected, then that does not trigger an obligation to consult because the only person affected is that employee.

PN236

MR WHITBREAD: Yes, and that's - that's the approach that Boyce DP has taken, which we say is correct, yes.

PN237

VICE PRESIDENT ASBURY: It seems to be on the basis of one case, which was the Crown Melbourne case, which was an interpretation of a consultation team in an enterprise agreement, not a modern award.

PN238

MR WHITBREAD: Yes.

PN239

VICE PRESIDENT ASBURY: The Crown case, the 2016 case that's cited.

PN240

MR WHITBREAD: Yes, that's the approach that Boyce DP has taken.

PN241

VICE PRESIDENT ASBURY: So are you aware of any case where there's been such a decision, in relation to a modern award provision?

PN242

MR WHITBREAD: I have not looked at that. I do not know if there is or if there is not.

PN243

VICE PRESIDENT ASBURY: All right, thank you.

PN244

MR WHITBREAD: If I may just have a moment to confer with my instructors as to whether there's anything else they wish to raise? Thank you.

PN245

VICE PRESIDENT ASBURY: No problem.

PN246

MR WHITBREAD: Sorry for that delay, Mr Williams and Full Bench. The only other point that I'm instructed to note is that in relation to the consultation obligation point, there was evidence, from a number of the respondent's witnesses, about discussions being had about difficulties in the business and the appellant being informed of that. But I appreciate that that evidence wasn't analysed or discussed by Boyce DP in his decision and he hasn't taken the approach of going through whether that would satisfy an award consultation obligation because he thought one didn't apply.

PN247

So I think, if the Full Bench disagrees with that point, it may be necessary for - we'd have to talk about what is done thereafter, in respect of how that question is answered.

PN248

VICE PRESIDENT ASBURY: Yes, I understand, Mr Whitbread, it's a difficult circumstance. But, in any event, I just thought it only fair to put that out there, in any event. Thank you.

PN249

MR WHITBREAD: Unless there's any questions that the Full Bench has for the respondent, we're relying on our written submissions.

PN250

VICE PRESIDENT ASBURY: Thanks, Mr Whitbread.

PN251

Mr Williams, anything you want to say in reply?

PN252

MR WILLIAMS: So just on the award how the employee versus employees, there's multiple stages in the award when it only refers to employees but most people would come to the conclusion that a single employee is included, so I'll just go over one quickly, which is point 4, 'Coverage of the award':

PN253

This industry award covers employers around Australia, in the industry of (audio malfunction) provided by electrical, electronics (audio malfunction) contractors, and their employees, in the classifications in Schedule A of classifications definitions, to the exclusion of any other modern award.

PN254

So that's one instance of where the award will only say 'employees' and from point (audio malfunction) when it does actually speak about 'employees' it does say a full-time employee.

PN255

VICE PRESIDENT ASBURY: I understand.

PN256

MR WILLIAMS: So that's just on the award. In terms of consultation, there was no significant evidence that was provided to the Commission on any meeting happening, I deny (audio malfunction) and Mr Jordan (audio malfunction) has actually stated in the hearing, that he can't recall any stage where I was present at any meetings.

PN257

VICE PRESIDENT ASBURY: Okay. Thank you.

PN258

MR WILLIAMS: I think that's all.

PN259

VICE PRESIDENT ASBURY: Thank you. Well, thank you to the parties for your submissions. We'll indicate that we will reserve our decision and issue it in due course. On that basis I'll adjourn. Thank you.

ADJOURNED INDEFINITELY

[11.22 AM]