



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BEAUMONT
DEPUTY PRESIDENT ROBERTS**

C2023/8148

s.604 - Appeal of decisions

**Appeal by Meltser
(C2023/8148)**

Sydney

2.00 PM, MONDAY, 11 MARCH 2024

PN1

VICE PRESIDENT ASBURY: Good afternoon. Could we just start by taking the appearances. Mr Meltser, you're representing yourself today?

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MR MELTSER: Yes, I am.

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VICE PRESIDENT ASBURY: Great. Thank you. And for the respondent we've got Mr Burnett. You're the managing director?

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MR BURNETT: Yes.

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VICE PRESIDENT ASBURY: Great. Thank you for that. We've read your submissions and the material that you've filed, Mr Meltser. So would you like to speak to those, and elaborate or clarify any points?

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MR MELTSER: Yes. I believe that the decision was in error. The decision to not do a multifactorial test, which would have determined the amount of control that (indistinct) had over my work there, as well as whether I was free to subcontract my work, (indistinct) representing myself with the company uniforms, and numbers of numerous other factors. The decision - - -

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VICE PRESIDENT ASBURY: Sorry, could you just get a bit closer to a microphone?

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MR MELTSER: Yes.

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VICE PRESIDENT ASBURY: I'll just get the associate to sort that out. Thank you. Great. Thanks.

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MR MELTSER: I was saying that the decision did not do a multifactorial test, which is the standard I believe that should be applied here. I believe there was an error by skipping directly into – taking a phrase of the recent High Court decision which actually stated that contracts effectively – I have written it – the contracts that are well-formed and the contracts that have no sham allegations should be held in its own rights. I believe none of those factors apply here. I think that also the Deputy had made several errors in interpretation of facts, as well as having been guided by some irrelevant principles, such as whether other people were hired as casual employees by Toppa, which do not have any bearing in the – I believe if every factor would be assessed on its own, while each of them does not hold more weighting than others, I believe they would be falling squarely that this relationship was an employment relationship.

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VICE PRESIDENT ASBURY: So essentially, the error you assert is that the Deputy President should have applied a multifactorial test.

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MR MELTSER: That is correct.

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VICE PRESIDENT ASBURY: Right. And what do you say were the errors of fact, the interpretation of facts that were erroneous?

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MR MELTSER: For example, one of the factors is whether doing a sports analyst performance role included live scoring. The initial advertisement that I've responded to on LinkedIn had stated, 'Willingness to learn other software'. Now, we have never used SportsCo. We have used I believe – sorry, I'm blanking on the name, but there were two different apps that we used for scoring red cards, yellow cards, number of penalty kicks, et cetera, which is a part of an analyst's role. Now, of course, there is different kinds of analysts, there's different levels of analyst. But fundamentally, this is what it is; it is creating metadata from the game while streaming it. I would also say that the Deputy Commissioner has said that you'd be investigating tax obligations, whether they've been complied to. The decision did not address superannuation, which would have been required to be paid for all labour done personally. That's the gist of it.

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VICE PRESIDENT ASBURY: So how do you say that the failure to pay superannuation is relevant?

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MR MELTSER: The relevance of that is, he had stated that I did not sign the contract merely on the basis that I've been previously represented that I was an employee. Additional reason I have stated is that there is a part of the contract that is not legal, and I didn't sign on that basis.

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VICE PRESIDENT ASBURY: All right. So can you take us in the appeal book to where this contract that you didn't – is there a copy of the contract that you didn't sign?

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MR MELTSER: Yes, there is.

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VICE PRESIDENT ASBURY: This is page - - -

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MR MELTSER: Page 66, Au independent contractor agreement.

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VICE PRESIDENT ASBURY: Yes.

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MR MELTSER: So the part there does not that the company will not pay for superannuation.

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VICE PRESIDENT ASBURY: All right. So you say you didn't sign it on that basis?

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MR MELTSER: That is one of the two bases. I've been previously represented that I was an employee. I have joined the company with intent to be an employee. And I have been given a contract which deprives me of my rights.

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VICE PRESIDENT ASBURY: So you didn't sign the contract, but you kept on working?

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MR MELTSER: Yes. As I was on Centrelink at that time, I was unable to leave the job, because I needed a reasonable excuse. Now, whether quitting and immediately beginning a process of dispute would be reasonable would simply depend on the administration of the system.

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VICE PRESIDENT ASBURY: All right.

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MR MELTSER: Yes.

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VICE PRESIDENT ASBURY: And what are the other factual errors that you assert?

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MR MELTSER: All right. One moment. I'm going to switch back. I'm using a paper form. I've also stated in fact denying that the Deputy has only considered the four portions where Chris – has not considered portions where Chris has not challenged some of my assertions. He has only considered the fact that I did not argue about the fact that other people employed as contractors to be held against me for the decision.

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VICE PRESIDENT ASBURY: So you say that where you made assertions that the employer didn't contradict, then that should have been accepted, and wasn't?

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MR MELTSER: Whether the employer has argued against them or not should have been taken into consideration.

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VICE PRESIDENT ASBURY: All right. And where do you say that occurred, or in relation to what points?

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MR MELTSER: That occurred at several points. I've stated this is a sham contracting attempt. I had also stated that Chris has not done the due diligence by checking whether I had public liability insurance, professional liability insurance, and a Working with Children Check, that is – the super for paid work. And each one of them was not taken into consideration. Additionally, I've said that this is a part of a scheme where he had recruited multiple people as employees on LinkedIn, and after that told them they're going to be independent contractors. That was also not (indistinct) by Toppa. In fact, I believe that Toppa had simply stated that if this was a scheme, it would simply be bad accounting, which is not a defence, and it should have been held as such.

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VICE PRESIDENT ASBURY: So when you say a sham contract, what do you say made this a sham contract?

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MR MELTSER: I would say that every aspect of it follows an employment model, except for the invoicing. And I was directly reporting to Chris. He had full control of my equipment, schedule, time, and had full control of the contract, full control of the pay terms. And I had no independence, I had no ability to make any – anything that could be expected from an independent contractor, such as decisions about how I do my work, when I do it, and whether I'm able to give it to someone else.

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VICE PRESIDENT ASBURY: But the kind of work that you did, as I understand it, was recording sporting events.

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MR MELTSER: That's correct.

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VICE PRESIDENT ASBURY: So the events were going to go ahead whether you recorded them or not. It wasn't something that you could have done at a different time, because the sporting event you were meant to be recording was on at a particular time.

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MR MELTSER: That is true. However, Chris had an allocation of courts if there are six games played – Chris had given some people assistance. I was not one of them. And I don't know whether these people are – a part of the testimony was that when the shifts are opened, they were opened to both independent contractors and employees of the company. So Chris had allocated some people as he wished. We had no ability to switch shifts between them. Now, if this was a set of independent videographers, they could arrange themselves, which courts they would do, what is the schedule, who would be assisting whom for a takeover, for things such as a break.

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VICE PRESIDENT ASBURY: So you say the fact that the videographers couldn't switch between themselves and decide who did what and when indicates you were an employee?

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MR MELTSER: Yes, it does.

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VICE PRESIDENT ASBURY: All right.

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MR MELTSER: The amount of control that Chris held over the people was one of the factors.

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VICE PRESIDENT ASBURY: All right. Is there anything else you wanted to say?

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MR MELTSER: I've also written on page 12 that the High Court decision applies to a well-formed contract. If Chris had informal parts of the contract, such as the fact that I was required to provide an SD card for free, or where there was minimum shifts, or whether there was an expectation to take a shift that preceded the shift that I wanted to take. Such informal arrangements refutes that there is an agreement in place of a signed contract, which is just as strong. I believe that this is not an agreement. These are instructions simply provided by Chris, and I had followed them.

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VICE PRESIDENT ASBURY: So you say that the matters that the Deputy President relied on to find that there was an oral contract was not a contract, it was instructions to you as an employee?

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MR MELTSER: Yes. It was instructions. I believe there was an assertion by Chris that there was an agreement for equipment hire with me. Now, I have submitted a day before the hearing a Deputy message to me stating, 'Collect spare life streaming kit'. I believe that's an instruction rather than an agreement.

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VICE PRESIDENT ASBURY: All right. Is there anything else?

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MR MELTSER: I also believe that the Commissioner should have pointed out which features are consistent with casual employment and independent contractors. I believe I have cited one case, *Austin v Honeywell*, where some of the – whether the decision was that the person was an independent contractor, but that decision pointed out certain features that were consistent with employment. I don't think he has done – he has not looked into whether there are any features in this case which were consistent with employment, such as work trials,

requirement to give two weeks' notice and such, (indistinct) give notice after quitting.

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VICE PRESIDENT ASBURY: All right.

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MR MELTSER: That is a summary of the errors that I've seen, and I bring them to the appeal case.

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VICE PRESIDENT ASBURY: All right. Thank you very much. Are there submissions you'd like to make orally to add to your written submissions, Mr Burnett?

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MR BURNETT: No, I'm fairly comfortable. Is this the time to rebut any – yes, all right. So from the top, we actually never communicated to Mr Meltser at all that he was an employee. All the communication was, 'You are an independent contractor', from the very beginning. He did respond to an ad that was for a performance analyst, but part of that role was videographer. And he had no skills or training in sports performance analysis, so we discussed from the start, 'You are more suited to a videographer'. And we've always had independent contractors and casuals employed, depending on whether they wanted to run their own business, had some of their own equipment, or didn't, or we thought they were ready to go and had the skills, which Mr Meltser did, as a videographer, or we needed to train them up, which was where we directed more often the casuals.

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So we never mentioned anything about being an employee, casual or permanent, and Mr Meltser never discussed or asked us to be a permanent employee. So the communication that invited him to the HR platform was as an independent contractor. Our scheduling email that was sent to him was, 'You're an independent contractor'. And although he never returned a signed contract, which was obviously an error, after doing shifts he began to invoice us as per the contractor agreement that was sent to him, with an ABN. So it was our understanding that he knew and understood that he was an independent contractor, being paid at the contractor rates, which Mr Meltser, through the 14 months that he did work for us, was around 60 to 65 per hour. Our permanent employees and casuals roughly equate to about \$30 to \$35 per hour.

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So he was getting twice the hourly rate that he would have if he was employed as an employee. He did also average a little over two hours per week in the 14 months that he did work for us, which at no time did we believe that that was a permanent role. The shifts allocated were allocated or offered. The way we set up our business is, we do film live sport a lot of the time, basically all the time. So there's no other time that you can work, other than the time that the games are on. And we try, as best as possible, to get the employees and contractors alike to work close to where they are, so there's not a huge amount of

travel. I think it was 2.05 hours a week for the 14 months was his average time at work.

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The other thing about the gear, and his example about that, when we had six employees and contractors on one location, it's very specific. We offer our contractors different rates, depending on the gear that they supply. So we give a full suite, 'This is the gear we need to perform our live sport live streaming'. If you purchase it and own it, we pay you a higher rate for the use, and it's your gear. We 100 per cent allow that, but we also need to know which bit of live streaming equipment is directed to which platform in the internet cloud world. So it's very specific, that, if we're using that set of equipment, we need you on that court, because otherwise, red versus blue, when it comes up on Kayo, or is blue versus purple, you need specific equipment. And that needs to be prepared within several days, if not further away, than on the job, if you understand what I mean.

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So although the contractors can use their own equipment, we need to know that that bit of equipment is preferably being used by that contractor on that court at that time. We need a level of control to provide the service adequately. So we can't allow contractors and casuals alike just to switch shifts.

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VICE PRESIDENT ASBURY: So you're saying the control isn't because you need to control people because they're employees; the control is because you need specific equipment in specific places at the specific times.

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MR BURNETT: Yes. And that gets to the next point – that's correct – where our camera operators do have a phone or an iPad to do the scoring, live scoring. That's how a lot of live streams get the graphics up live. And that, to us, we never considered that performance analysis, because it was just the score. There was never any suggestion or request for Mr Meltser to do yellow cards or red cards, or goals, or anything like that. And if he did, it was of his own accord. We never did that on any of his shifts. It was just, if red scored, you press soccer, goal; blue scored – so that was, again, an extra pay rate to live stream, versus, sometimes we just record it, and then upload it to the platform afterwards, so it wasn't a live stream. So yes, he was employed as a videographer, never as a performance analyst, and we discussed that several times.

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The contract that was written said that, and he was never requested to do any performance analysis, which is a completely separate part of the business. And in terms of the sham contracting, he was given full ability, and he said multiple times that he was going to purchase gear to get a higher rate. He did purchase a camera, which gave him a higher rate that he would have otherwise not have had. He was never expected to wear any of our equipment, I mean our gear, Toppa. And one of his arguments has been that our gear had our sticker on it, but we need to make sure our gear has our sticker on it, so it doesn't get lost. Potentially you could put your own – and we could have discussed this – you could put your own business logo or name over that. It's just, we need some form of identification for our

equipment if we're going to have it out with independent contractors and employees alike.

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VICE PRESIDENT ASBURY: Do employees wear your gear?

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MR BURNETT: Employees, they're given the gear, but they're never demanded to wear it. But employees, we certainly give – we give the gear to the contractors as well. And some of them choose to wear it, some of them don't, but we're fine either way. I think our fairly informal request is neat and tidy attire with closed shoes, and, if it's not too warm, long pants. But yes, very unrestrictive about the clothing worn.

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VICE PRESIDENT ASBURY: All right.

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MR BURNETT: So I think that's a summary, rebutting some of the major points. I'm comfortable leaving it at that.

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VICE PRESIDENT ASBURY: All right. So that's all you want to say, in addition to your written submissions?

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MR BURNETT: Yes. I feel very comfortable that all communication to Mr Meltser was employing him as an independent contractor. The first time we heard of any idea from him that he felt he was a permanent employee was after we said we had no more shifts for him. So over 14 months, I would have expected that there was a request to be an employee, or a request as to why he needed to send an invoice, or was getting paid off the invoice. That was not mentioned or commented on once, until we said we had no more shifts for him into the future. And I think the big point is that it just doesn't feel to me like there was – he should have had a concept that he was a permanent employee when it wasn't work that was every week, and it was only two hours a week, on average, over 14 months. It feels very much like he should have been aware, and should have had the understanding that he was an independent contractor. So an unfair dismissal claim just shouldn't have much strength. So I'm happy to leave it at that.

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VICE PRESIDENT ASBURY: All right. Thank you.

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MR MELTSER: I'd like to add something to his statement.

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VICE PRESIDENT ASBURY: Sure.

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MR MELTSER: This is the first time I'm hearing about, for example, long pants during times when it's not too warm. There has not been such discussions. I believe I spoke about this in the original hearing. Four shifts – and I have asked about how will I be paid – this is before I was given an independent contractor agreement – he said, 'Since you have your own ABN, you will need to invoice us'. Chris has previously argued that an independent contractor agreement was on my behalf, that I have initiated it. That was not the case, because he had refuted it several times during the closing arguments of the original hearing, where he said, 'How clearly we have explained this was an independent contractor agreement'.

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Furthermore, live scoring did not attract higher rates. Some live streaming was done without any scoring. Some of this was done with scoring. I have not been able to discuss in the original hearing that if this was all above board, he could have simply attached the job description that he intended me to do. He could have attached a reasoning for why this is going to be independent contracting, such as, 'We think that you may have your own gear', or something along these lines. However, this was all sprung on me after I had begun the shift. Furthermore, I'd like to state that in the submissions that were done – let me find this. One moment, please. Refutation point 11, stating, 'Using your Toppa gear was never a compulsory expectation'. However, during times Chris had told me that I may use a certain camera, that a certain camera was unsuitable, and other times he said that it is suitable.

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I have originally started with an EV-10. There are cameras which look at SLRs, and there's cameras that look at the video cameras. The performance of them is almost the same. Chris has said that that camera will not be suitable, because it's not a video-style camera; so flip screen, strap, et cetera. At Bill Burgess Centre, he told me to use that particular gear. After that, even after I purchased gear for an unrelated project, he had told me to use a latest camera. I believe it was a Panasonic 1000. So in fact, he had full control of the equipment. It was not a matter of whether I used it or didn't. It's a matter of whether he permitted me to use something.

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VICE PRESIDENT ASBURY: All right. Thank you for that. Is that all you wish to say?

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MR BURNETT: Just one thing about that. Different cameras are suitable for sport and live streaming, and other cameras are not. So that is why we asked – we knew that he had two cameras, but one was not suitable, even though he may say that it was. That is our perspective, and it's a different quality of vision, and it's a different – so that we asked for specific cameras to be used for a specific job. It wasn't suitable, and that's not how we work.

PN76

MR MELTSER: I would say that both of these cameras were used at Chris's direction for live streaming. It's just that I was not permitted to use EV-10. In fact, EV-10 is a higher quality camera. It's a larger size, (indistinct) it's more

expensive than an EV-10. So the camera he deemed not suitable was actually the better camera, from the vision side of things, but that's going into minutiae of the matter. But yes, both cameras were used for live streaming.

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VICE PRESIDENT ASBURY: All right. Just a quick question from me. I note that you've said – I've called it number 3 in your appeal grounds.

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MR MELTSER: Yes.

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VICE PRESIDENT ASBURY: And so I might just repeat that for you. You said:

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The decision deals with arrangements comprehensively committed to a written contract.

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MR MELTSER: Yes.

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VICE PRESIDENT ASBURY: So you're saying that in the decision, the Deputy President found that there was a written contract? Is that what that means?

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MR MELTSER: No. The Deputy stated that there was no written contract, that there was an oral contract. And basically he had cited a case where it said an oral contract is equivalent to a written contract. There may be well-formed oral contracts where there's no dispute about terms. That is certainly not the case here.

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VICE PRESIDENT ASBURY: So what you're saying is, you're saying that it's an oral contract or a written contract, or an oral and written contract?

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MR MELTSER: I'm saying that I had intended to enter into an employment agreement.

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VICE PRESIDENT ASBURY: I know what your intent was, but what actually occurred, in your view?

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MR MELTSER: I believe I was following instructions, and I have relied on things like pay rates. I've received the pay rates too late. Before I had received the pay rates in October, that was entirely a verbal contract.

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VICE PRESIDENT ASBURY: So you're saying there's no contract?

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MR MELTSER: No, I'm saying that I have accepted the pay rate – I've accepted lower pay rates. In the beginning, the pay rates were rates.

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VICE PRESIDENT ASBURY: All right. So I'm going to ask the question again, because I'm still unclear. Do you say there was a contract, whether it be an employment contract or an independent contract, between you and the company?

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MR MELTSER: I would say there is an oral contract that changed as the needs of the business – as the business made certain changes, such as reimbursements, informal minimum rates, whether I'm required to send back cards. All of these things were made up as they went along. I have gone along with some of these requirements, possibly to my detriment, because essentially what happened is, if you give an inch, it will take a mile. The reality is that the dispute eventually has culminated at the point that I'm required to work on a Monday, be on shift the entire week. In case Topper's gear malfunctions, I have to come in and fix it free of charge.

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VICE PRESIDENT ASBURY: All right. Thank you for that. No further questions from me.

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DEPUTY PRESIDENT BEAUMONT: Mr Meltser, I think you've just accepted in those answers that your contract was party oral.

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MR MELTSER: It would have to be, yes.

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DEPUTY PRESIDENT BEAUMONT: And do you say that the Deputy President made any errors in identifying what those oral terms of your contract were?

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MR MELTSER: Well, yes. For example, there was obviously no agreement prior to the very last time that I had to come in and do a shift. I don't believe the Deputy had made real a fact-finding mission that this is what we think the agreement was in the – during the entire process. I think he has taken Topper's interpretation far more than is reasonable.

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VICE PRESIDENT ASBURY: Well, thank you for your submissions. We'll indicate that we'll reserve our decision, and we'll issue it in due course.

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MR MELTSER: Thank you.

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VICE PRESIDENT ASBURY: We'll adjourn. Good afternoon.

ADJOURNED INDEFINITELY

[2.45 PM]