



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT DEAN

ADM2022/6

s.602 - Application to correct obvious error(s) etc. in relation to FWC's decision

**Thiruvasan Nagan, Mr Loi Toma
and
Workforce Recruitment and Labour Services Pty Ltd T/A Workforce
International Group
(ADM2022/6)**

Canberra

10.00 AM, FRIDAY, 17 MARCH 2023

PN1

THE DEPUTY PRESIDENT: Good morning, it's Deputy President Dean. Mr Toma and Mr Nagan, can you hear me?

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MR T NAGAN: Yes, we can.

PN3

MR L TOMA: Yes.

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THE DEPUTY PRESIDENT: Thank you. Mr Slater, can you hear me?

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MR D SLATER: Good morning, Deputy President. Yes.

PN6

THE DEPUTY PRESIDENT: Thank you. This is an application that's been made under section 602 of the Act to correct what the applicants say is an obvious error. There have been an application that's been filed by Mr Nagan, another application by Mr Toma, submissions by both applicants and the respondent. I have read all of those matters.

PN7

Mr Toma and Mr Nagan, perhaps I can start with either - who will be speaking, which one of you?

PN8

MR NAGAN: I will be speaking, Deputy President, and then Mr Toma will also have something to say at the end.

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THE DEPUTY PRESIDENT: All right. Mr Nagan, there's two issues that you are going to need to deal with. One is the question of standing. Obviously, the error that your application seeks to address is the decision by a member of the Commission in October 2018 to amend the name of the respondent from Workforce Variable Pty Ltd to Workforce Recruitment and Labour Services Pty Ltd; is that correct?

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MR NAGAN: That is correct, and the second part of that - sorry, you said two issues, yes.

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THE DEPUTY PRESIDENT: The first part was the question of standing.

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MR NAGAN: Yes.

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THE DEPUTY PRESIDENT: Whether you - - -

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MR NAGAN: Yes, I can address the question of standing.

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THE DEPUTY PRESIDENT: Just a moment. So there are the two issues? Can I just be clear about that? The two issues in terms of your application is whether you have standing in the first place to make the application, given that you were not a party to the decision that you wish to now amend. That's the first question. The second question is the actual issue of the change of the respondent's name; is that correct?

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MR NAGAN: That is correct.

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THE DEPUTY PRESIDENT: Right. There have been, as you would know, a number of decisions, both of the Fair Work Commission and the Federal Court dealing with this matter.

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MR NAGAN: Yes. I was not party to that.

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THE DEPUTY PRESIDENT: All right. Well, let's just deal with your application first then. Over to you. What is it that you wish to say?

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MR SLATER: Deputy President, I'm sorry to interrupt. Just in relation to that matter that Mr Nagan wasn't aware, Mr Nagan was in fact involved with the decision with Wigney J. He actually made an application to represent Mr Toma in relation to being a McKenzie Friend. That application was denied, but the judge, Wigney J, did give Mr Nagan the courtesy of sitting at the Bar table and assisting in relation to that matter. The appeal was then subsequently heard. So, I think Mr Nagan is well aware of those and has participated in both of the hearing of the Full Court at first instance and also in the Full Court appeal.

PN21

MR NAGAN: Deputy President, that is incorrect. I did not say that I wasn't aware of the decision, I said I wasn't a party of the decision. Mr Slater refers to Wigney J. Wigney J allowed me - because the respondent submitted documents with its own numbers and Mr Toma had his version, the respondent passed me documents and I had to give it to Mr Toma. So, I was allowed to sit at the front bench thing just to pass documents. I wasn't allowed to speak or anything.

PN22

THE DEPUTY PRESIDENT: Mr Nagan, I can't see you, I think I can only see Mr Toma. Are you able to adjust the camera?

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MR NAGAN: Yes.

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THE DEPUTY PRESIDENT: Thank you.

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MR NAGAN: I apologise for any confusion. I'm aware of the decision, it's just that I played no part in saying anything or - - -

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THE DEPUTY PRESIDENT: All right, let's move on, let's move on.

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MR NAGAN: All right. As far as - - -

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THE DEPUTY PRESIDENT: In relation to standing, what do you want to say in terms of standing?

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MR NAGAN: Yes, I've looked through the Fair Work Act for the definition of an affected person and, unfortunately, I couldn't find one, but I did look at the Oxford, Collins, all the dictionaries, about what an affected person is and the respondent made me an affected person by making a lot of accusations against me during Mr Toma's application. I have listed all those, let's call it allegations made against me, and those decisions did affect me.

PN30

You know, I like to quote the late Princess Dianna: there seem to be three people involved in this application. It got a bit crowded, and the respondent treated me as a shadow applicant where they made all these allegations against me which had nothing to do with Mr Toma's constructive dismissal complaint, like the name of this company had nothing to do with it, but the entire purpose of changing the name was to affect me in another matter that was happening in a civil court.

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THE DEPUTY PRESIDENT: Mr Nagan, an applicant can only bring an application against their employer and that was the issue that the Commission, back in 2018, dealt with, which was what was the correct name of the employer.

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MR NAGAN: Yes. I have brought this application as an affected person. I'm not - - -

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THE DEPUTY PRESIDENT: Were you affected by the name of the employer for Mr Toma?

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MR NAGAN: Yes. In the civil case, the respondent, which is the same respondent there, told that judge that I was responsible for Mr Toma choosing the name and I was in breach of a confidential settlement that I had reached with them for my matter with them in 2017, and they pointed out to the Fair Work

Commission changing the name. So, they used findings of the Fair Work Commission against me in another case and, luckily for me, they had to discontinue that case because there was no evidence of me being involved in February, I think, 2018, but this decision made by the Fair Work Commission, where I was not a party, was used in an application against me - - -

PN35

THE DEPUTY PRESIDENT: Mr Nagan, that doesn't mean that it was wrong. The question that I need - the application, fundamentally, is around an assertion that the change of the name was wrong, was an error.

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MR NAGAN: The change of the name was wrong. That's - - -

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THE DEPUTY PRESIDENT: But why do you have standing to deal with that issue?

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MR NAGAN: Because the entire decision, the reason the respondent used to change the name was to use it against me in another court, which they did. Now, the decision is wrong; I know that; I've seen the evidence. There was a David Lyons, at that stage, who said that all the payslips were in the name of Workforce Recruitment. That is simply not true because, from August 2017, I worked at that place as well. Everybody got payslips Workforce Variable. It did change some time in 2018 - I don't know when - but everybody got payslips. That's the agreement.

PN39

I know that the name was wrong. I had no part in him choosing the name because he just saw it on his payslip and he went 'No', but I did not - I wasn't even around when his employment ceased, but it's definitely the name is wrong. There's no dispute about that, there's - - -

PN40

THE DEPUTY PRESIDENT: Mr Nagan, there's a significant dispute about that. That's the purpose of your application. You're saying that the Commission has got it wrong in at least three decisions and the Federal Court have got it wrong in a number of decisions.

PN41

MR NAGAN: The Federal Court delivered a decision. As I said, I just sat there, I didn't participate in it, except for passing documents. But the name of his employer is Workforce Variable because he got payslips. Now, there's some payslips dated March 2018 in the name of Workforce Recruitment, but his employment ended on 15 February 2018, so that's the only ones I've seen, but, from the time he was employed at that place, he was getting Workforce Variable payslips - for months.

PN42

THE DEPUTY PRESIDENT: All right. Can we just deal with the issue of standing first. Is there anything else you wish to say in relation to why you have standing to make the application you've made?

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MR NAGAN: I have standing because the respondent mentioned me so many times in this case solely for the purpose of using the decisions of the Fair Work Commission against me in another case, so they made me a shadow applicant in this case.

PN44

THE DEPUTY PRESIDENT: All right. Is there anything else you wish to say about standing?

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MR NAGAN: No, just that section 603 deals with people like me, who were not the applicant or respondent but are mentioned in this court case, in this case, and I've been affected by the decisions they've made and I had no say in the Fair Work making its decision.

PN46

THE DEPUTY PRESIDENT: All right, thank you. So in terms of the substantive application then?

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MR NAGAN: Yes. Mr Toma - - -

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THE DEPUTY PRESIDENT: Just a second. The difficulty that you need to really address is why, after now - as I said, multiple decisions of both the Commission and the Federal Court and a number of those decisions have dealt with this complaint specifically - why should I now find that all of those decisions were wrong and that there's an error that requires correcting?

PN49

MR NAGAN: Because there was an error. I mean, people get released from prison after 30 years when information comes to light. Now, section 602 has no limitations on it.

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THE DEPUTY PRESIDENT: What information has now come to light that wasn't before the Commission or the Federal Court?

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MR NAGAN: Well, what Mr Toma didn't know then, and that he knows now, is there is a section of the Act, section 623 of the Fair Work Act - - -

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THE DEPUTY PRESIDENT: But, in terms of the evidence that Mr Toma could provide to both the Commission and the Federal Court, how has that changed in terms of - so, obviously, there was evidence that was put or submissions that were

made about why he said the change of the employer's name was wrong. What new evidence is there now?

PN53

MR NAGAN: Well, Wigney J did find that the name was changed under irregular circumstances, but that the name had no material effect on Mr Toma's application for constructive dismissal.

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THE DEPUTY PRESIDENT: Well, he also said it was open to the Commission, based on the evidence, to make the finding it made.

PN55

MR NAGAN: And he did say that, I think it was Simpson C, appeared to rely on payslips dated March 2018. It's just below when he said that the name was immaterial.

PN56

THE DEPUTY PRESIDENT: But, again, you have had the opportunity to vent this issue in a number of previous proceedings and now, after multiple decisions of both the Commission and the Court have found that that was not an error, what's new?

PN57

MR NAGAN: What's new is that during those proceedings at the Fair Work Commission and at Federal Court, Mr Toma appeared self-represented with the aid of an interpreter. Now, because of this application that I have made and I am able to speak on it, I can better articulate what Mr Toma couldn't then. He did say all this, but I can specifically point to a section in the Fair Work Act that said that Hamberger C made a mistake; he did not familiarise himself with all the information of the case when he took over from Simpson C and he made that error when he allowed the third statement of Ms Vanzwan.

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THE DEPUTY PRESIDENT: (Indistinct.)

PN59

MR NAGAN: It's there. On 7 February 2019, he took - he was appointed to replace Simpson C and he did not fulfil his duties in terms of section 623 of the Fair Work Act.

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THE DEPUTY PRESIDENT: But why is any of that an error as relating to the change of the employer's name?

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MR NAGAN: Because the third statement of Vanzwan, which was submitted on 12 February 2019, was so materially different from the other two that she supplied in 2018, was that it dealt with the name change.

PN62

THE DEPUTY PRESIDENT: Again, this is all material that was known to you or known to Mr Toma. If it wasn't put before any of the relevant members of the Commission or judges in the Federal Court or the Commission, you know, that was the opportunity for that to be done.

PN63

MR NAGAN: Mr Toma did put all these documents before the Full Bench in May 2019 when he lodged his appeal. The Full Bench decided not to look at it because they said there was no public interest in his claim that he was racially discriminated against by - I think it's Hamberger SDP.

PN64

Now, all these documents have been before the Fair Work Commission. It is not Mr Toma's fault that the Fair Work Commission, the Full Bench, decided that it was not in the public interest to look at his claims and then they denied his appeal, and then they went on to quote from a transcript that they were told was incorrect.

PN65

Now, yes, there has been some time, but you must realise that you had an unrepresented applicant with English as a second language up against a \$6000 a day worth of legal team, so the Commission has to appreciate that. Now, I spoke to the former President, Iain Ross, on this matter and I had a chance to email the current President - he was the Vice President then - Adam Hatcher - and both said that the appeal will deal with Mr Toma's complaint against Hamberger, and the appeal just didn't deal with it.

PN66

So, yes, there's a lot changed, but, every now and then, information comes up that, you know, you get to look at things, you get more educated on things, and Mr Toma, with all his limitations, has tried to understand the Fair Work Act and why these decisions are made, and the reason I decided to lodge this application is because the respondent is still using that against me in my life, so I'll be affected by this, looks like, for as long as they want to affect my life, so I needed that record changed.

PN67

I had nothing to do, as they allege in that October 2018 mention and in their outlines of submission - I am not responsible for Mr Toma using the name Workforce Variable. I didn't even know Mr Toma during his employment.

PN68

So, on their submissions, accusing me, although I wasn't there, of being the reason why Mr Toma chose Workforce Variable, that's just a blatant lie, and it's backed up by the evidence of the payslips that Mr Toma has given the Fair Work Commission. It's always been there. So, I'm still an affected person because they keep affecting me.

PN69

In terms of 633, I have no idea about 633, but, you know, Mr Toma found it in the thing. I went and read up on it and said, yes, I wish that he knew in 2019, or could afford a representative in 2019 that could have told him, 'Hey, just tell the

Fair Work Commission in terms of 623, Hamberger C made a mistake.' But he knows now, and - - -

PN70

THE DEPUTY PRESIDENT: Mr Nagan, the fundamental decision in relation to Mr Toma's employment was that he resigned, he was not dismissed. Even if there was an error, it doesn't change the outcome in any way whatsoever.

PN71

MR NAGAN: The fundamental error that Hamberger C made was when he allowed Vanzwan to put in a third statement on 12 February 2019, two weeks before the hearing, which was not allowed in terms of the directions given by Simpson C on 31 October 2018.

PN72

Now, the issue was constructive dismissal. Mr Toma has always said, 'Yes, I sent the text message.' He has never denied that. But, he said, 'The reason why I sent the text message was because they were forcing me to do unsafe work' and - - -

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THE DEPUTY PRESIDENT: Mr Nagan, the change of the name, which is the application that is being made now, will not affect that outcome at all.

PN74

MR NAGAN: The application that Mr Toma has made - sorry, are you just dealing with my application at the moment?

PN75

THE DEPUTY PRESIDENT: Well, your application, or his, they both seek the same outcome, which is to correct an error as to the respondent's name, but, even if I was to say that there was an error, that changes nothing in terms of the outcome of the application. There was still a finding that he resigned, and whether he resigned from Workforce Recruitment and Labour Services or Workforce Variable or Workforce International, or anything else - - -

PN76

MR NAGAN: Well, according to Simpson C, the name is critical to this application because, according to Simpson C - and it's in the transcript - if the name of the respondent is incorrect, the order cannot be enforced. Simpson C said that about, I think, four or five pages into the transcript. He says if the name of the respondent is incorrect, the order or decisions that arise from this thing cannot be enforced. He said that.

PN77

When David Lyons was asking for the name to be changed, he did say that - it's in the transcript - so we're stuck with an order in favour of Workforce Recruitment and Labour Services, I think, that cannot be enforced because the name is incorrect, and the circumstances under which the name was changed was because the respondent lied to Simpson C.

PN78

Payslips don't lie. The payslips were generated by the respondent. Ms Vanzwan, in her statement - the third one - says, 'I had access to all records of all employees', yet she lies in her statement that he worked at all material times for Workforce Recruitment. So, the issue at hand here is we have an order that cannot be enforced, according to Simpson C, because the name of the respondent is incorrect.

PN79

THE DEPUTY PRESIDENT: Is there anything further you wish to say, Mr Nagan?

PN80

MR NAGAN: No, only the other thing that Mr Toma brought up was the section 638 and the error and then the error by the appeal bench when they - - -

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THE DEPUTY PRESIDENT: No, your application was very specific and we are not extending past that. Your application is to correct an obvious error, which was the change of the name of the respondent.

PN82

MR NAGAN: Yes, and so, next week, Mr Toma can bring an application regarding 623?

PN83

THE DEPUTY PRESIDENT: Well, that's a matter for you. I'm not going to say anything about that.

PN84

MR NAGAN: Yes.

PN85

THE DEPUTY PRESIDENT: So is there anything further you wish to say in relation to the application that I have?

PN86

MR NAGAN: No.

PN87

THE DEPUTY PRESIDENT: All right. Mr Slater, I will hear from you after we have finished with both of the applicants; okay?

PN88

MR SLATER: That's fine, Deputy Commissioner.

PN89

THE DEPUTY PRESIDENT: Okay. Mr Toma, in terms of your application to amend the name, do you want to say anything in addition to the submissions you have made? Do you want to rely on the submissions that Mr Nagan has made or do you want to make your own submissions? It's a matter for you now.

PN90

MR TOMA: I agree what Mr Nagan say about his application because the whole 2018, it's between the Workforce and Mr Nagan (indistinct) on the top of me. So, the whole truth he knows because he was with me the whole time in the court and everything, so he understand, and he is one of my witness, prime witness of my case and my application. So, the whole thing that he's talking about, that's the truth, that's the truth where we're starting from, and allow the first day (indistinct), that's where all the other view, fake statement come in. That's all the lies start come in.

PN91

If you ask me why I said this, and then it's a big pressure to me because they send me back to where I was injury, and I never (audio malfunction) and when the first statement come, they said I was still working with them. So that's the lie, that's the lie, that's not true. I seen this one that when they sent the email 6th of February, and they said I was still working on February, March, April and May, and that's why they paid back the whole lot because they soon find out they are lying.

PN92

THE DEPUTY PRESIDENT: Mr Toma, I am dealing with one issue very specifically, and we clarified this at the beginning.

PN93

MR TOMA: Yes.

PN94

THE DEPUTY PRESIDENT: The issue that I'm dealing with is whether there was an obvious error. This is an application that's been made under section 602 to say that there was an obvious error, which was the changing of the respondent's name. That's the application, that's what you've got in your application and that's what I'm dealing with, and we clarified that at the beginning.

PN95

MR TOMA: Yes.

PN96

THE DEPUTY PRESIDENT: So do you want to say anything else about that matter?

PN97

MR TOMA: That's all I say. I already send it in. That's - I stay relies on that, that's the true one.

PN98

THE DEPUTY PRESIDENT: All right, thank you.

PN99

Mr Slater, I have read your submissions; I don't need you to repeat them. Is there anything you want to add or highlight or say?

PN100

MR SLATER: I only have two issues, your Honour. One of the issues is in relation to Mr Toma's credibility and particularly in relation to his explanation in relation to the various documents. That's been addressed in relation to the decision of Hamberger. It's been looked at by the Full Court and a Full Bench, it's also been looked at by Wigney and also by the Full Court.

PN101

The other issue is Lisa Vanzwan has not been declared that she is a liar. She was actually found to be a witness of truth and, at the end of the day, I find that submission quite unhelpful and there's simply not a basis of any evidence.

PN102

The issue here, your Honour, is really simple. This is an unfair dismissal case between an employer and an employee. Mr Nagan has no standing whatsoever. The application to amend this has been heard by eight judges on four separate occasions and, on each of those occasions, this matter has been dealt with. We've got the right party. If there's any further evidence, Mr Toma has been given ample opportunity to provide that evidence. It's just simply not the case.

PN103

This issue, for us, is that there has to be some form of finality of decision, and we believe that, at the end of the day, this matter has progressed to a Full Court hearing in the Federal Court and again that application was dismissed.

PN104

We have nothing further to say that isn't addressed in the detailed submissions, but I would also like to clarify that this appears to be an application under section 602, albeit with reference to affected person, which is in relation to 603, and my submissions have tried to deal with both section 602 and 603 to assist the Commission.

PN105

THE DEPUTY PRESIDENT: Thank you, Mr Slater. Mr Nagan or Mr Toma, is there anything you wish to say in reply?

PN106

MR NAGAN: Yes, I have something to say. I have just pulled up Mr Toma's application and it specifically asks for a hearing to deal with the compelling evidence that the witness deceived the Commission. So, this is not narrowly on just the name - I'm reading Mr Toma's - - -

PN107

THE DEPUTY PRESIDENT: What section of the Act allows me to do that, Mr Nagan?

PN108

MR NAGAN: Well, section 602 of the Act asks you to deal with obvious errors, and the obvious error relates to the third statement of Lisa Jacqueline Vanzwan.

PN109

MR SLATER: Where's that?

PN110

MR NAGAN: It's in - I'm reading it now, so it's page 4 of 6.

PN111

MR SLATER: In terms of a medical certificate.

PN112

MR NAGAN: So page 4 of 6 and page 5 of 6, Mr Toma has listed six things that he wants the Commission to look at in terms of his application, and I apologise for not reading it earlier, but he clearly has six things and one of them is hold a hearing to discuss the witness. Basically, it's misleading - false and misleading allegations, and regarding his constructive dismissal, so he's clearly set out different things than I've set out. I've just concentrated on the name because it affected me, but he has a much broader application and he lists six things.

PN113

So Mr Slater can say that Hamberger said that Vanzwan was honest, but the complaint against Hamberger was that he racially discriminated against Mr Toma, so that was a tainted opinion.

PN114

Secondly, both Adam Hatcher and Iain Ross said that Mr Toma's complaint against Hamberger would be dealt with by the Full Bench, and I'm just reading here. I think you were part of that Full Bench, which is Hunt, Catanzariti and Dean, so I'm assuming that you were part of that Full Bench, which I didn't know before. The Full Bench decided not to deal with Mr Toma's complaint - - -

PN115

MR SLATER: Medical certificate.

PN116

MR NAGAN: - - - which was contrary to what Iain Ross and Adam Hatcher said, so that complaint was never looked into. So, yes, Mr Slater is correct in saying that Hamberger - - -

PN117

THE DEPUTY PRESIDENT: There's a difference, though, Mr Nagan, between a complaint that you wish to make and an appeal of a decision on the basis that the decision's wrong.

PN118

MR NAGAN: And one of the grounds for the appeal in 2019 was that Hamberger racially discriminated against Toma - - -

PN119

MR TOMA: Yes.

PN120

MR NAGAN: - - - when he allowed the third statement to stand, and then in his judgment. So that complaint - and I remember speaking to the legal director, Kate Scarlett, who also confirmed that the complaint was never dealt with, but I digress

there. But Mr Slater is correct, Hamberger did say that Vanzwan was an honest and reliable witness. I don't disagree with that. Though one thing that Mr Toma has also said that's never been dealt with by the Fair Work Commission, which is a contravention of section 581A - I think Adam Hatcher has got that notice in his inbox in recent days - was that Hamberger was a racist, he racially discriminated against Toma. So that's never been dealt with by the Fair Work Commission and apparently the appeals process - - -

PN121

THE DEPUTY PRESIDENT: Mr Nagan, don't make those allegations to me. I've got one matter to deal with.

PN122

MR NAGAN: Well, you've got more than one matter to deal with. As I said, Mr Toma's application deals with six matters. There are six points in it. Mine only deals with one because that affected me and that's what I'm here for.

PN123

THE DEPUTY PRESIDENT: There's four in terms of the relief sought, not six. I don't know what you're looking at.

PN124

MR NAGAN: The six points on his - - -

PN125

THE DEPUTY PRESIDENT: I'm looking at his application now.

PN126

MR NAGAN: Well, I just counted six things there, six points that he made. One, two, three, four, five, six, yes. It's point number 2, 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6. So maybe there's only four things in that six, but I just saw one, two, three, four, five, six.

PN127

MR TOMA: (Indistinct.)

PN128

THE DEPUTY PRESIDENT: Is there anything else anybody wishes to say in response to Mr Slater's submissions?

PN129

MR NAGAN: Well, Mr Slater is incorrect.

PN130

MR TOMA: He's not a lawyer.

PN131

MR NAGAN: And if he's talking about credibility, Burley J removed that man from his court because he lied to Burley J that he was a lawyer.

PN132

MR TOMA: Yes.

PN133

MR NAGAN: So, Mr Slater can try and deny it. He was - - -

PN134

THE DEPUTY PRESIDENT: Mr Nagan, I need you to focus on the matters that I need to deal with, please.

PN135

MR NAGAN: Yes. He just brought up credibility.

PN136

MR TOMA: Yes.

PN137

MR NAGAN: Talk about his credibility and what he - he made the submission.

PN138

THE DEPUTY PRESIDENT: It's about the parties. What else is there?

PN139

MR NAGAN: He brought up credibility, he brought up credibility.

PN140

MR TOMA: He's a liar.

PN141

THE DEPUTY PRESIDENT: In relation to one witness, and he was referencing something that the Commission found.

PN142

MR TOMA: (Indistinct) liar.

PN143

MR NAGAN: Well, if he's going to rely on credibility, he made the submission on behalf of the respondent. He says that - - -

PN144

THE DEPUTY PRESIDENT: I heard what you said in that regard. Is there anything else you wish to say?

PN145

MR NAGAN: No.

PN146

MR SLATER: No, thank you.

PN147

THE DEPUTY PRESIDENT: All right. On that basis, the hearing is concluded. I will consider the matters that are before me and a decision will be issued in due course.

PN148

Thank you all. Good morning.

ADJOURNED INDEFINITELY

[10.34 AM]