TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT EASTON
DEPUTY PRESIDENT ROBERTS

C2023/2675

s.604 - Appeal of decisions

Appeal by Noble
(C2023/2675)

Brisbane

10.00 AM, TUESDAY, 18 JULY 2023

PN1

VICE PRESIDENT ASBURY: Good morning, parties. Could I just start by taking the appearances?

PN2

For the appellant?

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MR WRIGHT: Good morning, Vice President, Wright, initial A, for the appellant. Also, she's obviously here with her mother.

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VICE PRESIDENT ASBURY: And you're seeking permission, Mr Wright?

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MR WRIGHT: Yes, thank you, Vice President.

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VICE PRESIDENT ASBURY: Thanks.

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And for the respondent?

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MS HENNING: Henning, initial K.

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VICE PRESIDENT ASBURY: And do you have any position in relation to appellant being legally represented, Ms Henning?

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MS HENNING: No.

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VICE PRESIDENT ASBURY: All right.

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Well, on the basis that the appeal raises some matters of complexity and it would allow it to be dealt with more efficiently, we grant permission for the appellant to be legally represented.

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So the matter's been listed for hearing in relation to permission to appeal and the merits of the appeal. We've received the submissions of the parties so perhaps, Mr Wright, you might like to speak to your submissions and tell us what you have to say in relation to those matters.

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MR WRIGHT: Thank you, Vice President. We do intent to rely on the outline, but there's probably just a couple of points that I want to highlight. The first issue, I suppose, relates to, essentially, two matters that the Deputy President needed to

take into account at first instance. The first issue relating to the termination of employment on 12 December, which was by way of the written resignation.

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But the second issue that the Deputy President had to take into account, which was clearly articulated at first instance, related to the notice period. And indeed, whether or not anything turned on the employer requiring the appellant, or the employee as she then was, to work out her notice period with no guarantee that she wouldn't be running into, on either a regular basis or in part, during her working day, with the, what we'll call, the perpetrator, the person that was bullying her.

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And that issue, Vice President, and Full Bench, was never taken into account by the learned Deputy President. He didn't factor that issue into account and we say he erred as a result of not doing that. And just so that I can be clear, the issues there related quite specifically to agreed facts. And the agreed facts were that the employee at the time did, we accept, tender her resignation. And after that, she also agreed that she would work out her notice period so long as she was provided with a safe workplace.

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And that was articulated at first instance, but certainly, it was never - that hasn't made its way to the decision.

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VICE PRESIDENT ASBURY: Mr Wright, what do you say are the implications of this alleged failure to consider the resignation and the notice period? What do you say the error was that flowed from that?

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MR WRIGHT: Vice President, I would say, and I made these submissions, again, at first instance. I think it's twofold. I think first and foremost it is an entitlement that would otherwise be given to any other employee in Australia, which is also articulated under the National Employment Standards, a requirement to be given notice or payment in-lieu of notice.

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So I think - well, my submissions are that she missed out, that the employee missed out on that, their entitlement, that minimum entitlement. But I think second to that, Vice President, having a read of the Deputy President's decision, and obviously, considering some of the issues raised in the matter of Skeen, I would also say that the apology letter that you may have read about in the original decision wasn't provided on 12 December, when it was agreed by the respondent that it would have been provided by her next work day.

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And so it isn't a clear-cut case whereby - and the Deputy President correctly alluded to all of this, it isn't a clear-cut case whereby the 8th the appellant went back to work and then was provided with the apology letter which may have

assisted, we don't know that, but then potentially, the employment relationship could have been restored, we don't know, we don't know.

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So I guess, first and foremost, at its bare minimum, there was an entitlement, a statutory entitlement to notice. It wasn't given either to work out the notice for a payment in-lieu of that, and second to that, which we don't say is a stretch based upon what the Deputy President found in the decision, is that there could have been a restoration of the relationship, differentiating from the contract. And so the employment relationship could have potentially continued.

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VICE PRESIDENT ASBURY: But Mr Wright, is that open on the evidence? Because my recollection is that the appellant's evidence was that the other party would never change no matter what happened. You can mediate, you can do whatever you like, but the other party won't change her behaviour.

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MR WRIGHT: Yes, look, certainly, Vice President. I guess what I'm looking at is the - I'm looking at what the learned Deputy President has provided in his decision. The Deputy President in his decision said that this letter, this apology letter, or a letter of apology as I think it was phrased, could have made the difference by providing some sort of comfort to the appellant, going forward, about at least feeling, you know, at least knowing that the perpetrator in this case had accepted she had done something wrong.

PN25

But Vice President, I can't say to you that that would definitely have occurred. But I do think on the evidence it was open, and indeed the Deputy President even considered it and suggested that had this apology letter been given prior to the end of the employment relationship, that could have made a difference. And indeed, one other thing, Vice President, was that from the respondent's standpoint, their evidence was that they left the employment open, so they left that employment, whether it's a contract or the relationship, or the position, they left the employment position (indistinct) up until 14 December.

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So two days after, and that is the evidence that was accepted and put. So from the respondent's standpoint, the employment relationship hadn't completely closed on 12 December when the resignation letter was given, nor had it closed entirely when the appellant said that she couldn't work out her notice because she felt sick as a result of potentially having to be exposed again to the perpetrator. So I think that in some way assists the appellant with the facts.

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VICE PRESIDENT ASBURY: So do you say that the fact that the appellant wasn't given the apology letter before her employment ceased is an omission on the part of the respondent, that had the likely effect of bringing about the termination of employment?

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MR WRIGHT: Yes.

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VICE PRESIDENT ASBURY: And with respect to the notice period, do you say that the failure to allow the - or provide an environment for the appellant to work out the notice period was the conduct, or course of conduct, that ended the employment relationship?

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MR WRIGHT: Yes. And I've said that it's twofold, Vice President. I think what needed to be considered by the learned Deputy President is whether or not it was a constructive dismissal on 12 December as a result of the action, or inaction, or the omission, from the respondent. Because then after that, on the evidence it's clear to me that the appellant said that she was willing to, and would indeed, work out her notice period.

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All she wanted, the only thing that she wanted, was to make sure that she felt safe in the workplace and the only way that she said to the respondent that she could do that was that if she wouldn't come into contact with, which were the words that were used in the decision, that she wouldn't come into contact with the perpetrator. And that wasn't agreed by the respondent.

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VICE PRESIDENT ASBURY: So do you say that is an alternative basis upon which the appellant was constructively dismissed? Is that- I'm just not - - -

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MR WRIGHT: Yes.

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VICE PRESIDENT ASBURY: Because really, Mr Wright, if you're arguing that the appellant didn't get a notice period that she was entitled to under the NES, then that's not a matter that the Fair Work Commission can deal with. It's a matter for a court.

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MR WRIGHT: Yes.

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VICE PRESIDENT ASBURY: So I'm just not understanding - I just want to make sure I understand the basis upon which you say this resignation notice period is relevant. And are you saying that the employment actually ended when the appellant was not allowed to work out her notice period or were a safe environment to work out her notice period wasn't provided?

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MR WRIGHT: Yes, that's right. So the way that I put it at first instance to the learned Deputy President, he asked specifically the question that you're asking, Vice President, and I responded and I said that, first and foremost, that there is a

letter of resignation. Now, that resignation doesn't terminate the employment contract until it's accepted, which is the simple issue of contract.

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That there was an offer to terminate the employment contract and that was done on the basis that she would work out her notice. And the notice that would have been worked out should have been in accordance with, you know, feeling safe in the workplace. And so then they were my submissions at first instance. Now, it wasn't agreed by the respondent then, on the evidence, that that is what they were willing to do. They said, look, they can't make those adjustments. It's just not feasible, it was coming up to Christmas, and they just weren't able to manoeuvre around sufficiently a workplace whereby there would be complete solace for the appellant.

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So Vice President, getting back to the legal issue, then the legal issue is that there wasn't - there needed to be a consideration in regards to whether or not the offer to terminate the employment contract was accepted. Now, if indeed it was accepted, then the second issue then had to be, well, has there then been a further repudiation of the employment r before it actually ends. Because the employment relationship doesn't end until the notice period ends.

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So you can terminate your - you ask for the termination of the employment contract, it's either accepted or not, but irrespective of that, there still is an obligation to work out the notice period.

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VICE PRESIDENT ASBURY: Not necessarily. It ends when the parties - if there's an acceptance of a resignation on the basis of payment-in-lieu of notice then the employment relationship ends there and then.

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MR WRIGHT: I agree, Vice President. And this didn't occur on that case. There wasn't a suggestion that there would be a payment-in-lieu of notice. Indeed, there was none. And I guess the other issue so far as it relates to the public interest is exactly what you've said, Vice President, about what would technically be an issue of issue estoppel or res judicata, whereby we brought this entire action through an unfair dismissal in the Fair Work Commission on the basis of those two issues.

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Those two issues - - -

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VICE PRESIDENT ASBURY: And you say the second issue wasn't dealt with by the Deputy President?

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Well, Mr Wright, I'm not sure about res judicata, but leaving that aside, if the Deputy President had have accepted the second argument, arguably, the only

remedy that would have flowed from that is that the appellant had given her notice, it had been accepted that she would work out her notice, her employment was ended within the notice period which was, on your view, a termination at the initiative of the employer, and the remedy would have been compensation in the balance of the notice period, wouldn't it?

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MR WRIGHT: I think that's right, Vice President.

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VICE PRESIDENT ASBURY: Well, two weeks pay.

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MR WRIGHT: Well, two weeks pay, to be perfectly frank, Vice President, is quite considerable when you've got no money.

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VICE PRESIDENT ASBURY: I accept that, but I'm just putting to you that the ramifications of accepting your second argument are that the employment ended within the period the appellant was supposed to be working out her notice. And if it's found that that was a dismissal and that it was unfair, then the remedy would be the balance of the notice period. I'm just putting that as a proposition and you can agree or disagree with it.

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MR WRIGHT: Well, my submissions went further than that, Vice President. My submissions outlined what the Deputy President had suggested in his decision, which was that if the letter of apology had been provided, and the only reason it wasn't provided was because the appellant at that point hadn't returned to work, which is what the respondent had said in her evidence.

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If that had been provided, the Deputy President had thought that things might be a bit different, that possibly it could be the case that the relationship, employment relationship, could have been restored. And then there would have been a continuation of that, in which case the Commission would then not just be looking at the notice period but it would also be looking to see how much longer the employment relationship would have lasted to have justified financial remedy.

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VICE PRESIDENT ASBURY: All right. So if we're with you on that argument, Mr Wright, what do you say the disposition of the appeal should be? How should we deal with this appeal, in the event that we accept your arguments?

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MR WRIGHT: I think just twofold, Vice President. I think if you're against me on the issue, the latter issue, that I just raised which relates to the contract of employment being restored, and if you believe that that would have ended after the notice period, then I would have thought it would be satisfactory for the Full Bench to simply make a decision to that effect and it doesn't need to be referred back to the decision maker or to a separate Commissioner, Deputy President(?).

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But if it's the case that you are with me on the latter issue, which is that there could have been - it could have been likely that there could have been a restoration then I think the matter needs to be referred back for that point only.

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VICE PRESIDENT ASBURY: So what you're saying is that the second argument is that had the appellant been allowed to work out her notice period, in a safe environment, she could have been provided with the letter of apology and the whole outcome might have been different. She might have remained in employment.

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MR WRIGHT: That's correct.

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VICE PRESIDENT ASBURY: So if that is what that you say the outcome would have been, is the appellant seeking reinstatement or is she seeking compensation?

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MR WRIGHT: She can't go back there to work now, Vice President, so with hindsight, she's not able to. So she has since put a workers' compensation claim as a result of the bullying that she was subjected to. At first instance when we were before the learned Deputy President, there hadn't been a decision about that. There has since been a decision, in her favour, whereby it was accepted that she suffered an injury at work as a result of what occurred in her employment.

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VICE PRESIDENT ASBURY: And has it been accepted back to the date of the termination taking effect?

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MR WRIGHT: Well, it doesn't get - so there's a period of time that you are, in South Australia, not able to be provided with compensation under the State statutory scheme. So there's the two-week period whereby you don't receive income maintenance under that legislation.

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VICE PRESIDENT ASBURY: So if the matter went back to be redetermined on your first - or on your second argument, that this relationship would have remained in effect, the practical reality is the appellant is unable to work and is receiving workers' compensation.

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MR WRIGHT: She's currently unable to work, Vice President. I don't think she's - she's quite young, so I'm sure she will be able to work in the future, but at present, and from the date that the Deputy President heard this until today, I can tell the Full Bench that she has been unable to work.

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VICE PRESIDENT ASBURY: All right. So she's been in receipt of workers' compensation payments, so what would the remedy - assuming this matter was redetermined, what would the remedy be?

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MR WRIGHT: Well, the remedy would still be - so the notice period would clearly cover the period that she hasn't received workers' compensation. But I don't think - in my respectful submission, Vice President, the State statutory scheme for workers' compensation is the bare minimum, so a little bit like awards under the Commonwealth jurisdiction, where that is the last place that you go to to receive compensation.

PN65

Now, that shouldn't affect an entitlement under this jurisdiction, and indeed, we brought this claim prior to that workers' compensation claim being accepted. So just like a third-party claim, so as an example, Vice President, a worker is injured offsite and they're still working for their employer but they're working offsite at a third party, then they're still covered under workers' compensation by their employer. But they're able to recover from the third party at a later stage.

PN66

Now, there's an obligation that the third party then pay to the corporation that money at first instance. So what I'm saying is, Vice President, if there's an entitlement to compensation here, the fact that there has been money paid through a workers' compensation scheme in this State should not have any bearing on the remedy. Because that would then be - it would be double-dipping.

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VICE PRESIDENT ASBURY: Why not?

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MR WRIGHT: There's no double - - -

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VICE PRESIDENT ASBURY: No, there's no double dipping, but why isn't this Commission entitled to take into account in that - assuming your right, it goes back and there's an assessment that the appellant would have stayed in employment for a particular period, why isn't the Commission entitled to take into account the fact she's receiving workers' compensation payments and deduct those from any award of compensation?

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MR WRIGHT: Well, look, again, my respectful submissions, Vice President, are it's not for the Commission to do that. It's for the corporation to recover any money that's been paid twice as a result of weekly payments. And that is what I mean by the bare minimum safety net that is provided by what is, essentially, levies from employers that go into the scheme that's run by the Government, the State Government, and then distributed to injured workers.

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Now, if there's an issue whereby, under this statutory scheme, there's a termination of the employment that's unfair and there's a remedy, then that remedy, if it bears any financial fruit, should then be paid to the employee, and that employee then needs to advise the corporation of that money and then that money then goes back to the corporation to then refund injured workers in this State.

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VICE PRESIDENT ASBURY: Yes. I understand your submission. Is there anything else you wanted to say?

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MR WRIGHT: The - - -

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DEPUTY PRESIDENT EASTON: Mr Wright, just (indistinct), you mentioned in your submissions just before, and also in written submissions, this notion that Ms Noble, her resignation wasn't effective because it hasn't been accepted. I think that's the short version of your submission. Do you have any authority to back that up?

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MR WRIGHT: Yes. I do, Deputy President. I've got it here.

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DEPUTY PRESIDENT EASTON: And while you're finding that, I'll tell you what I understand the law to be that's fairly uncontroversial for some time. And that is that giving a notice of termination of a contract is the unilateral right but doesn't depend on the acceptance by the other party.

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And there's a particular case in the employment (indistinct) from 1984, Birrell v Australia National Airlines, that makes it pretty clear that, from an employment contract point of view, a person giving notice to resign doesn't require the consent of the employer for that resignation to be effective.

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And Gray J's decision goes on to consider as well whether or not a person can unilaterally withdraw a notice of termination of a contract without the consent of the other party. And it's only in very limited circumstances that that can occur. So what authority were you referring me to?

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MR WRIGHT: Deputy President, I don't necessarily disagree with any of what you've said. I think the operative word there is notice. That a person gives resignation on the basis that they're giving notice to resign. Now, if that isn't accepted, the notice or something else, within the termination letter then I would say that that is very much distinguishable on Birrell.

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DEPUTY PRESIDENT EASTON: Yes. So what we have in this case, it seems, from the Deputy President's decision, at paragraph 77 we have Ms Noble's written resignation. And it says:

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I request you accept this letter as my formal resignation from Smiling Samoyed Brewery.

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And then paragraph 116 in the decision, there's a text message I think it is that says, at the end:

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I think it's best for all to terminate my contract effective immediately.

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So those, as I would understand it, constitutes Ms Noble's giving of a notice that she intends to resign, and then being very specific in the second message about when that resignation's effective. Is there any different evidence about that?

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MR WRIGHT: Yes, thanks, Deputy President. I think with the first section that you mentioned, which is section 77, that letter was actually written on 5 December so she didn't actually tender that resignation until 12 December, she kept it in her back pocket in the hope that things would change.

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DEPUTY PRESIDENT EASTON: Yes.

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MR WRIGHT: And which essentially shows a couple of things, but one really important thing that it shows is that she really wanted the relationship to continue. In any event, it is also important, Deputy President, that it be understood, that was the same letter, she didn't rewrite the letter, that it was the same letter that she used to then resign from her employment.

PN88

As far as 116 is concerned, there was - I think if you look at that in isolation that would certainly suggest, Deputy President, what you're putting to me, which is that she's resigning without notice. It was very clear from the lay evidence, and it wasn't disputed, that there was a clear intention, and indeed, there was clear communication around working out the notice period.

PN89

And it went so far as to discussing what days the notice period could be worked, how it could be worked, and then what the respondent would need to in order to allow that notice period to be worked. And when it was put by the respondent that they couldn't provide a guarantee that when she was working that notice period, that she wouldn't come into contact with the bully. It was at that point that Ms Noble, the appellant, then says she feels sick, she hung up and then,

essentially, I think the respondent had termed that as a frustration of the employment contract.

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They said it was a frustration, or an abandonment, of the employment contract. So there was some additions to that. But as far as the case in Birrell is concerned, Deputy President, I don't necessarily disagree with what's been put, it's just that the operative word was 'notice'. I think that there is a case, and obviously it's not as significant as Birrell, but there was a case called Isabel Nohra v Target Australia Pty Ltd. And it was by Roberts C on 22 October 2010.

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And that was a situation, at paragraph 10 of that decision, where - and if you don't mind I might just read it, it will make it easier than explaining it. And it says:

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Ms Nohra had been through a protracted process with Target concerning the company's wish to transfer her from Bankstown to Rockdale. That proposed transfer was canvassed at length during proceedings, but in my view, there is no need to do so in this decision. In brief, Ms Nohra's letter of resignation shows on its face that she did not intend the employment relationship to end almost immediately but rather, for it to end prospectively on 3 December 2010. Target's action in purporting to accept the resignation but making it immediate was indisputably a termination at the initiative of the employer.

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Now, that obviously read in section 386(1)(a). Now:

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Ms Nohra's resignation letter was highly conditional and may, or may not, have constituted a constructive dismissal. That issue does not matter at this time as Target intervened to actively terminate the employment relationship immediately.

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VICE PRESIDENT ASBURY: But Mr Wright, sorry to interrupt you, but how is the appellant's resignation letter here conditional? It doesn't give notice, it just says:

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I request you accept this letter as my formal resignation.

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And then the respondent's response is, 'Look, the ball's in your court if you want to serve out the notice period or not'. So the respondent's alive to the fact the appellant should have given notice, but it's saying, 'It's up to you, you can serve out the period or not'. This is not a case where the appellant's said, 'I'm resigning my employment and my resignation will take effect two weeks hence.

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She's carried a letter around in her pocket for a week and then presented it, and it's, 'This is my formal resignation'.

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MR WRIGHT: In answer to that question, Vice President, it's (indistinct). She was entitled to receive any entitlement that arises from the employment contact which included her notice period.

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VICE PRESIDENT ASBURY: Well, she's not entitled to receive her notice period if the appellant terminated her employment and didn't give notice. In fact, the employer was entitled to withhold payment to her. So it's not an absolute - you know, we find that there was a resignation, arguably, the appellant had to give the notice and if she didn't, the respondent could have withheld the pay.

PN101

MR WRIGHT: Vice President, with respect, I think I can't see how the evidence - there couldn't be a suggestion that the appellant didn't attempt to work her notice period. She wanted to. She just wanted to be safe when she was doing so. And I mean, there was clear evidence that was put on that point. There wasn't any cross-examination on some ulterior motive, there wasn't any Browne v Dunn that was put.

PN102

So with my standpoint, it's very clear that workers should be entitled to the bare minimum. In this case, (indistinct) notice the relevant award, but it's under the Fair Work Act.

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VICE PRESIDENT ASBURY: I understand. Thank you.

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Deputy President Easton, Deputy President Roberts, do you have any other questions?

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DEPUTY PRESIDENT ROBERTS: Mr Wright, I have a question. AT paragraph 140 of the Deputy President's decision, he says:

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> *It is not contended, and nor do I find, that Ms Noble's employment was terminated at the employer's initiative.*

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Now, given what you've said about the circumstances of the termination, in relation to the notice issue, do you suggest that the Deputy President was wrong about that? Are you suggesting that given the discussion about notice, ultimately, Ms Noble's employment was terminated on the employer's initiative?

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MR WRIGHT: Yes. Look, I think that's right, Deputy President. I think that is correct. So I would say that the Deputy President there, at para 140.

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DEPUTY PRESIDENT ROBERTS: So was that put to the Deputy President as a submission?

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MR WRIGHT: That the employment was terminated at the employer's initiative?

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DEPUTY PRESIDENT ROBERTS: Yes.

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MR WRIGHT: Yes, it was certainly canvassed so far as it related to the notice.

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VICE PRESIDENT ASBURY: So that was an alternative argument. You weren't just relying on the forced resignation, you were relying on an alternative argument, at first instance? That if it didn't terminate because of the resignation, it terminated because of the failure to allow the appellant to work out her notice.

PN114

MR WRIGHT: So Vice President, there was clear discussion in regards to that issue. And that issue was what should he do with the issue of the notice. And I said, 'Well, there needs to be' - and then I went through the point of then explaining that it may well have been the case that there needs to be a finding, one way or the other, either for or against the appellant, about whether the respondent had accepted the resignation as it was or not.

PN115

And if it was found that it was accepted, then, obviously, the other issues, such as that are learned in 140, need to be considered.

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VICE PRESIDENT ASBURY: But in your outline of argument at first instance, Mr Wright, the argument is put that:

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The predominant issue that needs to be considered is whether section 386(1)(b) applies.

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And what Roberts DP was asking is did you put in the alternative - - -

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MR WRIGHT: No.

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VICE PRESIDENT ASBURY: - - - section 386(1)(a)? Because I can't see where you did.

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MR WRIGHT: Not in the outline of submissions. I guess what played out over a day and a half and two days of the hearing was the lay evidence, which was from the respondents and what they had said. And then, I guess - no, the only time that I put that, Vice President, as far as I'm aware, was in my closing submissions, which was then the subject of quite a few questions from the Deputy President.

PN122

VICE PRESIDENT ASBURY: Yes. And so the Deputy President erred by not taking something that was put in your closing submissions into account. Was there evidence about it?

PN123

MR WRIGHT: Yes, there was evidence, Vice President. But there was nothing said. In the decision it's silent on it, so yes, I do believe - - -

PN124

VICE PRESIDENT ASBURY: But the decision might be silent because it was never argued, Mr Wright. That's the issue. This is a different argument than - because your submissions, your written submissions, talk about section 386(1)(b), which is the forced resignation. If you're going to argue that the employer actually terminated the employment by an initiative, which was failing to allow the appellant to work out her notice period, that's section 386(1)(a).

PN125

MR WRIGHT: Vice President, I think, to be perfectly honest, it was in the closings. 386(1)(b) was important, was more important, and I think still is more important. When the notice was rejected on the basis of the conditions that the appellant was asking for, then there needed to obviously be the same consideration, by the Deputy President, for the exact same thing we had been arguing under (1)(b), not under (1)(a).

PN126

But as a result of the argument we were putting under (1)(b) or the second-tier issue, which related to the notice, it did turn, to some extent, on the possibility of an argument being that it was at the hands of the employer. I think what's most important though is that my submissions then, and my submissions now, are - and I think you're again referring back to paragraph 140 that the Deputy President's taken you to, now, I think that was definitely a second-tier issue that was only in our closings.

PN127

The crux of the issue was always about the test associated with the termination and when the contract terminated. And there needed to be the same rigour attached to the Deputy President's finding from when there was a rejection of the respondent refusing, essentially, to provide suitable duties, as much as there was rigour associated with everything leading up to that discussion.

PN128

So I would still put 386(1)(b) as more weight, as far as I'm concerned, based on the evidence than 386(1)(a), though it's a technical point.

PN129

VICE PRESIDENT ASBURY: But the 386(1)(b) deals with the employment ending because of the resignation, but the person being forced to resign. So having no other reasonable option but to resign.

PN130

MR WRIGHT: Yes.

PN131

VICE PRESIDENT ASBURY: That applies to that circumstance, but if you're going to say the person resigned and gave a month's notice, and the employer accepted that, and then it moved to terminate immediately, then 386(1)(a) applies, because that's the employer's initiative, that the employer says, 'Leave now'.

PN132

MR WRIGHT: Yes, look, I understand there's a line of authority on that, Vice President. I think my argument, my predominant argument was then, as it is now, 386(1)(b). And again, the flipside to what we're talking about, Vice President, would be a situation whereby there was an agreement to work out the notice period by the appellant and the respondent, and then the appellant, let's say as an example, stole some money, and as a result of the theft, then there was a serious (indistinct) misconduct that then the employment contract comes to an end forthwith.

PN133

There's no obligation to then, for the respondent, to then continue to pay any further money, either in salary or in-lieu of that, as a result of that conduct.

PN134

VICE PRESIDENT ASBURY: Only if the employer dismissed the employee within the notice period. The fact that the employee steals money in the notice period, while they're working out their notice period, doesn't of itself bring the contract to an end. It would be the employer dismissing, taking some action to dismiss the person.

PN135

MR WRIGHT: Yes. My point being, Vice President, that there would then be a reason to terminate the employment contract forthwith. It's not the, from a legal standpoint, that then ends it, but it is a reason to end it.

PN136

VICE PRESIDENT ASBURY: Yes. Thanks.

PN137

DEPUTY PRESIDENT EASTON: So just to be clear, Mr Wright, the sequence of events relevant to this particular submission that you're making seems to be Ms Noble told Ms Henning that she was resigning, then gave her the written resignation letter. Ms Henning then sends a message, which is paragraph 115, about not accommodating Ms Noble's conditions to working out the notice period, and then Ms Noble sends her message at 116 that the employment's finishing immediately.

PN138

So the conduct is said to be the termination of the employment at the initiative of the employer is the email from Ms Henning at paragraph 115, not agreeing to Ms Noble's terms for how the notice period's to play out. Is that the conduct that is the action of the employer that it initiates the dismissal?

PN139

MR WRIGHT: Yes, Deputy President. The question really should have been, what option then was available to the appellant. If she's been told to go to work with a person that she feels is going to injure her forever, then what other option did she have but to simply say to the respondent, 'Well, I've got to leave, I can't - I feel sick', which is what she said, 'I'm leaving'. And then she didn't come back.

PN140

DEPUTY PRESIDENT EASTON: Well, wouldn't the action that initiates the dismissal in that situation be Ms Noble's email that says, 'I'm finishing immediately because you're not agreeing to my conditions for working out the notice period'?

PN141

MR WRIGHT: I think that's probably right, Deputy President.

PN142

DEPUTY PRESIDENT EASTON: Which doesn't engaged 386(1)(a) anyway.

PN143

MR WRIGHT: I think that's probably right. I think it was the second-tier argument, the (1)(a) argument, Deputy President, was really - it was probably more an academic argument whereby you would look at, well, is that then, technically speaking, at the behest of the respondent because of the chronology of events or is it not. But again, from a practical standpoint, it makes more sense that (1)(b) applies in that case, and that's why I said the test need to be provided with as much rigour there as it did with the events leading up to receiving that email.

PN144

DEPUTY PRESIDENT EASTON: And were you planning to address us, Mr Wright, on the proposition that there should be a subjective assessment rather than objective? And yes, were you planning to address us on that?

PN145

MR WRIGHT: Yes, Deputy President. I think, certainly, the objective test has been discussed, originally in Mohazab, and the objective test really is for the Commission to determine whether or not the action, or inaction, of an employer could reasonably be seen to bring about an end to the employment contract. The objectivity, from my standpoint, stops at that point and indeed, there's findings by the Deputy President, and I can take you to those findings, where he says quite clearly that - I'll just go to paragraph 167, where it says:

PN146

The employers handling of the incident was reasonably founded such that it denied a real or effective choice but to resign.

PN147

And those words are actually repeated I believe later on at paragraph 178 where he finds to a material degree that:

PN148

(The inadequacy of a first verbal warning and the lack of advice about the apology but not the failure to end Ms Galvin's employment) Smiling Samoyed's conduct in taking the action it did against Ms Galvin weighs in favour of a finding that Ms Noble's loss of trust and confidence in the employer's handing of the incident was reasonably founded such that it denied her a real or effective choice but to resign.

PN149

And so my submissions there was, from what I could see, we've achieved what we'd set out to do which was - there's a finding on the Evans, there's a decision made by the Deputy President that she didn't have any other choice. That he had heard from Ms Noble and he said, very clearly, to a material degree he finds that she didn't have any other choice but to resign, and so the object (indistinct) in Mohazab only goes so far as that.

PN150

The question then, after, is the Deputy President asking himself, 'Well, is there any other option available to her?' And we don't say that's simply an objective test, that you can't just really - a string of other things that she could have done as an alternative to the resignation. If there wasn't a finding such as in 178 and 167, and I think in another paragraph, then I think I would be in a far tougher presumption of innocence. I don't think I could be making these submissions.

PN151

But because we've got that finding, we've already garnered that ground. I don't think then we need to be subjected to further tests after that to then show that there wasn't any other reasonable option, if indeed there's already been a frustration.

PN152

DEPUTY PRESIDENT EASTON: I suspect that you're putting too high a weight on paragraph 178 because you can't read at paragraph 178 without also reading paragraph 204.

PN153

MR WRIGHT: I mean, again, my submissions there are is that it's contradictory. It would appear that the Deputy President has said one thing and then suggested another later on. And it's not that he's done it once, and we're not talking about a language issue, and sometimes, you know, on appeals, we're talking about specific language and it's simply just a, you know, a (indistinct) language, which I think we've discussed in the past. This is an ongoing - this is clear - we can see very clearly what the thought processes of the Deputy President, and he mentions it I think on three occasions. I've referred to two, I think there's another one.

PN154

VICE PRESIDENT ASBURY: Two presidents weighing up the various events. That's what he's doing.

PN155

DEPUTY PRESIDENT EASTON: Here's how I'm reading it at the moment but you can tell me if this is wrong. Paragraph 160 and 161, Deputy President turns to consider:

PN156

Whether the employer's conduct was a course of conduct that forced Ms Noble's resignation in the sense of her being denied a real and effective choice but to resign.

PN157

Paragraph 160. He then lists the employer's conduct that he considers in the next paragraph, in paragraph 161, he lists those different aspects of the employer's conduct. And then he assessed them. And one of those aspects of the employer's conduct that he assesses is the measures concerning Ms Galvin, that starts at paragraph 168, and concludes at paragraph 178, that that factor points in a certain direction.

PN158

Now, that's not a finding as I read the Deputy President's decision. That's not a finding that the employer's course of conduct left the applicant with no reasonable option but to resign. He found that that element of a number of elements that he considered points a certain way. And then in paragraph 204, after considering all of those elements, he says, 'Well, one and a half elements point a certain way, the rest of the elements point a different way':

PN159

Overall, I do not find that Ms Noble had no real or effective choice but to resign.

PN160

Isn't that, effectively, the Deputy President, you know, doing the task that the legislation requires him to do?

PN161

MR WRIGHT: But my submissions, Deputy President, and I know it's contradictory, and it's very clear that it's contradictory. He said that she had, in 178, no real or effective choice but to resign. And like you say, Deputy President, at 204, he then suggests that she had alternatives - - -

PN162

DEPUTY PRESIDENT EASTON: But he doesn't find that in 178. He says that's an element that points a certain way. He doesn't find that that particular conduct was conduct that left the applicant with no option but to resign.

PN163

MR WRIGHT: Deputy President, I would have to respectfully disagree. He mentions the words, 'I conclude to a material degree'.

PN164

DEPUTY PRESIDENT EASTON: Yes.

PN165

MR WRIGHT: Now, the material degree has to be based upon his weighing of the evidence. And the weighing of the evidence would then be specifically in relation to the test, and the test would have to be the test outlined in the hazard.

PN166

DEPUTY PRESIDENT EASTON: Finds that it points - weighs in a favour.

PN167

MR WRIGHT: Well, on the balance of probabilities, presumably, 'to a material degree' would be, I think, what the Deputy President, in my respectful submission, is saying in that situation, which is all we need to establish.

PN168

DEPUTY PRESIDENT EASTON: Yes. But he only finds that it 'weighs in favour of a finding that'. But that's the words he uses in paragraph 178. That that conduct weighs in favour of a finding. And then he finds that other conduct weighs against the finding of those. And he puts it all together at paragraph 204 and 205 and considers each of the elements as a collective and makes a conclusion.

PN169

MR WRIGHT: Paragraph 167, Deputy President, he also does mention that the - I think that's where you're saying:

PN170

Impact on her weighed in favour of a finding that Ms Noble's loss of trust and confidence in the employer's handling of the incident was reasonably founded.

PN171

So I think that that is his finding. He's made that finding and then he further qualifies that at 178 where he says that she's got:

PN172

No real of effective choice but to resign.

PN173

But look, they're my submissions, Deputy President. I respectfully accept what you're saying. I do want to also say though, that was only considered so far as it related to the first limb of the issue, and the second issue was that was there a real or effective choice other than resignation, after the respondent said that Ms Noble needed to then work with, or couldn't guarantee that she wouldn't run into the perpetrator during the notice period.

PN174

And that wasn't set out by the Deputy President at that point.

PN175

DEPUTY PRESIDENT EASTON: Mr Wright, are there any authorities that you can point us to in relation to the question of whether the test is an objective one or, as you put it in paragraph 10 of your outline:

PN176

There must also be consideration for the state of mind of the worker.

PN177

MR WRIGHT: Deputy President, I totally rely specifically on the case of O'Meara v Stanley Works Pty Ltd. I think there's a few cases that touch on it but essentially, at paragraph 23 of O'Meara, and this only in part answers your question, Deputy President, so I apologise if this isn't fulsome, but it states there at probably the last sentence, at the last part of the sentence, and it's referring to Mohazab, that it says:

PN178

In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result -

PN179

- but then importantly, and this is what I want to importantly say, the emphasis being on 'or', so there's two limbs:

PN180

- or that the appellant had no effective or real choice but to resign.

PN181

Which was the exact words that the Deputy President used in the paragraphs that I've taken the Bench to.

PN182

DEPUTY PRESIDENT EASTON: But that's not implying a subjective test.

PN183

MR WRIGHT: It's not. It's not. It's outlining what the objective analysis should be. The objective analysis should be at the conduct of the employer, and then whether or not the wheels were set in motion such that the employment contract came to an end as a consequence of a constructive dismissal or not. But we don't say then there's another test that attaches to - we don't say that there's another objective test. We say that the test should simply be - (indistinct) - look, I guess the answer is, Deputy President, I can't point you to any cases specifically in relation to that.

PN184

I can only say that constructive dismissal is a common law - it originates from common law. The Eggshell Skull principle, which is, I guess, a test or a principle that accepts that not everyone is the same. And indeed, when we're looking at these types of matters, there needs to be an element of subjectivity about the employee, or the person that we're dealing with, and whether or not in their mind,

at that time, based upon what they thought, on their evidence, it was reasonable or not to terminate their employment because they felt they had no other option but to do so.

PN185

And in Ms Noble's case it was clear that the respondent was well aware of previous mental health issues, that that was well discussed. Where there was even a period of time where there was a short detention in a mental health institution. And all of these things should not simply be overlooked and an objective test throws a blanket for them determining whether there was some other technical option that was available. It should be - in my submissions, it should be like that. It originates from the common law.

PN186

DEPUTY PRESIDENT EASTON: But in the relatively recent decision of the Full Bench in Bupa Aged Care v Tavassoli, and I arranged for a copy of that to be provided a little while ago - - -

PN187

MR WRIGHT: Thanks, Deputy President.

PN188

DEPUTY PRESIDENT EASTON: - - - the Full Bench, at paragraph 45, cites a decision from Rares J which makes it pretty clear that at least the Full Bench was accepting the proposition that

PN189

The question of whether a resignation given does not depend on the parties as subjective intentions or understanding?

PN190

That's about 45. Are you, in effect, asking us to come to a conclusion contrary to that?

PN191

MR WRIGHT: No, I don't think a reasonable person test, Deputy President, from my understanding, isn't entirely objective. There's still an element of subjectivity within the reasonable person test. So I don't think this (indistinct) been - with due respect, I don't think this (indistinct) my submissions so far as the subjectivity of the test. I think, objectively, my hazard is clear, that the objective elements would be there so far as it relates to the conduct of the employer.

PN192

But the reasonable person test is a test that isn't entirely based on objective standards.

PN193

DEPUTY PRESIDENT EASTON: Thank you.

PN194

VICE PRESIDENT ASBURY: Submissions, Mr Wright?

PN195

MR WRIGHT: Unless there's anything further from the Bench, no, I've got not further submissions.

PN196

VICE PRESIDENT ASBURY: Any other questions from other members of the Bench? Thank you.

PN197

Thank you. Ms Henning, we've read your submissions. Do you wish to speak to those and add anything, or elaborate on anything?

PN198

MS HENNING: I'm happy to take any questions about - in relation to Mr Wright's submissions, I've just got a few notes. A lot of them have picked up by your Honour's - in your questions as well. If there is a contract issue about when the contract terminated, which I understand that the case law is that it can be unilateral, we would say that it terminated at the time that she said it was terminating, 'effective immediately', not as Mr Wright said on the Wednesday.

PN199

Mr Wright's submission was that if an apology had been given there could have been different circumstances. Hypothetical, what might have happened if something else happened, isn't really relevant. The finding was that she had choices other than resigning when she did resign, so that's the important point, not hypothetical things that might have happened.

PN200

Your Honours have, we would say, correctly said that the notice period was for the employer and the employer was entitled to accept a written resignation from the appellant. Mr Wright said that there wasn't - or that there was an argument that the termination was at the initiative of the employer. Paragraph 150 of the Deputy President's decision finds that the employer did not want Ms Noble to resign, so that finding is at odds with the submission that the termination was at the initiative of the employer.

PN201

And in terms of not agreeing to the terms of the notice period, we would say that the same options were available to the appellant at that time as were available to her at the time of her resignation. So she could have asked to take leave, and there were a number of other options that the Deputy President referred to. Those options were still available for her at the time that she said she wanted to terminate her employment immediately. So she did have choices at that time as well.

PN202

We say, yes, the Deputy President weighed up the different aspects and some weighed in favour of a finding that she had no choice, but overall, he found that she did have choices. And that's the relevant one. I think that's everything, unless you have any questions for me.

PN203

VICE PRESIDENT ASBURY: Not from me.

PN204

DEPUTY PRESIDENT EASTON: No.

PN205

VICE PRESIDENT ASBURY: No.

PN206

Thank you, Ms Henning.

PN207

MS HENNING: Thank you.

PN208

VICE PRESIDENT ASBURY: Anything in reply, Mr Wright?

PN209

MR WRIGHT: No, thank you, Vice President.

PN210

VICE PRESIDENT ASBURY: Well, thank you to the parties for your submissions. We will reserve our decision and issue it in due course. And we will adjourn. Good morning.

PN211

MR WRIGHT: Good morning, thank you.

PN212

MS HENNING: Thank you.

ADJOURNED TO A DATE TO BE FIXED [11.13 AM]