TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT GRAYSON

C2023/6965

s.604 - Appeal of decisions

Appeal by Coogee Legion Ex-Service Club Ltd
(C2023/6965)

Sydney

10.09 AM, MONDAY, 12 FEBRUARY 2024

PN1

DEPUTY PRESIDENT CLANCY: Good morning. I'll just confirm appearances, please. For the appellant, Mr Wells, the Clubs New South Wales seeks permission?

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MR J WELLS: Yes, your Honour.

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DEPUTY PRESIDENT CLANCY: Yes, all right. Thank you. And Ms Giblin, good morning.

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MS D GIBLIN: Yes, good morning.

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DEPUTY PRESIDENT CLANCY: Thank you. Mr Wells, do you want to say anything in addition to what's been put in terms of permission?

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MR WELLS: No, your Honour. We are content for those matters to be considered.

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DEPUTY PRESIDENT CLANCY: Thank you. Ms Giblin, are you across the issues about the parties seeking to represented in matters before the Fair Work Commission?

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MS GIBLIN: Yes, your Honour.

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DEPUTY PRESIDENT CLANCY: All right. Do you have any comments about the application that was made by the Coogee Legion Ex-Service Club to be represented today?

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MS GIBLIN: No problems, your Honour.

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DEPUTY PRESIDENT CLANCY: All right, thank you. The members of the Full Bench have conferred on the question of permission and we are of the view that it's appropriate in this appeal for permission to be granted to the appellant to be legally represented. We are of the view that the matters raised by the appeal are of sufficient complexity such that it would be more efficient for the matter to be dealt with if the appellant was legally represented. Thank you.

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MR WELLS: Thank you, your Honour.

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DEPUTY PRESIDENT CLANCY: Now are there any housekeeping matters before we - - -

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MR WELLS: Your Honour, the only one from our point of view is the question of the video.

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DEPUTY PRESIDENT CLANCY: Yes.

PN16

MR WELLS: If it can't be played that won't be fatal to us but it might be helpful if it can be played. I'm quite sure it's only about a minute.

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DEPUTY PRESIDENT CLANCY: Okay. Thank you. We have made arrangements so that it can be played, we hope, technology being with us.

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MR WELLS: I was just conscious that the screen is facing the wrong way and one never knows where that might lead us.

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DEPUTY PRESIDENT CLANCY: We'll find out shortly, I suppose. But I think the best way to approach it is, at the point at which in the presentation of the appeal arguments this morning you indicate when it is you want to play it, and then we'll take the steps to have it played on the screen.

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MR WELLS: Yes. I think, your Honour, we'll probably be getting to it very quickly.

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DEPUTY PRESIDENT CLANCY: All right.

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MR WELLS: Almost from the kick-off.

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DEPUTY PRESIDENT CLANCY: All right. You just let us know precisely when and we'll do it that way.

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MR WELLS: Thank you, your Honour.

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DEPUTY PRESIDENT CLANCY: The parties have filed material in response to the directions in the appeal. Ms Giblin, the way we'll proceed this morning is the appellant presents the case on appeal first. You then have the opportunity to respond. And then they have an opportunity to make any comments in reply. And if you have any questions along the way about the process please just indicate. All right, thank you, Mr Wells.

PN26

MR WELLS: Thank you, your Honour. As your Honour has indicated the appellant has filed submissions on 19 December and I won't go through those at length. I'm assuming that those are matters that the Bench will have had an opportunity to review. But I would like to speak to some matters in there and I think it's fair to say that the most significant issue in the appeal is what we call, ground 7 where in the submissions is referenced at page 2.

PN27

And this is the question of whether four other facts not being significantly in dispute, whether the respondent intentionally or unintentionally didn't pay for the drink on the day. And you can see from paragraph 9 of the submissions that most of the facts there are not in dispute as to the existence of the policy and the content of the policy, the respondent's acceptance of the policy, and that the respondent received a drink on the day and didn't pay for it.

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The live question which the Commission below was against in the appellant was that the respondent unintentionally took the drink and relied on a number of matters informing that view which we have extracted and set out at paragraph 11 of the submissions.

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It is our contention that that finding is unsafe and we say it's unsafe because it substantially hangs on the notion that in the world of bar service drinks are ordered, prepared and delivered in stages and customers pay depending on when the bar person rings up the order.

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And we'll probably all be familiar with that from our own experiences that sometimes when you order they ring it up then prepare the drink. Other times they go and prepare the drink and ring it up when they bring the drink back.

PN31

And we don't dispute that that's a common practice. What we say is, when you see the video and look at what happens on the video the distinction as to when the drink may have been rung up becomes academic.

PN32

Because what the video shows is that the drink is ordered at about the ten second mark of the video. Then the respondent moves about two feet to the right where the – I don't know if it's a Tyro machine, but one of those pay machines is sitting, and focusses on the machine ready to pay, doesn't pay because nothing has been rung up. The drink then arrives at about the 30 second mark of the video which leaves a 20 second gap.

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Where the respondent is doing nothing except standing, waiting to pay at the cash machine. We say that speculation about whether it's possible that someone forgot they paid, or speculation that a gap between when the drink is ordered and the drink is delivered, someone could be distracted and forgot whether they paid, is

irrelevant in this case. One, because the video doesn't leave those opportunities open. But also there's no evidence that's what happened in this case.

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The respondent's evidence was very clear. On numerous occasions she maintained she had no recollection of the incident and so the case that was put as to what may have happened on the day was just, as the Trial commissioner put it, speculation based on what the respondent was herself seeing on the video. And we say the video is important not only because it's the only direct evidence of what happened on the day but at trial the video was in evidence and it was reviewed.

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But the analysis of the video seems to have got somewhat side-tracked by the matter dealt with at paragraph 116 of the decision. And for the purpose of the appeal we say that that is a distraction. It was put at trial that there was effectively a modus operandi scam going on at the club whereby employees who were getting free drinks would effectively wave their phone over the pay machine when the drink arrived to represent to video footage that they were paying.

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But the bar person had not run up the drinks, so it was effectively a mime. It was put at trial that that's what was happening with the respondent in this video and there was a lot of evidence and argument about that. We say it's unnecessary for you to resolve whether that happened or didn't happen, whether that argument is necessary or not. Because the only question is, even on the Deputy President's view of the evidence, what was there respondent's state of mind when she took the drink.

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So, the Deputy President's assessment of the evidence was the drink was ordered, the respondent waited to pay, the barman turned up with the drink, he never rung it up, then the respondent must have assumed she paid and left with the drink. So, what she is actually doing with the phone and what was hotly debated and trial and what the Deputy President deals with at paragraph 116 is academic.

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Because whether you take the club's view of the footage of the respondent's view of the footage the key question is when she takes the drink, what is her state of mind about whether she had paid, not what she was actually doing with the phone.

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Because on the club's view she was part of the routine for not paying but making it look like you are.

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On her own view and on the Deputy President's view she went to pay legitimately because she hadn't, and when it wasn't rung up on the machine she must have formed the view that she had already paid, and took the drink.

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And that's the critical finding that we have a problem with because as a matter of speculation but not direct evidence, the video is just inconsistent with that. It is almost impossible to conceive the idea that the respondent in the time that lapsed in the absence of any distraction, formed the view that she had already paid. And we say this is important for contextual matters behind that, as well that it's also not in dispute that there had just been an unusual staff meeting immediately before the incident where the issue of stock wastage had been discussed.

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And as the Deputy President note, the club has policies in place outlawing the consumption of club drinks and food without charge. And this meeting was effectively to emphasise that that is the policy and whatever the past may have been, there is to be no more. So one might ask, if you've ordered a drink and you think you haven't paid for it so you go to pay, which is what the Deputy President found, and nothing's rung up, on what basis do you say, 'Oh, I must have paid,' and walk away with the drink?

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Or do you flag down the barman and make sure, if you genuinely are not sure and I'll come to that last point later which is a different appeal ground. But this might be an appropriate point to view the video if we might, your Honour.

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DEPUTY PRESIDENT CLANCY: All right. Thank you.

VIDEO PLAYBACK **[10.22 AM]**

PN45

MR WELLS: So, if we can just pause – have we got the facility of – yes. So, by way of description – sorry, can we just go back to the – the off – just to describe the cast? Is it possible to just freeze it? Yes.

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So, the respondent is at the very top of the screen ordering at the very top end of the bar, and the barman who prepares the drink is the one in – it looks blue to me but it might look bluey-green to others, the shirt.

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DEPUTY PRESIDENT CLANCY: The collared shirt.

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MR WELLS: Yes.

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DEPUTY PRESIDENT CLANCY: Yes.

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DEPUTY PRESIDENT GRAYSON: Mr Wells, just so your clear we've got screens here, so that's why we're not looking there.

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MR WELLS: Okay, no problem. I've probably got it too but it's a bit obscure with the – thank you.

PN52

MR WELLS: So, the order has been taken in that playing piece. And so, that's the pay machine. And there's the drink. The respondent goes to pay. Nothing is rung up and she takes the drink. Now we say that absent positive evidence of what was being thought at the time, it's almost inconceivable that someone could have thought in that 20 second gap that they had already paid in circumstances where there are no distractions.

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The respondent has gone straight to the cash machine to pay and that's where the drink was delivered. That evidence clearly shows that there was no attempt to pay and no reason to jump to this conclusion that she must have forgotten. Because as I say, the respondent's evidence was not that she recalls the drink and recalls thinking that. She's just interpreting the video. There are other matters that we address in paragraph 15 of the submissions which we say suggest the contrary.

PN54

Mr Dunbar Reed who was the barman in the blue shirt was said at various places in the decision to corroborate or partially corroborate the respondent's evidence. But any assessment of the references that are provided in that paragraph show that not only did Mr Dunbar Reed serve the drink without charging for it, his evidence was all over the place. I would be surprised if anyone would be comfortable relying on Mr Dunbar's evidence. If anything, it wasn't corroborated independently. And perhaps the best evidence he gave is at paragraph D5. When asked why he gave the drink he said, 'Naivety.'

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DEPUTY PRESIDENT CLANCY: Is that PNT file? What was the paragraph reference then?

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MR WELLS: Sorry, it's paragraph 15D(5).

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DEPUTY PRESIDENT CLANCY: Yes.

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MR WELLS: And the reference is PN459 of the transcript, which is at appeal book page 74. Now that ground and the next ground that I would like to deal with which is ground 3 are linked in some respects. Because it's clear from paragraphs 113 of the decision that the Commission seemed to place great stock on the fact that the respondent hadn't requested the drink, hadn't teed up this arrangement in advance with the barman.

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And we would accept that had it been a prearranged even that would be clear evidence of misconduct or wrongdoing because you're party to something in advance. It may also be an aggravated circumstances as to how serious the

conduct is. But the absence of evidence of prior arrangement with the barman is not exculpatory of taking the drink without paying with knowledge.

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And the distinction that the Commission drew at paragraph 133, we would take issue with. One, it's unclear what the Commission was referring to about Mr Dunbar Reed's evidence partially corroborating. If the partial corroboration is limited to there being no prior arrangement, well, that might be so. But to say that it partially corroborates that the actions are unintentional is a bridge too far.

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The reason for that being clear is further down in the paragraph where the Commission seems to draw a distinction between that taking of the drink opportunistically with taking it in a preplanned way, and then the Commission going on to say that this indicates at its highest, the club's case is that the respondent was opportunistic.

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But there is no finding as to whether if the drink was taken opportunistically what does that mean from a conduct perspective. And we say that it doesn't matter. We say that taking the drink without paying for it is the critical issue. It may well be that if there'd been a preplanned arrangement that would be strong evidence in support of that. But the absence of that evidence does not mean that you do not engage in this conduct by taking a drink you know you haven't paid for.

PN63

And it's difficult to know what the Commission made of the opportunistic taking of the drink. Because the Commission has positively found that the respondent didn't do it deliberately, so to be fair to the Commission, at 113 she's speculating that even at the time that the drink was taken, if it hadn't come with preplanning it would be opportunistic, but then doesn't go on to find what that would necessarily mean.

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And we say that that is equally evidence of misconduct, just perhaps not with the degree of evidentiary certainty or with the aggravating circumstance of being part of that group that also was terminated on the day. And in any case we've made the point about Mr Dunbar Reed but for reasons that are unclear, his evidence seemed to have been accepted uncritically when he seemed incapable of giving consistent evidence about any other matter.

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The next issue, your Honours, is - - -

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DEPUTY PRESIDENT CLANCY: Are we leaving the video at this point?

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MR WELLS: Yes, your Honour, unless you have questions of us in relation to it.

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DEPUTY PRESIDENT CLANCY: There was discussion during the first instance hearing about the phone and where it was placed, and what was on the screen of the phone at the time. And the proposition as I understand the appellant is that it was designed to look as if payment was being made when it could not have been made. How are you relying on the footage to that extent?

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MR WELLS: We don't resile from the fact that what the club has put at trial is that the waving of the phone near the machine was consistent with other employees who were part of this organised scam to look as though they are. But what we're saying is you don't need to go that far even if you accept the Deputy President's version of events, which is she went to pay. We say that just demonstrates she knew she hadn't paid and to have then take the decision when there's nothing rung up, well, I must have paid, in those circumstances is untenable.

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DEPUTY PRESIDENT CLANCY: Your proposition is that they must have paid me because there's no footage indicating that there is any prior attempt to have paid.

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MR WELLS: That's right. And not only any prior footage, no lapse in time to lead one to think – we've all been somewhere where you might order something, the guy next to you strikes up a conversation – if it's a complicated order it might take seven minutes to turn up if it's a 15 content cocktail of something. This is the simplest of orders and there's no time passage, there's no intervening distraction. In the absence of someone saying, 'I remember that incident, I remember at the time I was daydreaming and I just thought I'd paid, and walked off thinking, oh, did I really pay?

PN72

But there's none of that. This is purely evidence based on, as the Deputy President said. The respondent's speculating – that was the word the Deputy President used, 'speculating,' as to what the video showed. And we say that the Full Bench is in as good a position to interpret that video as anybody else.

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DEPUTY PRESIDENT CLANCY: You say the speculation thesis goes nowhere because the footage shows.

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MR WELLS: The footage shows what it does.

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DEPUTY PRESIDENT CLANCY: Yes.

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MR WELLS: And we say that the theory, the subject of speculation is so inherent and probable that it shouldn't have been accepted as a speculated theory.

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DEPUTY PRESIDENT CLANCY: Yes.

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MR WELLS: And while, as I say, we would accept that you do get instances of drinks being rung up at the time of order, and at the time of payment but you can't throw every order into that bucket and say you can never remember when you're ordering a drink whether you've paid or not because it could have been here or it could have been here. For it to be one and not the other, there needs to be something to explain why you might have thought it was then and not then.

PN79

And there was also in evidence lots of sort of high level discussion around whether patrons forget to pay, because quite often a patron will forget to pay. And I think the Deputy President, in our view wisely, didn't pursue that as part of the reasoning because while all of the evidence for the respondent talked that up at a very superficial high level, when the Deputy President was taking that further with the club's witnesses, I think the evidence from

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Mr Armstrong at PN714 which is page 97 of the appeal book, the Deputy President asked, 'Not often?' with a question mark, and Mr Armstrong said, 'No, I wouldn't say. It's probably once a month then if you were talking frequency wise?'

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And then the Deputy President says, 'Yes, and in your experience why does it happen?' Mr Armstrong said, 'It can be because they haven't – their card hasn't been held close enough to the receiver. We've had instances where they might be paying with an Amex, for instance, and Tyro terminals don't accept Amex cards. Yes, they're probably the two most common ones.'

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So, when the blow torch was put to the feet, the fact that customers don't pay – it's a mishmash of they tried to pay but the equipment didn't respond; operator error, they didn't hold it close enough. It's just another speculation that people forget whether they've paid or not in a 20 second time space with no interruptions. And that's really what the decision rests on below, an acceptance of that proposition which was not even a matter of direct evidence.

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If there are no more questions on that matter I would move to ground 6.

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DEPUTY PRESIDENT CLANCY: Did Mr Dunbar Reed give evidence on whether he entered a sale into the till?

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MR WELLS: He did give evidence and that's one of the pieces of evidence that was variable depending on when he was being asked. So, he told the club when they were investigating that he didn't. When he gave evidence he suggested that

he accepts he didn't but he was finding out for the firs time while giving evidence. His evidence is a mess. He accepts he didn't ring up the drink.

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DEPUTY PRESIDENT CLANCY: No.

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MR WELLS: He says he thought he did but then that's inconsistent with evidence where he told the club that he hadn't. And in fact he resigned before he was even investigated. Ground 6, your Honour, is a matter that arose during the trial, as I understand it. When giving evidence the respondent stated that she'd had one or two drinks before the staff meeting which I was talking about earlier where this issue of stock wastage was going on.

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And the club raised that during the trial as an issue of concern given the club's policy about the consumption of alcohol before or during a shift. And the Commission in dealing with that issue allowed the parties to develop the argument and effectively concluded that the staff meeting is not a shift because it doesn't appear in the roster. And if staff were paid only for the duration of the meeting but not the minimum engagement in the award then it's unlikely that it would be a shift.

PN89

I'm not sure that any of those propositions naturally hold. It may well be that what is a shift and what isn't a shift will depend on the terms of the award, not how the employer treats the shift or treats the meeting. Theoretically it may just be the employer didn't pay them any engagement under the award but that doesn't mean that it's not a shift.

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DEPUTY PRESIDENT CLANCY: Well, everyone got fixated on the word, 'shift.' But was there discussion about whether it was work?

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MR WELLS: I understand there was some discussion. To be fair to the respondent I think she drew a distinction between work and attending a staff meeting. But the club's position is it's paid people to be there and whatever objective the club sets for the employer while they're paying them – and I think the point that we made in paragraph 29 of the submissions is whatever policy is driving a prohibition against drinking before or during a shift or a break would seem to equally hold if it's a staff meeting, particularly a matter of that importance. The respondent accepted in evidence that the meeting was an unusual meeting and therefore important.

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I can't take that any further because the evidence may – I don't think the evidence went down the path that your Honour is going beyond a distinction being drawn, which is an obvious distinction between doing the tasks of the job and attending a staff meeting. But the significance of employees being on paid time is a matter that was not considered from the perspective of was this a shift. And it seems to

us that it's a relevant matter, whatever that might mean in terms of the minimum award engagement.

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There's also a reference at 128, because there are really two prongs for the Commission rejecting that argument, and the other at paragraph 128 of the decision the Commission says that the respondent gave uncontested evidence that staff and management had previously consumed alcohol before staff meetings without sanction. We would accept that that evidence was given but it's difficult to see that that gets through the threshold of preventing the employer from relying on it to maintain a claim of breach of the policy.

PN94

Because the fact that things happen, and if we accept the respondent's evidence these things happened, it's not enough that it happens. The employer has to know about it and sanction it. And it would not be a defence, for example, for someone who works in accounts to say you can't sack me for stealing from petty cash because everybody does it. It has to be known to the employer and effectively sanctioned to the philosophy based on the concepts of wavering acquiescence.

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And that, to the extent of my searches of the transcript, was the height of the evidence on that matter.

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DEPUTY PRESIDENT CLANCY: So what you're saying is the only person to give evidence on that practice was the respondent.

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MR WELLS: That's right. And I don't think anyone was cross-examined on the club's side about that matter. And I should just for completeness take your Honours to paragraph 107 of the decision where that same matter is addressed in passing. And that paragraph says, 'Ms Giblin said that Mr Armstrong was aware that staff would have drinks prior to the meetings as he was in the building.'

PN98

And I found that reference a little odd because I couldn't find anything in the transcript to suggest that Mr Armstrong had been identified as providing that degree of knowledge, Mr Armstrong being the witness I referred to earlier for the club. I stand to be corrected if I'm wrong but I think what the Deputy President is referring to there is a closing submission from the respondent which is at page 444 of the appeal book.

PN99

And in closing submissions the respondent says, 'Higher management being Matthew Armstrong, were aware staff would have been prior to meetings as he was in the building at the time,' et cetera. That's not a matter that I can find was ever put to Mr Armstrong, nor was it in evidence. It seems to have got in through written submissions after the trial and has been cited in the decision but as near as I can tell, without any evidentiary basis.

PN100

So, our position on that ground is that it may well be that on a proper consideration of the evidence the policy did or didn't apply to the staff meeting but it appears not to have taken into account that people were paid. And if it was covered by the policy one can't just jump to the excuse that other people did it because of the evidence of it being sanctioned up the line isn't sufficient to be able to get to that closing position.

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DEPUTY PRESIDENT CLANCY: Your position on appeal is there is no evidence that it was sanctioned.

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MR WELLS: That's right.

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DEPUTY PRESIDENT CLANCY: No.

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MR WELLS: That's right. The cases that we cite about management sanctioning certain conduct and therefore losing the capacity to rely on it as misconduct were of a lot more specificity than just the assertions that unnamed people were aware of it and in what context. Now, if I might move to ground 8 - - -

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DEPUTY PRESIDENT GRAYSON: Just before you do, just going to this question, the shift versus work question, my recollection is that the emphasis on a shift below was probably because of the terminology in the policy. Is that correct?

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MR WELLS: Yes. I think the policy was worded.

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DEPUTY PRESIDENT CLANCY: And that's why there was kind of this particular emphasis in the decision, is that right?

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MR WELLS: Except, your Honour, I think the exact wording in the policy, 'No employee shall present for duty in a state of intoxication of affect by any other illegal or recreational substance. Alcohol must not be consumed prior to a shift, during a shift or break period. A breach of this rule may warrant suspension or summary dismissal.'

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So, I think it's not quite a black and white call around what is a shift because if you're including a break period it's not just talking about while dealing with work tasks or being on the tools, so to speak. It's a broader concept than that. And I accept I don't think it was argued with great specificity because it was all a little bit on the run, it only emerging during the hearing. And I think the parties provided some late submissions to try and deal with it.

PN110

Now, ground 8 – there's a paragraph in the decision at 152 which is problematic in our view. And it really ropes in ground 4, as well. And the emphasis is that the club used words like 'fraud' and 'theft.' And there seems to be, at least if it's not a finding, certainly an acceptance of a proposition that those words were used by the club with the intent to intimidate the respondent.

PN111

What we would say about that is I'm not sure that was ever put to the decision-maker or the investigators in the club. It seems to arise out of an exhibit to a statement which included a file note of a meeting, and that meeting is referred to in paragraph 151 of the decision, when a fellow called Mr Fethers(?) who was the respondent's support person, made this assertion that he'd never seen a letter written with fraud and theft used to intimidate a young member of staff.

PN112

In that context he was clearly speaking in an advocacy capacity during the meeting with the club. And that seems to have found its way into the decision as a finding or a matter of evidence, which colours that it's relied on as a factor under any other matters. To suggest that use of that language was not only intimidatory but designed to intimidate. And we struggle with that because, you know, we accept they're not nice words and they impugn the character of the person they're being said to, but these are words that – 'theft,' for example, you'll find in the regs(sic) as a matter justifying termination for misconduct.

PN113

I mean, I often wonder whether people would be better off throwing away labels and just describing the conduct to establish a valid reason rather than to put labels on them, but we say there was no evidence of an attempt to intimidate and in fact I think the history of these proceedings shows that the respondent not only was not intimidated but conducted herself with confidence in the hearing and has been through a process that not a lot of other people have, and has done quite well for herself. It is unclear why that ought to have been taken into account, as in any other matter being relevant.

PN114

Which also leads into the next point which is this idea that you can only use these terms, being terms, creatures of criminal law which in paragraph 152, intent is required, conduct must be established to the criminal standard which is beyond reasonable doubt. It's unconscionable for the club to claim that someone is engaged in criminal behaviour in the circumstances described. And I am at a lost to understand exactly what that all means.

PN115

I can certainly accept that when the employer is relying on criminal behaviour as the conduct providing a valid reason, the Briginshaw test is you need a certain level of satisfaction because such conduct is out of the ordinary experience of most people and they don't normally do it. But it's difficult to see that the criminal standard has any role to play, either in the employer's assessment of the conduct when investigating, or the Commission's when it's evaluating the evidence.

PN116

And as we say in the submissions we freely recognise that the Deputy President has cited the test for valid reason correctly in paragraph 79 that it is balance of probabilities. But in light of paragraph 152 it is difficult to know whether the Deputy President is saying that the misconduct is criminal then a different standard applies. I don't think that's what she was saying because it would probably be up at the valid reason end of the decision. But then you wonder what its relevance is.

PN117

When the employer is relying on criminal conduct what is the relevance of the unreasonable doubt as a matter for an employer of the Commission? It seems to be suggesting that it's unconscionable to alleged criminal misconduct if you couldn't establish it beyond reasonable doubt. And that proposition just doesn't hold, cannot hold.

PN118

And then the very last issue, your Honour, is that I take you to is if you're not with us on all of that, the Commission speculated below and we're still in paragraph 152, that it was open to the club to investigate

PN119

Ms Giblin's conduct on the basis that she breached the club's policies, but instead the club made the baseless conclusions that Ms Giblin engaged in criminal conduct. We say that based on the Commission's findings the Commission ought to have assessed that conduct to determine whether that established a valid reason.

PN120

Even if the Commission has taken the view that it was unintentional it is still in breach of the policy, and it's in breach of the policy in circumstances where there had just been a staff meeting on that very issue and sensitivity should have been heightened. You might say that the Commission did that in paragraph 124 of the decision. In paragraph 124 the Commission said, 'Given

PN121

Ms Giblin's good employment history and remorse this could have been dealt with by way of a verbal warning.'

PN122

It's not clear how that conclusion sits with the undisputed fact that the respondent had been told about this matter in a meeting just before the incident occurred. Now, some people talk about warnings as if they're punishments but from a procedural point of view they are flags as to what you shouldn't do after you've been warned, to avoid a disciplinary consequence.

PN123

And it's unclear how the Commission though that dealing with the matter by way of a verbal warning would be an effective response if having just been at that staff meeting to talk about this very thing, that wasn't enough to prompt the respondent even on the Commission's own findings to adopt a level of diligence about paying

for the drink, which was expected by the club and which was the subject of the warning.

PN124

But we say that the meaning of itself flagged the issue and the importance of the issue, and in the case of a policy breach where the direction has just been given fresh off the press, an employee breaches the policy which seems not to be in dispute even if you accept that it was unintentional, that it can be so easily dismissed and without contextualising the meeting, that it could have been dealt with by a verbal warning.

PN125

So, we say that it was incumbent on the Commission having made the findings that were found, to consider whether taking into account all of the matters in the case, that provided a valid reason.

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DEPUTY PRESIDENT CLANCY: Are you saying that the Deputy President failed to take into account the fact that these matters had just been raised in the meeting?

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MR WELLS: It's not clear that she did, if she did.

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DEPUTY PRESIDENT CLANCY: No.

PN129

MR WELLS: She's certainly aware that the meeting occurred and that it was raised. And your Honours may form a view that that paragraph says enough, that she was aware of the meeting but that's offset by the good employment history and remorse. And you may find that they're wrong about that. Because we're not necessarily saying you would get to a different result. That would be a matter of discretion. But it just seems to us that the resolution of that with a warning is not that different from saying, well, we should have another staff meeting and talk about it again.

PN130

DEPUTY PRESIDENT GRAYSON: Do you say that the warning constitutes disciplinary actions, or does not constitute disciplinary action? I'm not clear on what you're saying.

PN131

MR WELLS: It is disciplinary action, your Honour, but a warning doesn't do anything to you. I know it makes you feel bad but it doesn't penalise you. It just puts you one step closer to a very bad place. It's really designed to set expectations more clearly if they're not, or if there's a policy that isn't at front of mind, it brings it into front of mind.

PN132

And I think if we were dealing with this scenario without the staff meeting immediately before, that's an important contextual matter and having just flagged it one may wonder what's a verbal warning going to do as an effective response to this bad pattern. And we say that on the premise here again, just on everything else, this is sort of the last – accept all the facts but - - -

PN133

DEPUTY PRESIDENT GRAYSON: All right. Thank you.

PN134

MR WELLS: Those are the submissions, your Honours.

PN135

DEPUTY PRESIDENT CLANCY: Ms Giblin, would you like to make any oral submissions?

PN136

MS GIBLIN: Yes, your Honour.

PN137

DEPUTY PRESIDENT CLANCY: Thank you.

PN138

MS GIBLIN: So, just speaking to the fact of the video first, the appellant has said that you can't – I said I did not recall the drink situation. However they're still speaking on my state of mind, saying that I did know that I didn't pay for it. And so intention there is questionable because I said that I didn't remember and if I did take it, it was not intentional. I had paid for drinks prior to that one drink that is seen on the CCTV footage.

PN139

And the scam that they're talking about, I was not involved in. I had paid for drinks prior to and after that one drink in question. And then they also just said that – they put me in with that scam and then immediately after said that I did not wave my phone in front of the EFTPOS machine as the people who were involved in the scam did, therefore also showing that that was not my intention. I was never part of the people who did get dismissed that day. Yes, so - - -

PN140

DEPUTY PRESIDENT GRAYSON: Can I ask you a question. Was the video footage of anybody else shown to the Deputy President or just the video footage in relation to yourself?

PN141

MS GIBLIN: Yes. So, I think it's very unfair to put me in with the group of people and say I did the same thing when nothing was ever provided. Also with the use of the theft and fraud, in my termination letter I was terminated for dishonesty, which again the club is talking on - they're, you know, surmising what my thought and process was when I told them I'm sorry, it wasn't intentional.

PN142

So, I think that's, you know, very unfair to speak on my state of mind when I said I didn't intentionally do it. Aiden(?) also gave evidence saying 'I didn't ask for the free drink.' And just during these meetings I was never provided CCTV footage until I asked to see it. They had made up their mind in this suspension meeting. They had already made up their mind that I did this intentionally.

PN143

They gave me the choice to be terminated or resign without providing any evidence of the situation until I asked for it. So, I just think that procedural fairness there isn't there. In regards to the having a drink prior to the meeting, this was brought up in the hearing. It was discussed. Matthew was not cross-examined obviously. But this one other time did have the opportunity to mention that in the closing submissions that were sent after the hearing and Matthew did not deny knowing.

PN144

Also on the day of the incident Matthew submitted the evidence of the unpaid drinks, so he was aware that Ben Mitchell who was one of the people also dismissed for not paying at certain times. He was aware that Ben had had drinks prior to this meeting and that was not a term for his termination. Yes. That's all, your Honour.

PN145

DEPUTY PRESIDENT GRAYSON: Sorry, I don't quite follow what you were saying about Matthew and Ben.

PN146

MS GIBLIN: Ben.

PN147

DEPUTY PRESIDENT GRAYSON: Would you just explain that to me a bit more?

PN148

MS GIBLIN: Yes, okay. So, Ben Mitchell was one of the employees who was terminated for not paying for drinks.

PN149

DEPUTY PRESIDENT GRAYSON: Yes.

PN150

MS GIBLIN: So, in past evidence submitted Matthew submitted invoices for drinks not paid for. And Ben Mitchell was one of them. He was drinking prior to the meeting and Matthew had flagged these drinks, as well. There was one from like, 4 pm which was prior to the meeting. So, he was aware that people were drinking prior to the meeting and that reason was not put in Ben's termination either, so – yes.

PN151

DEPUTY PRESIDENT GRAYSON: Drinking ahead of the meeting?

PN152

MS GIBLIN: So that's it.

PN153

DEPUTY PRESIDENT GRAYSON: Okay.

PN154

MR WELLS: Might I just deal with two – apologies.

PN155

DEPUTY PRESIDENT CLANCY: Yes, thank you.

PN156

MR WELLS: There are two very brief matters in reply? Just on that last point about someone else being terminated at the same time and consuming drinks in the meeting, not being relied on, that clearly can't be a factor in management endorsing conduct. Because it has to be leading the respondent here, the employee to assume that a certain state of affairs is acceptable.

PN157

So, you can't say because they didn't discipline him out of the same meeting that I was drinking, encouraged me to drink because they've both already drunk. You can't say, 'I was encouraged by.' That might be that if someone knew about this fellow whose name, Mitchell, I think it was – if someone knew about that now they might go out and have a drink, thinking he wasn't sanctioned for that. But that can't help the respondent. The second point, quickly, is - - -

PN158

DEPUTY PRESIDENT CLANCY: Is the submission made on that though more going to 387(h)?

PN159

MR WELLS: Difference of treatment?

PN160

DEPUTY PRESIDENT CLANCY: Yes.

PN161

MR WELLS: Well, the difficulty with that is, the cases – and I don't have any cases because it hasn't been put and I'm happy to provide them, but those cases say you've got to treat like for like, but you've got to be clear that they are alike. So, most of those cases are, you know, two guys getting in a biffo out the back and their facts are the same, their records are the same.

PN162

Whereas if one's already got a warning for something it doesn't mean they get the same punishment. So, unless you can line up Mitchell and the respondent and say their circumstances are the same, and the evidence just didn't go there.

PN163

The second brief point that I wanted to make, because the respondent mentioned procedural fairness, there was a lot of criticism in the decision about various

procedural breaches along the way. And the appeal grounds don't seek to challenge those findings or to suggest that this was a perfect termination or anything along those lines.

PN164

The appeal is based on the fact that there are grounds which, if you reach a different conclusion from the Deputy President it will require someone to sit down and say, based on these findings on valid reason and the other matters we've raised, do those procedural glitches impact the decision sufficiently to say that it's still fair or unfair. So that this isn't an appeal where we would say you're readily going to be able to say if you're with us, that that means the application is dismissed.

PN165

It would likely just mean it will have to be reconsidered in light of other findings. So, the procedural issues are live. We accept that. But as we say in the submissions, if you're with us on the valid reason question it makes the procedural issues very difficult for the respondent because they are all those cases that say when you've got misconduct at a sufficient level, matters of procedure often are really just around the edges and not likely to change or resolve. And that's a matter for the next stage if we ever get to it.

PN166

DEPUTY PRESIDENT CLANCY: Yes. What do you say on this position?

PN167

MR WELLS: I think if we're successful it will depend on the basis on which we succeed. But if we succeed on valid reason that the video tells a different story from the findings I think the discretion will need to be

PN168

re-exercised in light of that view, taking into account the unchallenged findings of the Commission about the procedure.

PN169

And I would suggest it not go back to the Deputy President but perhaps it's a matter that the Full Bench could determine with submissions on the basis that the Full Bench has the evidence every bit as good as the Trial Commissioner had it.

PN170

DEPUTY PRESIDENT CLANCY: Do the Full Bench need to hear further, to you say, or is the material that's before the Commission as it currently stands sufficient?

PN171

MR WELLS: In light of the authorities that minimise procedure if there's an established valid reason relating to misconduct you might be minded to say these procedural concerns will not be sufficient to uphold the application. But I think in fairness it would require a reconsideration and it may be that the respondent has other things to say in light of a different finding on valid reason. I think that would be necessary.

PN172

DEPUTY PRESIDENT CLANCY: There was a fair bit said on the procedure, wasn't there?

PN173

MR WELLS: Yes. Well, we haven't challenged those findings, and say that they are what they are.

PN174

DEPUTY PRESIDENT CLANCY: All right.

PN175

MR WELLS: But we would be content for the Full Bench to just go ahead and just reconsider it. But I'm just making the point that the respondent may want to be heard on the premise of the impact of the procedure on that different finding.

PN176

DEPUTY PRESIDENT CLANCY: There was a lot said on procedure under the – I think it's under 387(f). So, I'm looking in the decision at 134.

PN177

MR WELLS: Yes.

PN178

DEPUTY PRESIDENT CLANCY: That seems to turn into a discussion on procedure which you might have expected perhaps to be dealt with in (h) rather than (f).

PN179

MR WELLS: Yes.

PN180

DEPUTY PRESIDENT CLANCY: I mean, (f) simply says, well, is the size likely the impact on the procedures. It's not a then and now let's discuss the procedures. It just says it's - - -

PN181

MR WELLS: Yes, you'd normally see, this is a big organisation, they can manage their affairs best.

PN182

DEPUTY PRESIDENT CLANCY: One would expect, yes. And if it's more likely to have impacted on things. But you've already discussed the procedure, or you'll discuss it subsequent, that's all, so - - -

PN183

MR WELLS: Yes. I think a fair reading of the decision is wherever that commentary is from, it relates to procedure.

PN184

DEPUTY PRESIDENT CLANCY: To process.

PN185

MR WELLS: Yes.

PN186

DEPUTY PRESIDENT CLANCY: Yes. All right.

PN187

MR WELLS: But the difficulty with the procedure in a case like this were we to succeed on valid reason, is that it ill behoves an applicant that has engaged in misconduct and is not being frank about it during the investigations complained about in the procedure, that if you're not even going to take a frank position with the employer – you know, many of these cases, and again I'm taking it for granted that for the purpose of this argument that were we to succeed, where the employer strikes a challenge if somebody says, yeah, I did it and it just was a rush of blood and it was opportunistic as the Deputy President says, but I'm really a good guy and I won't do it again and I'm – all those things that a confession avoid.

PN188

But if you double down and effectively dispute that it happened and then run a claim it gets a bit complicated with you saying, that was never put to me, or that was never put to me, or you spoke to that witness after you'd already made a decision about that. Because we ask the question, well, if you find a valid reason isn't the right time when you're first confronted with it to say, yes, I did it? The employee is only being put through a process because of the denial.

PN189

And so the juxtapositioning of procedure with valid reason is still quite material and that's why those cases that I've got – I had one in my head but it's gone – do look at that question of if the employee has engaged in misconduct how much does procedure wind that back? And that's been the law since, I think, the other High Court in Byrne in the nineties that if they're not independent considerations and you can find fault in the procedure then that creates an unfair termination, that that just completely overwhelms the valid reason. You may find if you - - -

PN190

DEPUTY PRESIDENT CLANCY: That's part of the balancing, isn't it?

PN191

MR WELLS: That's right. I mean, you may find at the end of this the decision stands. You may find we've satisfied you there was a valid reason but the procedural problems remain and then you've got that balancing exercise to do.

PN192

DEPUTY PRESIDENT CLANCY: Yes.

PN193

MR WELLS: And that balancing exercise might take you to, say, yes, misconduct is a valid reason but the procedure is enough to still find it unfair. But then it effects remedy because you wouldn't necessarily be able to claim all the loss.

PN194

DEPUTY PRESIDENT CLANCY: Remedy hasn't been determined here though, so - - -

PN195

MR WELLS: Well, the Deputy President has - - -

PN196

DEPUTY PRESIDENT CLANCY: There's been no compensation set as I - - -

PN197

MR WELLS: The Deputy President hasn't - - -

PN198

DEPUTY PRESIDENT CLANCY: There's been no compensation set. It has - - -

PN199

MR WELLS: The Deputy President has done that and it's been paid.

PN200

DEPUTY PRESIDENT CLANCY: It has been paid?

PN201

MR WELLS: Yes.

PN202

DEPUTY PRESIDENT CLANCY: Sorry, so - - -

PN203

MR WELLS: But that decision came down in between.

PN204

DEPUTY PRESIDENT CLANCY: You haven't appealed that?

PN205

MR WELLS: No, we haven't appealed that.

PN206

DEPUTY PRESIDENT CLANCY: Right. So, where's that? You've paid the compensation?

PN207

MR WELLS: We've paid the money, yes.

PN208

DEPUTY PRESIDENT CLANCY: Right. Sorry, I didn't appreciate that. It's just that there wasn't any appeal against any award of compensation or any application for a stay, so - - -

PN209

MR WELLS: No. But my experience with stays and monetary payments have been fraught with some risk as opposed to reinstatement. We're relying on the good graces of the respondent if he succeeds to be able to deal with that.

PN210

DEPUTY PRESIDENT CLANCY: All right. Okay, so on balance your position on disposition is – is it something that - - -

PN211

MR WELLS: I think we're going to get into difficulty if at least the parties don't have a chance to make even just a written submission on the effect. We don't necessarily need to add another hearing.

PN212

DEPUTY PRESIDENT CLANCY: Right.

PN213

MR WELLS: But I think one needs to know the findings to be able to work out what that all means.

PN214

DEPUTY PRESIDENT CLANCY: Ms Giblin, do you have anything you want to say on the question of disposition, or when I mean disposition, what should happen if, for example, the appeal is allowed how it should next be dealt with? Can it be dealt with by us? Should it be dealt with by sending it back to the Deputy President for reconsideration or should it be sent to someone else?

PN215

MS GIBLIN: I don't really have any – I've never dealt with this before, so I'm not really sure what is the best way to go, I guess.

PN216

DEPUTY PRESIDENT CLANCY: All right. That's fine. I understand. All right, thank you. The Full Bench will reserve its decision and that means we will now consider the written material that was put before the Full Bench and the oral argument that has been made today. When we've done that and reached a decision it will be a decision made in writing and it will be emailed to the parties. There being nothing further we'll now adjourn. The Commission is adjourned. Thank you very much.

ADJOURNED INDEFINITELY **[11.18 AM]**