



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT ASBURY  
DEPUTY PRESIDENT COLMAN  
DEPUTY PRESIDENT MILLHOUSE**

**C2023/7690**

**s.604 - Appeal of decisions**

**Appeal by Niccolo Pty Ltd  
(C2023/7690)**

**Melbourne**

**2.00 PM, THURSDAY, 15 FEBRUARY 2024**

**Continued from 20/12/2023**

PN1

VICE PRESIDENT ASBURY: Thank you. Could we start by taking the appearances, please. For the appellant? Who's representing the appellant?

PN2

MR N BOLTON: Yes, Nicholas Bolton here.

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VICE PRESIDENT ASBURY: Mr Bolton, have you got your camera on?

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MR BOLTON: I do now.

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VICE PRESIDENT ASBURY: Yes. Great. Thank you. Okay.

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MR BOLTON: Sorry.

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VICE PRESIDENT ASBURY: Thank you. And your capacity that you're appearing is the representative of the appellant. What role do you hold with the appellant?

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MR BOLTON: I don't have a role. I've been asked to assist in relation to this matter. Danny is the – Danny Agocs on the call is managing director.

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VICE PRESIDENT ASBURY: Okay. Managing director. All right. Thank you. And you've also got Mr Alexander there?

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MR BOLTON: Yes. Mr Alexander is the chief financial officer.

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VICE PRESIDENT ASBURY: Thank you. And for the respondent?

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MR S DRUMMOND: Just Sandro Drummond representing myself.

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VICE PRESIDENT ASBURY: Okay. Thank you. All right. Are there any preliminary points that you want to raise before we commence from the appellant's perspective? As I understand it, you're seeking to introduce some new evidence.

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MR BOLTON: Yes. Look, we will rely on our written submissions. However, I'll just say that the additional evidence is provided because the decision appeared to draw a view on credit because there was competing evidence from both parties

and an opportunity wasn't provided for Niccolo to rebut some assertions made. And so we think that, if there's a finding on credit, then the documentary evidence is beneficial in terms of this initial evidence.

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And the other sort of circularity issue that we're dealing with is that the finding appears to say that Mr Drummond was not terminated by the discretion of an individual in the company, because the finding effectively says that I had no authority at the time to remove Mr Drummond and he was, in fact, removed on a later date by shareholder resolution.

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And so that creates a bit of a confounding issue for us, in that Niccolo has been criticised for, I guess, wrongfully terminating Mr Drummond when the Commission has found that the termination effectively has been initiated at the hand of the shareholder under their statutory rights.

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In that regard, Niccolo is a bit of an innocent party in that it has to oblige – comply with the Corporations Act and (indistinct) shareholder and the Commission appears to have effectively found that it was the shareholders that removed Mr Drummond by shareholder resolution rather than the discretion of management of Niccolo itself.

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So they're the primary issues to address.

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DEPUTY PRESIDENT COLMAN: Just in relation to that last point, can I just check my understanding. I mean, among your contentions in the appeal is a submission that the Commissioner made a mistake by concluding that the resolution of the 11th was directed at ending Mr Drummond's employment, and you say – is this right – you say that that resolution was confined to removing him from his directorship and any other offices that he held in the sense of being an office holder of the company, right? That's your contention?

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MR BOLTON: Yes.

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DEPUTY PRESIDENT COLMAN: Thank you.

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MR BOLTON: It was merely a shareholder resolution.

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DEPUTY PRESIDENT COLMAN: Yes.

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VICE PRESIDENT ASBURY: Okay. So what do you say about the new material that you want to put before the full bench, the three statements that you filed?

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MR BOLTON: Really that the complaint we have is that we believe there should've been – if we were aware that the Commission was considering these matters as a, you know, position of credit, then procedural fairness should've been afforded to put this material before the initial delegate or Commissioner. And so as a result, we're tendering it in appeal, but it's directly relevant to the findings of evidence that the original Commissioner drew.

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VICE PRESIDENT ASBURY: Well, have you got in front of you the appeal book that we sent – we issued? Because I'm not quite understanding this procedural fairness argument. So if you look at that appeal book, on page 366, so the directions that Commissioner Wilson issued in relation to the hearing of the dispute which led to the decision you are now appealing - - -

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MR BOLTON: Yes.

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VICE PRESIDENT ASBURY: - - - and in those directions, which were issued to both parties, the Commissioner clearly said it's going to be listed for extension of time, determinative conference hearing. So that's what the matter was listed for. So the directions told you that.

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MR BOLTON: Yes.

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VICE PRESIDENT ASBURY: The question to be determined is whether an extension of time would be – would be granted or allowed, sets out the section, and then tells you what needs to be filed; the applicant's outline of argument about why an extension of time should be given and the respondent's outline of argument and statements of evidence about what you have to say about the extension of time.

PN31

So the whole issue that was listed for hearing in accordance with the directions was the extension of time. And so I'm just not understanding now you say you were denied some opportunity to put evidence before the commissioner when he actually gave you an opportunity to do so. And it seems that, really, what you've done is just not taken advantage of it.

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MR BOLTON: Well, the Commissioner didn't extend time. The Commissioner found that the relevant time was a date that didn't require extension, and so I guess that's the issue. So we certainly contended that the extension of time should not be granted, but instead what's happened is, because the Commissioner did not

have in front of him evidence from the general manager of Niccolo at the time, he's made a finding that the relevant termination effectively did not occur. And so that - - -

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VICE PRESIDENT ASBURY: I'm sorry to cut you off, Mr Bolton, but in point 3 of those directions, the Commissioner tells you:

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*There is plainly a dispute between the parties as to the date of dismissal and whether, if the respondent's choice of date is accepted, an extension of time for filing the originating application should be granted. Going forward, Mr Drummond must cogently set out the date of dismissal and how that was communicated to him, and Mr Bolton needs to confirm the date of dismissal and how such was communicated to Mr Drummond.*

PN35

So you were on notice that the Commissioner well and truly understood there were two competing arguments about when the dismissal took effect. And if you needed Mr Ago's to corroborate that, why do you say he should now be – have to do that in circumstances where you knew that that was the issue that was going to be required to be determined?

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MR BOLTON: Well, there was no advice that – or notice that a finding of credit would occur. So Niccolo submitted – or the plaintiff submitted the relevant facts. What the Commissioner has effectively drawn is an inference based on credit as to – or authority at the time. So we say that, you know, that's plainly supported by the documentary evidence.

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But to the extent that there's a concern, which was in the – in the finding, that there wasn't authority, I mean, that's quite relevant – a quite relevant question to answer directly to deal with that, because there was authority. And it was tendered to me in the hearing, that question, and, obviously, I didn't have the relevant witnesses on the call to address that. So really, the - - -

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VICE PRESIDENT ASBURY: But Mr Bolton, you knew that, at all times, Mr Drummond disputed you had any authority to dismiss him. That was his central contention. You had his contentions about that. So why were you not given an opportunity to respond to that? You put your material on second, so you saw what he said?

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MR BOLTON: Well, the evidence was put on. There's been, effectively, a finding of credit. And the additional evidence is merely corroborative evidence, and so it wasn't strictly necessary based on the information required at the time to put forward, because the evidence stood on its own. It's only that there has been a, effectively, an adverse finding of credit that it needs to be addressed through corroborative evidence.

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VICE PRESIDENT ASBURY: Well, can you take us to the part of the decision that you say is the adverse finding of credit that needs to be addressed?

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MR BOLTON: Bear with me.

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VICE PRESIDENT ASBURY: Yes.

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MR BOLTON: Apologies. I don't actually have that material in front of me, but  
- - -

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VICE PRESIDENT ASBURY: Well, if you've got that appeal book, would that assist if I told you the page of the appeal book that it's on?

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MR BOLTON: I must say, I'm a bit unprepared because I didn't actually know that I was representing Niccolo today. I thought I was just appearing. So - - -

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VICE PRESIDENT ASBURY: Mr Bolton, again, can I ask you what – in what capacity – what – take this affidavit that you want to introduce of Mr Agocs. If he says, 'We all know Mr Bolton's got ultimate authority', what's that authority?

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MR BOLTON: My authority is as a shareholder and – as a controlling shareholder and as the – someone who's appointed from time to time by management to deal with things, but I don't have a formal role. And - - -

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VICE PRESIDENT ASBURY: So you're a controlling shareholder of the - - -

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MR BOLTON: That's right.

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VICE PRESIDENT ASBURY: - - - of Niccolo?

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MR BOLTON: Yes, if you trace it through. Yes.

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VICE PRESIDENT ASBURY: Okay. All right.

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MR BOLTON: And that's the regards in terms of why Mr Drummond sought my authority on every matter before affecting anything as director. But I don't actually have a daily role at Niccolo.

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DEPUTY PRESIDENT COLMAN: All right. So to the extent that the affidavit material of Mr Agocs seeks to make the point that you did have independent authority to dismiss Mr Drummond, well, that doesn't seem to be consistent with what was said at first instance; the first instance, the case run by the company was that Mr Agocs was the – was the general manager and that he had the authority, and then your submission was, Mr Bolton, that Mr Agocs had given you authority to dismiss Mr Drummond, correct?

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MR BOLTON: That's correct, yes.

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DEPUTY PRESIDENT COLMAN: Yes. And so it might be hard to see why we would admit Mr Agocs's material insofar as it sought to make a different point to the one that was made below. I mean, on the other hand, I suppose Mr Agocs's material, I think as you've mentioned, would, if we accepted it, corroborate your evidence below that he gave his approval to you to dismiss Mr Drummond. All right. So I understand that point. But insofar as it makes another point that you had your own independent authority, well, that's not something that you said below.

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MR BOLTON: I - - -

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DEPUTY PRESIDENT COLMAN: So it'd be difficult to see why we'd accept that, you know, effectively allow you to run a different case on appeal than the one that you ran below.

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MR BOLTON: I'm sorry. I'm not seeking to run a different case. What we're saying is the delegated authority was provided to me by Mr Agocs. And so I think that's consistent with what we ran in the hearing.

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DEPUTY PRESIDENT COLMAN: Yes, that is consistent, but insofar as Mr – I understand Mr – (indistinct) Mr Agocs made a further point that, in addition to him having authorised you to dismiss Mr Drummond, that you had this sort of overarching authority in that, you know, you're the – you're the main person in the company so you have a separate – or the suggestion seems to be that you have a separate – you have your own authority. I mean, on one view all of this, you know, we – you know, one view might be the Commission might be – the bench might be inclined to admit the statement of Mr Agocs insofar as it seeks to corroborate what you said below, perhaps, right?

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MR BOLTON: Yes. I don't think we're seeking anything higher than that.

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DEPUTY PRESIDENT COLMAN: All right.

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VICE PRESIDENT ASBURY: Well, Mr Agocs' statement, though, is saying that, as I understand it, 'I'd never do anything without Mr Bolton approving it.' So in the hearing before the Commissioner, your argument, as I understand it, was, 'I was authorised by Mr Agocs to dismiss Mr Drummond. Is that the case?'

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MR BOLTON: Yes.

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VICE PRESIDENT ASBURY: And now, Mr Agocs wants to put in an affidavit that says he's been in – that – sorry, just let me go to the section. There just seems to be a little bit of a conflict. So he says he approved you to terminate the employment, although you don't require his approval or consent to make decisions. In the usual course of business, Mr Bolton consults with you in operational decision-making.

PN66

MR BOLTON: Yes, I think there's a corporate government – the point we're making is one of corporate governance as opposed to general practice. So Mr Agocs advanced there's a – there's a general practice that I'll be consulted for any material decision in the business, and, certainly, Mr Drummond has done so for 10 years. And that's just a general character of my role in the business.

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That's distinct from what the corporate mechanism actually was here that we're relying upon, that the corporate body granted authority to me to deal with Mr Drummond's termination as an executive, not as a director; he remained as a director.

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DEPUTY PRESIDENT COLMAN: And that came from Mr Agocs as the general manager giving you authority. So do I understand correctly you say you – or, well, for the purpose of – for which Mr Agocs' affidavit is being sought to be led is to show, on the one hand, whilst you, as an individual, Mr Bolton, are very influential in the company, nevertheless, there's a certain chain of command and you took Mr Agocs' instruction as general manager and acted upon it? Is that right?

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MR BOLTON: That's correct.

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VICE PRESIDENT ASBURY: Excuse us for one moment. So the decision-making role you're referring to in – so when Mr Agocs says at paragraph 8 of his affidavit he understands that you're the ultimate decision maker and holds ultimate authority in Niccolo, that's – is that some different authority to the authority Mr Agocs gave you to dismiss Mr Drummond?

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MR BOLTON: Yes, that's correct. I mean, I don't have the authority to enter a lease in the company, for example. That would need to be done by the director. Whilst Mr Drummond was a director, that would've been him. So, you know, I can't bind the company on just, you know, on – pursuant to the Corporations Act, I can't bind the company because I'm not an officer of the company. So to the extent that something needs to be binding on the company, it would need to go through the proper corporate governance channel. Really, we're making a point about character – or the context as to how decisions are generally made in the organisation, but we're not veering away from that - - -

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VICE PRESIDENT ASBURY: So you're saying your view holds sway, but when – but when it's actually implemented, it's implemented by way of the corporate structure?

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MR BOLTON: Correct, yes.

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VICE PRESIDENT ASBURY: And that - - -

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MR BOLTON: And here we had - - -

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VICE PRESIDENT ASBURY: Sorry, go on.

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MR BOLTON: Here, we had a scenario where the company needed to remove the managing director. The executive branch of the company had no capacity to remove a sole director of the company. That obviously needed to happen by the shareholders. And so the executive branch could only make a decision to remove Mr Drummond as an employee, and that is the authority that I was given from Mr Agocs to - - -

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VICE PRESIDENT ASBURY: So he gave you the executive authority to do that, you say?

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MR BOLTON: Yes.

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VICE PRESIDENT ASBURY: Right. Okay.

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MR BOLTON: Which is consistent with the submissions made in the original hearing. It's merely about cooperation.

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VICE PRESIDENT ASBURY: So to the extent you're seeking to admit the first affidavit made by Mr Agocs, it's to – it's to corroborate the evidence at the – in the

first hearing before Commissioner Wilson that you were acting – Mr Agocs gave you executive authority to do this?

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MR BOLTON: That is correct. Nothing higher than that.

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VICE PRESIDENT ASBURY: Okay. I understand. Thanks. So on that basis, when you had the – when you sent the email to Mr Drummond on 5 August, do you say that was – that was what brought about the ending of his employment?

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MR BOLTON: That is correct. And technically, that is the only device that has occurred to remove Mr Drummond from employment.

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VICE PRESIDENT ASBURY: Yes. And the 11 August resolution was to remove him from all offices with the company?

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MR BOLTON: Yes.

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VICE PRESIDENT ASBURY: All his corporate roles, as opposed to his roles as an employee?

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MR BOLTON: That's right. While there's one brain, they're two distinct functions. And so, yes, in theory, you could've – the company could've approached it first to replace him as a director and then to appoint a new director and then the new director removes him, but there was a matter of urgency, given money was being taken from the company account and affecting solvency, to address it immediately.

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VICE PRESIDENT ASBURY: Okay. I understand. Thank you for that. Was there anything else you want to say, Mr Bolton?

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MR BOLTON: Only to just reiterate my earlier point that we're in an odd construct where I'm not sure what the utility of a further hearing is if this finding holds, because it – effectively, the finding says that the shareholders removed Mr Drummond from his role and the shareholders aren't a party to this proceeding.

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VICE PRESIDENT ASBURY: Okay. I understand. Thank you. So having considered those submissions in relation – sorry, we should – we should (indistinct) – yes, Mr Drummond?

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MR DRUMMOND: Yes.

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VICE PRESIDENT ASBURY: What do you have to say about this? If accept that we're really dealing with the first affidavit that was filed in relation to – by Mr AgoCs. Insofar as it goes to him authorising Mr Bolton to dismiss you, what's your view about whether that should be accepted or not in light of the principles that were sent to both parties about admitting new evidence in an appeal?

PN95

MR DRUMMOND: I'm still trying to understand that fully. I don't think even Mr AgoCs had the authority to, I suppose, give the authority to dismiss me. I was managing director of the company. Mr Bolton is not a registered shareholder nor an employee of the company.

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This is not exactly my field; please excuse my ignorance, but all I wanted was a point of reference for a date as to when I was dismissed so I can make my claim and submit my application for unfair dismissal. And 11 August was the only date, or document, that was sent to me or that actually suggested a date. And I am still trying to understand it. There is a new story now that I think – what is it again – Mr - - -

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VICE PRESIDENT ASBURY: But Mr Drummond, again, sorry to interrupt you - - -

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MR DRUMMOND: Please.

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VICE PRESIDENT ASBURY: - - - but when you say that, isn't it the case that there was evidence before the Commissioner that the day – so the day after this correspondence from Mr Bolton was received by you, you responded by saying, 'You had no authority to terminate my employment with the company'? So on one view of that, you understood that that's what Mr Bolton was purporting to do. He was purporting to terminate your employment.

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MR DRUMMOND: Look, this goes - - -

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VICE PRESIDENT ASBURY: So when you say that there's no indication that that's what they did until 11 August, that's not really the case, is it, because you understood on 6 – at least on 6 August that that's what Mr Bolton – that's exactly what he was endeavouring to do?

PN102

MR DRUMMOND: Yes, but for me to choose a date as to when to make my application, the 11th was the one with a formal document that was sent to me and a date for me to use only as a point of reference as to when to make my application, submit my application in time. If I could have chosen another date, I had the time. I wasn't employed, you know, and I didn't ask for an extension of

time. I just really wanted to use something that was – I could – I felt I could use in a – in a professional way to say, 'All right. This is the document that was sent to me on this date, so, you know, this is what I'm going by', if that makes sense.

PN103

DEPUTY PRESIDENT COLMAN: Why didn't you go by the email of 5 August that said, 'We need to immediately terminate your employment'?

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MR DRUMMOND: Because there was no document sent to me. Maybe that's what I saw it as a part of, you know, something more formal just to choose this date. I still wanted to defend myself at that meeting that he was not giving me notice for. He called a meeting in Melbourne when I'm on the other side of the planet, and I think he gave me two or three days to get there, maybe even less. And I'd certainly wanted to be there. I was being accused of things that I can prove that I – it's mainly – what's the term for it – like dishonest accusations. I can also prove everything that I'm accusing him of with formal documents and everything.

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VICE PRESIDENT ASBURY: But Mr Drummond, what we're dealing with today is whether you – whether you – the date on which your – the termination of your employment took effect - - -

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MR DRUMMOND: Yes.

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VICE PRESIDENT ASBURY: - - - and whether you require a further period to make this application. So the merits of it are not really - - -

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MR DRUMMOND: No, I understand that.

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VICE PRESIDENT ASBURY: All we can say about - - -

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MR DRUMMOND: My apologies.

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VICE PRESIDENT ASBURY: All we can say about the merits is, clearly, you've got arguments on both sides about who's right and who's wrong - - -

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MR DRUMMOND: 100 per cent.

PN113

VICE PRESIDENT ASBURY: - - - and the only way they can be resolved is at a hearing, should – but unless your application was made within 21 days of your dismissal taking effect, there is no application. It can't go any further. So that's what we're here dealing with.

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MR DRUMMOND: Well, (indistinct) - - -

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VICE PRESIDENT ASBURY: So the question is, if you could've picked either date and you – so you got an email on 5 August. You've been in ongoing dispute with Mr Bolton and you got an email saying, 'We need to immediately terminate your employment.' Why didn't you pick that date?

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MR DRUMMOND: Because there was no document. I didn't think it was formal enough, like, for me. When choosing a date to go by, that was something that seemed more organised for me with a document, with a meeting that was called.

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VICE PRESIDENT ASBURY: You wrote an email the - - -

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MR DRUMMOND: And resolution.

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VICE PRESIDENT ASBURY: You wrote an email the next day and said, 'You're not an employee so you have no authority to terminate my employment.' So you clearly understood, at least by the SFICs - - -

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MR DRUMMOND: Yes.

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VICE PRESIDENT ASBURY: - - - when you wrote that email, and probably by the 5th when you got the email - - -

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MR DRUMMOND: 100 per cent.

PN123

VICE PRESIDENT ASBURY: - - - that that's exactly what Mr Bolton was planning to do.

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MR DRUMMOND: My answer is still the same. When choosing a date, the, you know, the date of that meeting was – especially because, or maybe partly because, I disagreed with it – is that, you know, it was the more formal date with a document, with a meeting, with resolutions that were passed at that meeting. For that reason, I chose that date. I'll hold onto that for an answer. This is my answer. I chose that date because there was a document and I merely needed a date to go by and that seemed a more formal date to me.

PN125

VICE PRESIDENT ASBURY: But that removed you as a – so you – did you – you understand that you had essentially two roles, one as an employee and one as a director of the company?

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MR DRUMMOND: Now I do, yes.

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VICE PRESIDENT ASBURY: So you're saying you didn't understand that previously?

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MR DRUMMOND: Well, I was kind of forced to be a director of this company. Nick had one of his friends when I – when I – when I was forced to become a director. I think because of his suspension, he couldn't be director of anything and he organised for someone to be a director who then demanded that I become a director. And so, no, I didn't understand it, not to the best of my ability.

PN129

VICE PRESIDENT ASBURY: But you seemed to understand when you wrote on 6 August:

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*You're not an employee. You're a shareholder so you have no authority to appoint – to terminate my employment. Until then, as sole director of Niccolo Pty Ltd, I will ask you to step away from the company's administration.*

PN131

So it seems that you understood full well that (indistinct) - - -

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MR DRUMMOND: I understood partly. Look, it's difficult for me to pick – pinpoint exactly what I understood, but what you see in my emails is just me writing to the best of my ability. And obviously, you know, if that's what you see in the email, then, yes.

PN133

VICE PRESIDENT ASBURY: All right. Is that all you wanted to say about Mr Agocs's statement?

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MR DRUMMOND: Are you talking to me?

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VICE PRESIDENT ASBURY: Yes, Mr Drummond, I'm sorry. I am.

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MR DRUMMOND: Which one of the statements, ma'am?

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VICE PRESIDENT ASBURY: The first statement. Not the supplementary statement, the first statement. And the issue, I guess, I'm asking you to respond – and I'm sorry we got sidetracked – is what do you have to say about admitting that to the full bench having regard to that statement insofar as it corroborates the evidence that was given by Mr Bolton before the Commissioner that Mr Agocs gave him the authority to dismiss you from your employment?

PN138

MR DRUMMOND: That was a lie. There was no falling out with and Mr Agocs over here, you know. Those affidavits badly lie. I did not intimidate Mr Agocs. There was only - - -

PN139

VICE PRESIDENT ASBURY: I'm sorry, Mr Drummond. It's just the part of the affidavit in relation to Mr – we're only proposing to admit it for the purposes of corroborating Mr Bolton's evidence that Mr Agocs gave him the authority to dismiss you in his role as the general manager. So do you want to comment on your views in relation to that?

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MR DRUMMOND: What views was that? Are you looking at a document - - -

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VICE PRESIDENT ASBURY: Whether we should admit it or not. Whether we should consider what's in that affidavit to that extent or not.

PN142

MR DRUMMOND: No. No, you shouldn't, ma'am. I mean, for me, you know, I never heard of anything like that before, me intimidating anybody. I was never approached; I was never informed; we never tried to fix it as any corporation would do; address the problem; email me; let me know so I can, you know, speak to Danny or to anybody. That's how I work. Like, you know, the problem was never addressed. I never received an email and I can probably guarantee you there's no emails amongst themselves about me intimidating Mr Agocs. That never happened.

PN143

VICE PRESIDENT ASBURY: Mr Drummond, do you accept that, if Mr Agocs was given – gave Mr Bolton – if Mr Agocs could have had the authority to dismiss you from your employment?

PN144

MR DRUMMOND: No. I didn't think he had a more authority role than mine. I was the managing director and he was the general manager.

PN145

DEPUTY PRESIDENT COLMAN: I don't think you said that below, did you? Did you say that to Commissioner Wilson that Mr Agocs had no authority to dismiss you?

PN146

MR DRUMMOND: I didn't say it. There was a question and answer with Mr Bolton where he lied and he said that I was just a director, not the managing director, or that, you know, Mr Agocs had a more senior authority than I did, and then came up with story about me intimidating or a fallout that happened here that never did.

PN147

DEPUTY PRESIDENT COLMAN: But did you say to Commissioner Wilson – actually, I'll go back a step. Who could dismiss you then? If Mr Agocs couldn't dismiss you and Mr Bolton couldn't dismiss you, who do you say was able to dismiss you?

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MR DRUMMOND: I think at the meeting when they had the meeting and resolutions were passed, to the best of my understanding, that's how the dismissal happened. That's why I chose it as the date.

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DEPUTY PRESIDENT COLMAN: I think before Commissioner Wilson there was an exchange between Commissioner – Mr – Commissioner Wilson asked Mr Bolton which position was more senior, general manager or managing director, and Mr Bolton said managing – sorry, a general manager; that is to say Mr Agocs had authority to dismiss you. I don't recall you contradicting that before the Commissioner. Maybe you did. I just can't remember it.

PN150

MR DRUMMOND: I can't remember either. But one thing I do remember is that, you know, this is not something that happens in my life, you know, often or ever happened before. I was nervous; I was certainly anxious about the lies that were being said under oath and, you know, just as I am here now. Like, you know, I don't – you know, all I want here is for a fair hearing as to the dates that I was dismissed, and I chose that date and I've given you guys the reason.

PN151

VICE PRESIDENT ASBURY: Thank you for that. Can you just confirm that you did say before the commissioner that you were previously the general manager and then you became a managing director?

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MR DRUMMOND: Yes. Yes, I did

PN153

VICE PRESIDENT ASBURY: Okay. So that was your evidence before the Commissioner. We might just stand the matter down for a few moments. We're just going to go off the record and we'll come back shortly. Thank you.

PN154

MR DRUMMOND: No problems. Thank you.

**SHORT ADJOURNMENT**

**[2.51 PM]**

**RESUMED**

**[3.01 PM]**

PN155

VICE PRESIDENT ASBURY: Thank you. Having considered the submissions of the parties, we have decided to admit the affidavit of Mr Agocs that was made on 12 January 2024 only in relation to paragraphs 30 onwards with respect to the corroboration that it provides with respect to Mr Bolton being given authority by



Mr Agocs to terminate the employment of Mr Drummond, and we do so on the basis that that is a directly relevant point to the matter that is required to be decided in these proceedings and is – could be determinative of that issue.

PN156

And as we understand it, Mr Bolton, what the appellant is asking us to do is to quash the decision of Commissioner Wilson in relation to the finding that the termination of Mr Drummond's employment occurred on 11 August 2023 and instead find that the termination of employment occurred on 5 August 2023 in – as a direct result of the email that you sent to Mr Drummond on that date advising him that his employment would be terminated or needed to be terminated immediately? Is that the case?

PN157

MR BOLTON: That's correct. Thank you.

PN158

VICE PRESIDENT ASBURY: Yes. And you also are seeking that we find that the 11 August email did no more than simply record the resolution of a meeting of the shareholders to appoint a new director and to remove Mr Drummond as the director of the company and any other offices that he held with the company?

PN159

MR BOLTON: Yes. I don't think there needs to be a finding of that. I believe that's just the matter of fact. I think what we're asking for is to set aside any direction that that act led to Mr Drummond's employment termination.

PN160

VICE PRESIDENT ASBURY: Well, that was the act that brought about the employment termination because you say it occurred on the 5th.

PN161

MR BOLTON: Well, that's right.

PN162

VICE PRESIDENT ASBURY: Yes.

PN163

MR BOLTON: The employment was terminated on the 5th, yes.

PN164

VICE PRESIDENT ASBURY: Okay. Thank you. Mr Drummond, can I just ask you, is there anything you want to say? Because what the respondent is – or what the appellant is asking us to do is to quash Commissioner Wilson's decision and to find that, rather than the employment – your employment being terminated on 11 August by the notice that you received, it was, in fact, terminated on 5 August by way of the communication that you received from Mr Bolton.

PN165

And if you would like to address the requirements for being granted a further period – because if that's the case, then you would need to be granted a further

period in which to make your application having regard to the matters that were set out in the directions issued by Commissioner Wilson, being the reason for the delay, the date the termination took effect, whether you were aware the termination took effect, those matters, which I can take you to if you'd like, and this is your opportunity OT address those matters and tell us why you say that we should not do as the appellant is seeking and quash the decision but we should instead find that there are exceptional circumstances that would justify you being granted a further period if we find that you were dismissed on 5 August and not 11 August. Do you understand?

PN166

MR DRUMMOND: Yes, I do understand, and I would have made an application if I'd thought I needed the further period. I was feeling pretty confident about the 11th being, you know, the one date that I could formally choose to go by. And I think the results are obvious. I think that Commissioner Wilson agreed. So, I mean, I don't know. What do I do? Do I apply for an extension?

PN167

VICE PRESIDENT ASBURY: No, this is your opportunity to address those matters in the Act relating to whether an extension should be granted and to tell us why, if necessary for you to be given an extension, you should be given one. If you just bear with me, I'll take you to – have you got the appeal book in front of you?

PN168

MR DRUMMOND: Not yet. One second.

PN169

VICE PRESIDENT ASBURY: If you can go to page 366 of the appeal book and the matters set out under section 394, which are 'the reason for the delay' – can you see those?

PN170

MR DRUMMOND: 366, did you say?

PN171

VICE PRESIDENT ASBURY: Yes, page 366, at the bottom of the page.

PN172

MR DRUMMOND: One second. At the bottom of the page I see there is a 'plainly a dispute between the parties as to the date of the dismissal and whether'

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PN173

VICE PRESIDENT ASBURY: Yes.

PN174

MR DRUMMOND: Yes.

PN175

VICE PRESIDENT ASBURY: Go just above that. Can you see 'Section 394: Application for unfair dismissal remedy' in bold type?

PN176

MR DRUMMOND: Yes.

PN177

VICE PRESIDENT ASBURY: Underneath that, there are criteria (a) through to (f).

PN178

MR DRUMMOND: Yes.

PN179

VICE PRESIDENT ASBURY: And if you do require a further period if we find that you were dismissed on 5 August and not 11 August – what the – what the appellant – perhaps if I go back – what the appellant is asking us to do is quash the decision finding that you were dismissed on 11 August and instead decide that you were dismissed on 5 August, and that we should also decide that there are no exceptional circumstances justifying you being granted a further period to make your application having regard to those matters. And this is your opportunity to tell us why, if we take the course of action proposed by the appellant, why you should be granted a further period to make the application.

PN180

If we find that you were dismissed on the 5th and not the 11th, why do you say there are exceptional circumstances, having regard to those matters, that would justify you being granted a further period to make your application?

PN181

MR DRUMMOND: Look, I think there – I spoke about the exceptional circumstances. I've been moved overseas and I've been living here since 2019; moved to New York five months before the pandemic and worked every single day of the pandemic. So the exceptional circumstances are there. I - - -

PN182

VICE PRESIDENT ASBURY: So you just wish to rely on what you said the Commissioner Wilson at the hearing before him?

PN183

MR DRUMMOND: Yes.

PN184

VICE PRESIDENT ASBURY: Okay. And you are aware that, because we have admitted the affidavit of Mr Agocs, we are now able to have regard to what he says about having authorised Mr Bolton to dismiss you on 5 August and we're entitled to now take that into account? So is there anything you want to add to what you told Commissioner Wilson at first instance about why there were exceptional circumstances?

PN185

MR DRUMMOND: What else could I add to these other than the fact that I was unfairly dismissed? And I want you guys to take into consideration the different circumstances; the fact that I was moved overseas; the fact that I was here without support of an emotional type or of a professional type or family support. And I worked really, really hard; I worked every single day of the pandemic, like, in a different country, without family, without the support that I just mentioned. And this is all I want you guys to take into consideration.

PN186

Like, I could have applied for the extra period if needed be. I chose that date because, you know, it was the only thing that, you know, seemed understandable because of the mess of the situation and I used that date as the date to go by, you know. I will hold onto that.

PN187

VICE PRESIDENT ASBURY: All right. Thank you for that. Anything you want to say in reply, Mr Bolton?

PN188

MR BOLTON: Only that those reasons aren't directly relevant to the choosing of the date. I accept that Mr Drummond may have made an error in the date on which he relied, but the grounds don't justify an extension of time pursuant to the outline of rules in the Commission.

PN189

VICE PRESIDENT ASBURY: All right. Thank you for that. Well, thank you. We'll indicate that we will reserve our decision and we'll issue it in due course. And on that basis, we'll adjourn. Good afternoon.

**ADJOURNED INDEFINITELY**

**[3.11 PM]**