



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK

C2022/6540

s.400A - Application for a costs order against a party

**Classic Ceramics (Importers) Pty Ltd
and
Ms Mary Heywood, Thornton Tucker
(C2022/6540)**

Melbourne

10.00 AM, TUESDAY, 28 FEBRUARY 2023

Continued from 14/12/2022

PN1

THE DEPUTY PRESIDENT: Yes, good morning. Ms Pase, you're seeking permission to appear for the - - -

PN2

MS C PASE: Costs applicant.

PN3

THE DEPUTY PRESIDENT: - - - costs applicant?

PN4

MS PASE: Yes, Deputy President.

PN5

THE DEPUTY PRESIDENT: Thank you. And, Mr Raines, are you seeking permission to appear for Ms Heywood?

PN6

MR G RAINES: Yes. If the other side is permitted I would also - even though I'm not a paid agent or lawyer, I'm a disability support advocate - but I will seek leave if the other party is represented, yes, your Honour.

PN7

THE DEPUTY PRESIDENT: Yes, all right. Is there any objection to the applications for permission to be represented?

PN8

MR RAINES: No, your Honour.

PN9

THE DEPUTY PRESIDENT: Ms Pase? No?

PN10

MS PASE: No, your Honour.

PN11

THE DEPUTY PRESIDENT: In the circumstances I am satisfied the matters will be dealt with more efficiently, taking into account the complexities of it, I grant each of the parties permission to be represented by a lawyer, and I do so. Yes, Ms Pase.

PN12

MS PASE: Yes. Deputy President, just at the outset I've been briefed to appear following the filing of the application, submissions and evidence. So the costs applicant intends to narrow its grounds and does not intend to push all claims as set out in the application and submissions.

PN13

THE DEPUTY PRESIDENT: Good news.

PN14

MS PASE: I'd suspected you might feel that way. Also the costs applicant no longer relies on submissions in reply filed on 2 November 2022.

PN15

THE DEPUTY PRESIDENT: Yes.

PN16

MS PASE: As has already been advised the costs applicant no longer presses its application against the second costs respondent Mr Hayne. If it assists both the Commission and Ms Heywood and Mr Hayne I will briefly provide a summary of the grounds that are not pressed today as against Ms Heywood who I will refer to as the costs respondent.

PN17

First, the costs applicant continues to press its application under section 611(2)(b) of the Fair Work Act. However this is limited to one factual assertion, and that is the allegation that Ms Heywood covertly recorded various meetings with her employer and conversations with her employer. This issue was not one that was ventilated in the material in the substantive unfair dismissal application as the costs applicant only became aware of those alleged covert recordings after its material had been filed and before the costs respondent discontinued her substantive application. But for the covert recordings issue the costs applicant no longer submits that the unfair dismissal application had no reasonable prospects of success otherwise outside of the covert recordings issue.

PN18

THE DEPUTY PRESIDENT: So you say in effect that combined with the other reasons or independently of them that covert recordings would have amounted to a valid reason for dismissal?

PN19

MS PASE: Yes. Indeed we say serious misconduct.

PN20

THE DEPUTY PRESIDENT: And that was after acquired knowledge.

PN21

MS PASE: Yes.

PN22

THE DEPUTY PRESIDENT: Yes, I understand.

PN23

MS PASE: Yes, Deputy President. Secondly, pursuant to section 400A of the Fair Work Act the costs applicant submits that the costs respondent engaged in two - three really, but two groups of unreasonable acts or omissions over the course of the matter leading up to the hearing which caused the costs applicant to incur costs and for which a costs order ought be made against the costs respondent.

PN24

The first was the unreasonable act or omission of refusing to accept a very reasonable settlement offer made on 1 September 2022 prior to the respondent putting on its material, and this is in circumstances where we say that the costs respondent knew that she had engaged in conduct, which we say was serious misconduct, this being the act of covertly recording meetings and conversations with her employer.

PN25

The second relates to unreasonable acts or omissions involving a failure to comply with directions of the Commission and the matter having to be called on for a mention and a case management conference as a result of those unreasonable acts or omissions.

PN26

That provides a brief opening summary, Deputy President Gostencnik. I'm not sure of the process if Mr Raines would like to provide an opening or if we move straight to evidence.

PN27

THE DEPUTY PRESIDENT: I think we will move into evidence and Mr Raines can provide an opening when your evidentiary case closes if he wishes. I thought I heard you say you rely on three unreasonable acts.

PN28

MS PASE: Yes, sorry. The first is the refusal of the settlement offer. The second is one mention having to be called on. The third is another mention that was needed to be called on. Sorry, I meant two groups, but three actual acts.

PN29

THE DEPUTY PRESIDENT: Yes, all right. Will your instructors provide - having regard to the confined nature of the - - -

PN30

MS PASE: Yes.

PN31

THE DEPUTY PRESIDENT: - - - costs application will your instructors provide a revised particularised costs claim?

PN32

MS PASE: They certainly can do. In preparation I've singled out those items from the costs - - -

PN33

THE DEPUTY PRESIDENT: All right. You can come to those in good time. Yes, go ahead. Sorry, yes?

PN34

MR RAINES: Your Honour, would I be able to have a short time out just to explain to Ms Heywood what that all means?

PN35

THE DEPUTY PRESIDENT: How long do you want?

PN36

MR RAINES: Five minutes.

PN37

THE DEPUTY PRESIDENT: Yes, all right. I will give you 10 minutes, Mr Raines. We will adjourn until about 10.30 or as soon as practicable thereafter. Thank you. We're adjourned.

SHORT ADJOURNMENT

[10.20 AM]

RESUMED

[10.30 AM]

PN38

THE DEPUTY PRESIDENT: Yes, go ahead.

PN39

MS PASE: I call Ms Warren. I might just wait so that she can do the oath or affirmation.

PN40

THE DEPUTY PRESIDENT: Mr Raines, are you proposing to cross-examine Ms Warren?

PN41

MR RAINES: Yes.

PN42

THE DEPUTY PRESIDENT: Yes.

PN43

MS PASE: Yes, I call Ms Warren.

PN44

THE DEPUTY PRESIDENT: Yes,

PN45

THE ASSOCIATE: Could you please state your full name and address.

PN46

MS WARREN: Ashleigh Rose Warren, (address supplied).

<ASHLEIGH ROSE WARREN, AFFIRMED

[10.33 AM]

EXAMINATION-IN-CHIEF BY MS PASE

[10.33 AM]

PN47

THE DEPUTY PRESIDENT: Yes, thank you, Ms Warren, take a seat. Yes.

ASHLEIGH ROSE WARREN

XN MS PASE

PN48

MS PASE: Ms Warren, if you could state your full name?---Ashleigh Rose Warren.

PN49

And have you prepared a witness statement in this matter?---Yes.

PN50

Dated 23 September 2022?---Yes.

PN51

And are the contents of that statement true and correct?---Yes.

PN52

I tender that statement.

PN53

THE DEPUTY PRESIDENT: Any objection, Mr Raines, to the tender?

PN54

MR RAINES: No objection.

**EXHIBIT #1 WITNESS STATEMENT OF ASHLEIGH WARREN
DATED 23/09/2022 COMPRISING 32 PARAGRAPHS TOGETHER
WITH 12 ANNEXURES THERETO**

PN55

MS PASE: No questions in-chief.

PN56

THE DEPUTY PRESIDENT: Thank you. Cross-examination, Mr Raines?

PN57

MR RAINES: Thank you, your Honour.

CROSS-EXAMINATION BY MR RAINES

[10.34 AM]

PN58

Good morning, Ms Warren?---Good morning.

PN59

I will be very brief. I just wanted to talk about your statement in regard to your without prejudice offer to Ms Heywood. Ms Heywood responded to that offer; is that correct?---There were a couple - - -

PN60

MS PASE: There were multiple offers I believe, Mr Raines, so it might be helpful to provide some specificity.

*** ASHLEIGH ROSE WARREN

XXN MR RAINES

PN61

MR RAINES: Okay. On 4 September Ms Heywood responded to you with regard to an offer; is that correct?

PN62

THE DEPUTY PRESIDENT: I think the objection was that you should specify which offer made by the costs applicant, which is I am assuming you're referring to the 1 September offer.

PN63

MR RAINES: Yes, I am, the 1 September offer. Did you receive a response to that offer?---I received an email response, yes.

PN64

And in that response did Ms Heywood indicate that she wished to discuss the offer?---Yes.

PN65

Did you respond to that offer - sorry, to that email?---No.

PN66

Do you have a copy of that; it's marked AW8?---Yes.

PN67

Would you categorise that email as wanting to discuss the offer further?---It doesn't really respond to the offer that was provided to Ms Heywood. Ms Heywood was given a financial offer which she either could have accepted or declined, but she didn't do either of those things.

PN68

Did she request a meeting to discuss that offer according to that email?---In the email, yes.

PN69

Yes. Why wasn't there a response from your office to that email?---They asked for something separate to what was being offered, so asking to negotiate further. The letter that was sent by our offices on 1 September was an offer that was open for either acceptance or rejection, and the email response didn't do either of those things.

PN70

Does it point out that Ms Heywood was confused by the offer and would like to talk to you about it?---Yes.

PN71

If I was to put to you that Ms Heywood wanted to accept your offer and you didn't respond to her what would you say to that?

PN72

MS PASE: Mr Raines, she can't possibly say what was in the state of mind of Ms Heywood whether she wanted to accept or reject the offer.

*** ASHLEIGH ROSE WARREN

XXN MR RAINES

PN73

THE DEPUTY PRESIDENT: Yes. More importantly if that's a proposition that a solicitor advanced it really ought to have been in her statement.

PN74

MR RAINES: Thank you, your Honour. I put to you that Ms Heywood was accepting your offer, but wanted to discuss the terms?---(No audible reply)

PN75

In regard to your submissions, and I understand with your statement - if I could just get you to look through your statement. Point 9 through to 15 appear to be correspondence that you'd sent to me or tried to contact me?---Okay.

PN76

Do you accept that none of those communications were sent to Ms Heywood?---I do accept that, yes.

PN77

Thank you. Finally I'd ask you about your own particulars, because you do mention that my particulars were late. Do you accept that your particulars were also late?---I assume you're referring to the materials that we filed. I accept ours were a couple of hours - sorry, a few hours late. Yes.

PN78

Did you recall your Honour raising that point with you and giving all parties more time?---(No audible reply)

PN79

Did you recall during one of the mention hearings your Honour advising you that your particulars were also late?---I don't know. I don't remember that, no.

PN80

But you do accept that on several occasions your particulars were late?---No.

PN81

MS PASE: Sorry, Deputy President, I think an admission has been made that there was one point where materials were filed a few hours late, not several.

PN82

THE DEPUTY PRESIDENT: Yes. Mr Raines?

PN83

MR RAINES: Okay. Thank you, your Honour. I'm finished with the witness, your Honour.

PN84

THE DEPUTY PRESIDENT: Any re-examination?

PN85

MS PASE: Just briefly.

*** ASHLEIGH ROSE WARREN

XXN MR RAINES

RE-EXAMINATION BY MS PASE

[10.40 AM]

PN86

Ms Warren, you were asked some questions about the settlement offer that was made by your office on 1 September to the costs respondent?---Yes.

PN87

And you were taken to an email response that you received from the costs respondent?---Yes.

PN88

Other than that email did the costs respondent make any other contact with you in relation to that settlement offer; did you receive any phone calls for example?---No.

PN89

Any missed calls?---No.

PN90

Any messages with your office?---No.

PN91

Any other contact whatsoever, any other emails?---No.

PN92

No further questions.

PN93

THE DEPUTY PRESIDENT: Yes, thank you. Thank you, Ms Warren, for your evidence, you're excused.

<THE WITNESS WITHDREW

[10.41 AM]

PN94

MS PASE: That closes the evidentiary case for the costs applicant, Deputy President.

PN95

THE DEPUTY PRESIDENT: Yes, thank you. Mr Raines?

PN96

MR RAINES: Thank you, your Honour. I call Mary Heywood.

PN97

THE DEPUTY PRESIDENT: Yes.

PN98

THE ASSOCIATE: Can you start by saying your full name and address.

*** ASHLEIGH ROSE WARREN

RXN MS PASE

PN99

MS HEYWOOD: Mary Margaret Heywood, (address supplied).

<MARY MARGARET HEYWOOD, AFFIRMED [10.41 AM]

EXAMINATION-IN-CHIEF BY MR RAINES [10.41 AM]

PN100

THE DEPUTY PRESIDENT: Yes, thank you, Ms Heywood, take a seat. Yes, Mr Raines.

PN101

MR RAINES: Thank you, Ms Heywood. I might call you Mary if that's okay. Can I just confirm that you have provided a statement in this matter dated 10 October 2022?---I have.

PN102

Do you have that statement in front of you?---I do.

PN103

Thank you. Ms Heywood, as we've just heard most of the issues have been dropped in regard to some of the previous material. I'm going to ask you about the email that you sent with regard to the discussion we just had. Could you tell me - - -

PN104

MS PASE: Deputy President, I appreciate that some of the issues have been narrowed and dropped as Mr Raines calls it, but they were certainly all put in the material that was filed by the costs applicant, and so I would object to any leave being granted for examination-in-chief of this nature.

PN105

THE DEPUTY PRESIDENT: Yes. At this stage Mr Raines hasn't even tendered the statement.

PN106

MS PASE: Yes.

PN107

THE DEPUTY PRESIDENT: Mr Raines, would you like to - - -

PN108

MR RAINES: I would like to tender the email from Ms Heywood to Ashleigh Warren.

PN109

THE DEPUTY PRESIDENT: Well, before you do that, Mr Raines, do you want a statutory declaration made by your client to be - - -

PN110

MR RAINES: Tendered into evidence. Yes, your Honour.

*** MARY MARGARET HEYWOOD

XN MR RAINES

PN111

THE DEPUTY PRESIDENT: Ms Heywood, you've read recently your statutory declaration?---I have.

PN112

And are the contents of that declaration true and correct?---It is.

PN113

Would you like to make any amendments to it?---No.

PN114

And do you adopt that as your evidence in this proceeding?---I would like that, thank you.

PN115

Is there any objection to the tender?

PN116

MS PASE: No, Deputy President.

PN117

THE DEPUTY PRESIDENT: Thank you.

**EXHIBIT #2 STATUTORY DECLARATION OF MARY HEYWOOD
MADE ON 10/10/2022 COMPRISING TWO PAGES**

PN118

Yes. Now, Mr Raines, you want leave to lead some further evidence?

PN119

MR RAINES: Yes, your Honour.

PN120

THE DEPUTY PRESIDENT: Sorry, before you do that I might just have this discussion without the witness in the room. Ms Heywood, sorry to do this, would you mind just following my associate out for a minute?---Of course.

PN121

All right. Thank you.

<THE WITNESS WITHDREW

[10.44 AM]

PN122

MR RAINES: Sorry, your Honour, was that exhibit 2?

PN123

THE DEPUTY PRESIDENT: Yes, it was. Mr Raines, what additional evidence do you want to lead from this witness?

*** MARY MARGARET HEYWOOD

XN MR RAINES

PN124

MR RAINES: The email from Ms Heywood on 4 September marked AW8.

PN125

THE DEPUTY PRESIDENT: That's already in evidence.

PN126

MR RAINES: It is?

PN127

THE DEPUTY PRESIDENT: Yes. It was part of Ms Warren's statement.

PN128

MR RAINES: Thank you. That was the only evidence that I was going to submit with regard to - - -

PN129

THE DEPUTY PRESIDENT: And the subject matter of that appears to be dealt with in the fifth paragraph of the statutory declaration.

PN130

MS PASE: The statutory declaration of Ms Heywood.

PN131

THE DEPUTY PRESIDENT: All right. So is there any other evidence you wanted to elicit?

PN132

MR RAINES: Apart from the stat dec and this email, no.

PN133

THE DEPUTY PRESIDENT: All right.

<MARY MARGARET HEYWOOD, RECALLED [10.47 AM]

EXAMINATION-IN-CHIEF BY MR RAINES, CONTINUING [10.47 AM]

PN134

THE DEPUTY PRESIDENT: Yes, thank you, Ms Heywood. Apologies for the inconvenience. So that's the evidence-in-chief of this witness, Mr Raines?

PN135

MR RAINES: That and also just the statement of Ms Warren which has already been tendered.

PN136

THE DEPUTY PRESIDENT: The statement of Ms Warren is Ms Warren's evidence and the material that is attached is part of the evidentiary record.

PN137

MR RAINES: Yes.

*** MARY MARGARET HEYWOOD

XN MR RAINES

PN138

THE DEPUTY PRESIDENT: Thank you. Cross-examination? Did you want to ask - sorry, are you finished?

PN139

MR RAINES: No, I haven't.

PN140

THE DEPUTY PRESIDENT: You haven't?

PN141

MR RAINES: I haven't finished.

PN142

THE DEPUTY PRESIDENT: Well, when I asked you before about whether you wanted to elicit any further material you said the only issue was the statement or the email.

PN143

MR RAINES: Sorry. What I meant, your Honour, was I haven't finished with the stat dec or the email letter.

PN144

THE DEPUTY PRESIDENT: You want to ask some questions?

PN145

MR RAINES: Yes.

PN146

THE DEPUTY PRESIDENT: Apologies, Ms Heywood, could I ask you to leave the room again.

<THE WITNESS WITHDREW

[10.48 AM]

PN147

THE DEPUTY PRESIDENT: The usual course, Mr Raines, is that the parties file their written materials and their statements and they're not usually permitted to elicit further material beyond their written material at the hearing, because the other side hasn't been put on notice about. So you better tell me what it is that you want to lead from this witness.

PN148

MR RAINES: Thank you, your Honour. I do seek leave.

PN149

THE DEPUTY PRESIDENT: Yes, but about what? What matters do you want to lead evidence about?

PN150

MR RAINES: In regard to - - -

*** MARY MARGARET HEYWOOD

XN MR RAINES

PN151

THE DEPUTY PRESIDENT: You want to ask Ms Heywood some questions, tell me what they are.

PN152

MR RAINES: I'm simply going to ask Ms Heywood about her intention to settle and what that email is.

PN153

THE DEPUTY PRESIDENT: Isn't that set out in the fifth paragraph of her statutory declaration?

PN154

MR RAINES: Yes, it is.

PN155

THE DEPUTY PRESIDENT: I have read that.

PN156

MR RAINES: Yes.

PN157

THE DEPUTY PRESIDENT: She doesn't need to repeat it.

PN158

MR RAINES: Okay.

PN159

THE DEPUTY PRESIDENT: Is there anything else?

PN160

MR RAINES: There is also - I wanted to talk to her about the first settlement offer that she didn't receive; I received, but she never saw. So I was going to talk through that with her.

PN161

THE DEPUTY PRESIDENT: The first settlement offer being the offer of what?

PN162

MR RAINES: There was two offers made, the first one which Ms Heywood didn't receive.

PN163

THE DEPUTY PRESIDENT: Yes. Which was dated when?

PN164

MS PASE: If I can assist, Deputy President, Mr Raines may be referring to the letter of 12 August.

PN165

THE DEPUTY PRESIDENT: On which you don't rely.

PN166

MS PASE: No.

PN167

THE DEPUTY PRESIDENT: Yes, that's what I assumed and I'm just trying to clarify whether that's where he's going.

PN168

MR RAINES: Yes, your Honour, 12 August.

PN169

THE DEPUTY PRESIDENT: In opening the costs applicant made it clear that it doesn't rely on that. So it's not really relevant to any issue. The costs respondent does not rely on that offer as an unreasonable act.

PN170

MR RAINES: Okay. I wasn't aware of that. I understood that their third argument, their third point was that there was an unreasonable refusal of the offer.

PN171

THE DEPUTY PRESIDENT: Of the 1 September offer.

PN172

MR RAINES: Okay. Sorry, my misunderstanding.

PN173

THE DEPUTY PRESIDENT: Is there anything else?

PN174

MR RAINES: I just wanted to put to Ms Heywood that email on her intention, but if you're satisfied, your Honour, that - - -

PN175

THE DEPUTY PRESIDENT: It's not a question of whether I'm satisfied, she's given evidence about it in the fifth paragraph.

PN176

MR RAINES: Yes. I was just going to ask her to elaborate on that.

PN177

THE DEPUTY PRESIDENT: Yes, go on.

PN178

MS PASE: Sorry, Deputy President, but I object to that. She was given ample opportunity. She's given the evidence.

PN179

THE DEPUTY PRESIDENT: Yes. The difficulty about any of that is that this is the evidence to which the costs applicant had an opportunity to apply. This is the extent of her intention. You now want her to elaborate. I don't understand why any elaboration couldn't have been contained in the original statutory declaration.

PN180

MR RAINES: Yes, your Honour, and we certainly do rely on the submissions previously that were on paper, and in coming in today Ms Heywood did want to clear up some issues, and now that they have been - I guess the allegations have been slimmed down a little bit that seems to be an issue that she would like to talk to.

PN181

THE DEPUTY PRESIDENT: Mr Raines, what do you anticipate Ms Heywood saying in response to a request that she elaborate on her answer in the statutory declaration?

PN182

MR RAINES: So the Commission can potentially make further enquiries, understand that that was an offer that she had wanted to receive.

PN183

THE DEPUTY PRESIDENT: What she says in her evidence is that her intention in responding on 4 September, her intention in requesting discussions was for her to put essentially a five week offer with a view of accepting four weeks.

PN184

MR RAINES: Yes, your Honour, and to negotiate.

PN185

THE DEPUTY PRESIDENT: I take that to be a negotiating position; that is I want to put five. If I can get five that will be terrific, but otherwise I'll accept four. I understand that.

PN186

MR RAINES: Okay. Sorry, your Honour, I appreciate that. And then I rest that point then. Thank you.

PN187

THE DEPUTY PRESIDENT: All right. Is there anything else?

PN188

MR RAINES: There was nothing else.

PN189

THE DEPUTY PRESIDENT: All right. Very well, thank you.

<MARY MARGARET HEYWOOD, RECALLED

[10.54 AM]

CROSS-EXAMINATION BY MS PASE

[10.54 AM]

PN190

THE DEPUTY PRESIDENT: Yes, thank you, Ms Heywood. Again apologies. Cross-examination?

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN191

MS PASE: Yes. Ms Heywood, do you have a copy of your statutory declaration there with you?---I do.

PN192

THE DEPUTY PRESIDENT: Ms Heywood, what else do you have with you?---I have a piece of paper Mr Raines handed me when we were talking in the other office, and I also have some notes I've written about the hearing today.

PN193

If you want to hang onto them that's a matter for you, but just understand that if you do hang onto them counsel would be entitled to ask to see them?---I understand.

PN194

All right.

PN195

MS PASE: I do ask to see them then, Deputy President.

PN196

THE DEPUTY PRESIDENT: Perhaps hand those to my associate. Thank you.

PN197

MS PASE: Can I just have one moment, Deputy President?

PN198

THE DEPUTY PRESIDENT: Of course.

PN199

MS PASE: That's fine, Deputy President, nothing arising.

PN200

THE DEPUTY PRESIDENT: Yes, go ahead.

PN201

MS PASE: Ms Heywood, if I could take you to halfway down the page of your statutory declaration, the first page. There's a paragraph that starts with 'On 4 September 2022'. Do you see that?---On 1 September?

PN202

No, the paragraph below that starting 'On 4 September 2022'?---Okay.

PN203

Here you state, 'I responded to the letter agreeing to discussions.' I will go back, sorry, on 1 September 2022, the paragraph above, you say that you received a letter from the respondent's lawyers, is that right?---I wrote I received a very complicated letter from the respondent's lawyers titled 'Without prejudice.'

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN204

Yes. And you say in that paragraph, 'The letter was a four week offer to settle. This was something I wanted to accept.' That's right?---That's correct.

PN205

If we go to the next paragraph, 'On 4 September 2022 I responded to the letter agreeing to discussions.' Is that right?---I responded to the letter agreeing to discussions and explaining that I did not understand much of the letter.

PN206

Yes?---I had assumed I was going to settle.

PN207

Yes. I might just put that letter to Ms Heywood.

PN208

THE DEPUTY PRESIDENT: The letter is actually AW7.

PN209

MS PASE: AW7. I think it forms a part of AW8 as well.

PN210

THE DEPUTY PRESIDENT: It does also, yes.

PN211

MS PASE: Just so that it's a complete - - -?---Okay.

PN212

Now, take your time to have a look, but I'm just - where you've said here, 'I responded to the letter agreeing to discussions', I'd just like you to take me to the part of that letter where it asks you if you'd like to have a discussion, or invites a discussion?---Discussion on page 1, materials filed by you. Discussion on page 1, settlement offer.

PN213

Sorry?---Discussion on page 2, background circumstances.

PN214

Where is the invitation - - -

PN215

THE DEPUTY PRESIDENT: I think, Ms Heywood - sorry.

PN216

MS PASE: Sorry.

PN217

THE DEPUTY PRESIDENT: I think counsel was asking you, Ms Heywood, to refer to when you were initiating discussions in your email.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN218

MS PASE: No, no, sorry, I'm taking the email as saying that she responded agreeing to discussions, and I'm asking where the invitation for a discussion was.

PN219

THE DEPUTY PRESIDENT: I see. Apologies.

PN220

THE WITNESS: I'm not a lawyer, I don't - I'm not able to go into the verbiage and understand what you're asking for, in particular that I do understand that what you're asking for is a without prejudice discussion where the two of us can meet and discuss making the whole matter go away, ceasing the matter to exist, making it go away.

PN221

MS PASE: When you say that that's what you understood from the letter which part of - - -

PN222

MR RAINES: Objection. Now you're asking similar questions what I did, so go beyond what's actually put in the stat dec of Ms Heywood.

PN223

THE DEPUTY PRESIDENT: Counsel are not confined to the statutory declaration in cross-examination. She can canvass any matter that's relevant to an issue that requires determination, and what she's doing at the moment is she's testing the costs respondent's assertion in her statement that she was responding to an invitation for a meeting, which she's more than entitled to do.

PN224

MR RAINES: Yes, I understand that, your Honour. My point was that beyond that and asking further than what her intentions were is exactly the same questions I was asking.

PN225

THE DEPUTY PRESIDENT: What counsel was asking was where in the letter of 1 September was there an invitation.

PN226

MR RAINES: Yes, I understood that, your Honour. I have no - absolutely no problem with that.

PN227

THE DEPUTY PRESIDENT: That was the question.

PN228

MS PASE: Yes, Deputy President.

PN229

MR RAINES: Thank you.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN230

THE DEPUTY PRESIDENT: Repeat the question.

PN231

MS PASE: I am trying to be fair, but I can put it differently. Nowhere in the letter is there an invitation to discuss the offer that is put in that letter, is there?---The undercurrent of the letter reads to me that, yes, it is, I'm certain of it. The undercurrent is a settlement offer. 'Notwithstanding the above and the further matters detailed for commercial reasons our client will withdraw the termination and recharacterise your dismissal for misconduct as a resignation.' A lot of the other verbiage - I'm not a lawyer - all the other verbiage - why on earth would you send me a letter if not to dissolve this case and make it go away. Why would you do that? You know I'm not a lawyer. You sent me a very legally worded document. I have a right to accept it and ask for further - it's confusing. It's very confusing, so I requested my human rights to ask you to meet with me to discuss this not prejudice letter with the intention of settling the case.

PN232

So, Ms Heywood, you requested a meeting. A meeting wasn't - you were not invited to attend any meeting or to have any discussion; that's right, isn't it?---I wrote to Ashleigh. I have no idea what the letter dated 1 September actually means. I hypothesised, but I didn't know what it actually meant. Most of the issues you have raised are matters that have never been put to me and are very confusing to me without the full submission and witness statements. I was terminated. I go on to say I do not have legal representation. So your legal references that you are making are beyond me. I don't understand - - -

PN233

Ms Heywood, I will just stop you there. We can all read the letter, I don't think we need to have it read out?---I have said I am very open to the idea and I requested a private and confidential meeting with you. What does that say? I really wanted to settle. That's what I'm certain was going to happen if we meet.

PN234

Okay. If we go back to the statutory declaration in that same paragraph?---Sorry, did you say my statutory declaration?

PN235

Yes. So the paragraph that starts with 'On 4 September 2022'?---Okay.

PN236

Do you have that?---I have it in front of me.

PN237

A little further along there's a statement, 'My intention in requesting discussions with them was that I would try for five weeks and then accept their four week offer.' That's right, isn't it?---I have written that, yes.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN238

So I put to you that your intention of having some form of discussion with Russell Kennedy was to negotiate to try and get a better settlement than a four week offer. That's right, isn't it?---My intention was to get an offer. It's not pertained to four or five. My intention was to settle the matter to make it go away.

PN239

But, Ms Heywood, you'd received an offer, hadn't you? When you say your intention was to get an offer at this point you had received an offer, hadn't you?---What offer would you be referring to?

PN240

To the offer that you received on 1 September 2022, an offer of four weeks settlement, the offer about which you say you wanted discussions?---I received a first round offer of four weeks salary.

PN241

So you received an offer of four weeks salary, and you could accept or reject that offer. That's right, isn't it?---Well, my intention was to accept it, but still to talk to you and Russell Kennedy about my matter.

PN242

But, Ms Heywood, your intention is - in this statutory declaration which you've said is true and correct you state very clearly what your intention was. Your intention was to try for five weeks. That's right, isn't it? But that doesn't suggest that you're accepting the four weeks, that suggests that you're trying for a higher - - -?---Well, try is very - - -

PN243

MR RAINES: Objection, your Honour. The sentence clearly does indicate that she was - my learned friend here has only read half the sentence. The other half clearly answers exactly what she's asking, and the intention of Ms Heywood.

PN244

THE DEPUTY PRESIDENT: I'm trying to understand what the objection is. You're purporting to give the witness's answer at the moment. What's the objection to the question?

PN245

MR RAINES: The objection is that - again it is in front of us - my friend has actually only read half the document and is badgering Ms Heywood about something that's in front of all of us.

PN246

THE DEPUTY PRESIDENT: The difficulty arises from the way in which the proposition in the statement is constructed; that is it purports to be an intention, and counsel is entitled to explore what the actual intention was. The objection is overruled. Yes, continue.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN247

MS PASE: I take issue with badgering, Deputy President.

PN248

THE DEPUTY PRESIDENT: We will leave our adjectives at the door. Yes, go ahead. Before you do - - -

PN249

MR RAINES: Sorry, your Honour, I apologise for the term badgering then.

PN250

THE DEPUTY PRESIDENT: All right. Thank you for that. Ms Heywood, can I ask you this; in the paragraph before the 4 September paragraph, so the paragraph commencing 1 September - do you see that, and you say you were sent a very complicated letter. The letter was a four week offer to settle. 'This was something I wanted to accept.' Yes?---I'm certain of it. It was something I wanted to accept, yes.

PN251

Can I ask you this; why didn't you just pick up the telephone and call Ms Warren or Ms Newman and say, 'I've received your letter, I would like to accept your offer'?---First of all I wanted to formalise everything in writing so that it was written. I wanted to meet with them personally. I was in the hot seat and very stressed and ill, and I wanted them to take the lead in settling the issue and making it go away as paid professionals. I didn't know I had to do - am I supposed to - I didn't know I had to ring - - -

PN252

I didn't say you had to ring. There are lots of ways you could have accepted the offer. You could have written to the costs applicant's lawyers and said that you accept the offer as set out in paragraph 5 of the letter. You could have telephoned Ms Warren or Ms Newman and said you'd like to accept the offer, and would they mind sending you the written terms of settlement. There were lots of things you could have done. I'm just trying to understand how it is that you couldn't give effect to what you say was your intention at the time to accept the offer?---Your Honour, my intention was to accept the four weeks offer. I wanted them to take the lead as paid professionals. I'm not a lawyer, I don't know what I have to do.

PN253

I heard you say that the first time. It just seems to me that they have taken the lead, they've made an offer. They've set out the terms in paragraph 5(a) through to (f). They're the terms. So there was nothing more for you to do. If you wanted to accept it then just tell the costs applicant's solicitors that you accept the offer?---I wrote to them openly saying please let me know about my proposal to discuss this early next week. I was eager to discuss the termination and the letter, but there was a lot in the letter that I really needed explained to me.

PN254

All right. Sorry, Ms Pase, continue.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN255

MS PASE: Deputy President, I'm going to leave that issue and move to a different issue.

PN256

THE DEPUTY PRESIDENT: Yes.

PN257

MS PASE: If the witness can be shown AW10. Ms Heywood, do you recognise this document?---I do.

PN258

And that's an email that you sent to the chambers of Deputy President Gostencnik, is that correct?---Yes.

PN259

And it attaches a letter; is that right? Have you got that letter there?---I have it.

PN260

And you wrote this letter; that's right?---One moment, please.

PN261

Ms Heywood, did you write this letter?---One moment, please. I have written this letter.

PN262

If I can take you to the second last paragraph of that letter, the first sentence, you say: 'I have recorded my phone conversation with Sam Giunta.' Did you record a phone conversation that you had with Mr Giunta while you were employed with Classic Ceramics? Ms Heywood, the question doesn't relate to anything other than that first sentence, so it's a simple question?---I have recorded the conversation.

PN263

So you had a conversation with Mr Giunta while you were employed with Classic Ceramics?---That is correct.

PN264

And you're recorded that conversation?---I beg your pardon?

PN265

And you recorded that conversation?---I recorded that conversation for my own peace of mind and to recollect what he was saying to me.

PN266

Did you tell Mr Giunta that you were recording the conversation?---I did not tell him. I don't believe I did. I really don't recall to be honest. I don't recall.

PN267

Did you ask Mr Giunta whether you could record the conversation?---I really don't recall. I'm sorry, I don't remember.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN268

You don't remember whether you had his permission, whether you asked him to record it or whether you told him that you were recording it? You're under oath?---I don't remember.

PN269

Moments ago you said that you didn't. Are you retracting that and saying now that you don't remember?---I know I did record it, but I don't remember asking if - that I was recording it and telling him I was recording it. I just don't recall.

PN270

I put it to you that you didn't tell him that you were recording it and that you didn't ask him whether you were able to record it, whether you had his permission to record it. That's right, isn't it?---I don't remember.

PN271

Why did you record the conversation with Mr Giunta?---Because I wanted to understand what was happening whilst I was being targeted and attacked. I wanted to understand why - what he was saying to me, because he does speak and goes off in tangents, and I wanted to reason with him so that I could recollect what he had to say and where my point of view in relation to this possible termination, in which direction it was going. I know Sam is a very reasonable person sometimes. I thought that if he heard my view he would be able to assist, and I was extremely stressed, anxious and depressed at the time, and, you know, I needed to have that to prove to myself that what I was listening to was true and correct. And I was - I knew I had the right to record, and, you know, I was encouraged to do that.

PN272

You were encouraged to do that. By who were you encouraged to do that?---I was told by Greg that I could record the conversation. He is a licenced investigator with Victoria Police. I was under so much stress and anxiety I needed to remember what was being said to me, what was being alleged, and so I made the recording to help me.

PN273

So when you say that you knew you were able to what are you referring to there; you were able to because Greg told you or is there some other reason that you thought you were able, allowed to record this conversation?---Could you ask that question again, that's very confusing.

PN274

When you say that you knew you were allowed - I think the words you used you knew you were able to record the conversation - what do you mean by that, you knew you were able to. Able to according to who, according to what?---According to the Surveillance Act.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN275

Right. So you had looked at the Surveillance Devices Act and you took from that that you were able to record this conversation?---I was able to record any conversation for my own personal use, and that's why I recorded it, for my own personal use, because I was ill and I needed to remember what was being said. It was my own personal use. I knew I couldn't show it to anyone, it was for my own personal use.

PN276

You knew you couldn't show it to anyone?---I knew - I knew I couldn't show it to anyone, it was for myself.

PN277

Did you tell Sam that you'd made the recording?---I really don't remember. I'm really sorry, I don't recall.

PN278

So you remember that Greg told you you could take the recording. You remember that you looked at the Surveillance Devices Act, but you don't remember whether at any point you told Sam that you were making the recording?---I don't - I don't remember, and it's certainly not in the recording.

PN279

What do you mean it's not in the recording, what's not in the recording? You've listened to the recording?---I've listened to it, yes.

PN280

At any point in the recording do you tell Sam that you're recording?---Well, the recording - Sam spoke to me for over an hour and a half. The recording is not an hour and a half in duration.

PN281

Right. But you just said before it's not in the recording?---It's not in the recording.

PN282

So you telling Sam that you're recording is not in the recording?---Well, a lot of things Sam told me is not in the recording.

PN283

And you asking Sam's permission to record is not in the recording?---It's not in the recording.

PN284

Okay. If we go to the next paragraph, the second sentence: 'I also have recordings from my meetings with HR, which are very different to what witness statements are now stating.' So you took other recordings of meetings that you had with members of the Classic Ceramics management team or HR team while you were employed, didn't you?---I did.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN285

Did you tell any of those - first of all who were the people that were in those meetings with you?---Sally Keene.

PN286

What is Sally Keene's role?---She is the Victorian manager.

PN287

Was there anybody else present?---Nazrine.

PN288

And Nazrine is in the HR team, is that right?---She's the HR manager.

PN289

Were they the only two? Were they the only two?---Predominantly, yes.

PN290

So Sally and Nazrine are both in the management team?---That is correct.

PN291

In these meetings that you recorded with Sally and Nazrine did you tell Sally or Nazrine that you were recording the meetings?---I don't recall telling them, no.

PN292

Did you ask for Sally or Nazrine's permission to record the meetings?---I don't remember telling - asking that, no.

PN293

Have you listened to those recordings recently?---I have.

PN294

At any point in the recording do you tell them that you're recording or ask their permission to make the recording?---It's not on the recording, no.

PN295

So I just want to take you back to the Surveillance Devices Act. You say that you looked at the Surveillance Devices Act; is that right?---I did.

PN296

And you formed a view that you could make the recordings?---I did. I did, with the intention for my own personal use, because I was ill and not able to process information, so I had to play it back in my head to understand what was happening.

PN297

But why would you look at the Surveillance Devices Act if you could just go to the meeting, for example with Sally and Nazrine, and say, 'Sally and Nazrine, I'd like to record this meeting, or I'm going to record this meeting'?

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN298

MR RAINES: Objection, your Honour. I believe that Ms Heywood's answered that question several times.

PN299

MS PASE: About why she looked at the Surveillance Act?

PN300

MR RAINES: About why she recorded, why she - - -

PN301

MS PASE: No, the question was why she looked at the Surveillance Devices Act.

PN302

MR RAINES: Has she not answered that for you?

PN303

MS PASE: No.

PN304

THE DEPUTY PRESIDENT: Perhaps just state your question again.

PN305

THE WITNESS: Well, you asked me why I looked at it; because I'm a professional person and I want to do what's right, and I want to do what's right and not wrong, and I knew that I was in my right to make a recording for my own personal use.

PN306

MS PASE: Yes, but, Ms Heywood - - -

PN307

THE DEPUTY PRESIDENT: Ms Heywood, just so you understand, the proposition that is ultimately going to be put to you is that you looked at the Surveillance Devices Act because you had no intention of telling the people with whom you had a discussion that you were recording, otherwise there would be no reason for you to look at it.

PN308

MS PASE: Yes?---That's not the case, your Honour. That's not the case. Refreshing - refreshing I don't want to do - I'm a professional, I'm not going to do anything that's wrong. I need to make - - -

PN309

But, Ms Heywood, why would it be wrong to openly say, 'I'm going to record this conversation', or to ask to record a conversation; why would that be wrong?---That never entered - that never entered my mind at the time, because I wanted it for myself.

*** MARY MARGARET HEYWOOD

XXN MS PASE

PN310

Yes, I am just going to stop you there. When you say that never entered my mind, what never entered your mind, telling them that you were going to record? That's right, isn't it, that never entered your mind?---No, that's not the case. No, that's not the case. That's not the case.

PN311

No further questions, Deputy President.

PN312

THE DEPUTY PRESIDENT: Yes, all right, thank you. Mr Raines, any re-examination?

PN313

MR RAINES: No, I don't, your Honour.

PN314

THE DEPUTY PRESIDENT: All right. Thank you. Ms Heywood, thank you for your evidence, you're excused, and resume your seat at the Bar table. Thank you.

<THE WITNESS WITHDREW

[11.26 AM]

PN315

Do you want a short break before we start submissions?

PN316

MS PASE: Yes. Thank you, Deputy President.

PN317

THE DEPUTY PRESIDENT: Fifteen minutes?

PN318

MS PASE: That's fine.

PN319

THE DEPUTY PRESIDENT: We will adjourn for 15 minutes.

PN320

MR RAINES: Thank you.

SHORT ADJOURNMENT

[11.26 AM]

RESUMED

[11.47 AM]

PN321

THE DEPUTY PRESIDENT: Yes.

MARY MARGARET HEYWOOD

XXN MS PASE

PN322

MS PASE: Deputy President, first I will deal with the claim under section 611(2)(b) of the Fair Work Act, and on that our position is that the FWC ought be

satisfied that it should have been reasonably apparent to the costs respondent that her application had no reasonable prospect of success by reason of the issue of the covert recordings. This is an objective test, and although I appreciate the section refers to something being apparent to the costs respondent it's not about what was or wasn't apparent to her in a subjective sense. It's about reasonableness and what objectively ought to have been reasonably apparent to her.

PN323

When considering the meaning of section 611(2)(b) I go to the decision of *Health Services Union Victoria No.1 Branch v Sanli*, a Full Bench decision of 2018 FWCFB 745, and in that case the Full Bench stated at paragraph 113 - and I should say, sorry, I have a copy of this case if it would assist my learned friend or the Bench.

PN324

MR RAINES: Yes, please.

PN325

MS PASE: Would the Deputy President like a copy?

PN326

THE DEPUTY PRESIDENT: I may as well come to the party.

PN327

MS PASE: At paragraph 113 of that decision the Full Bench says:

PN328

The observations of the High Court in Spencer v The Commonwealth - - -

PN329

And there's a footnote for the citation for that, which is [2010] 241 CLR 118.

PN330

- - - as to the meaning of the expression 'no reasonable prospect' in section 31A of the Federal Court of Australia Act 1976 are apposite to the matter before us. In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described (with or without the addition of intensifying epithets like 'clearly', 'manifestly' or 'obviously') as 'frivolous', 'untenable', 'groundless' or 'faulty'. But none of those expressions (alone or in combination) should be understood as providing a sufficient chart of the metes and bounds of the power given by section 31A. Nor can the content of the word 'reasonable' in the phrase 'no reasonable prospect' be sufficiently, let alone completely, illuminated by drawing some contrast with what would be a 'frivolous', 'untenable', 'groundless' or 'faulty claim. Rather full weight must be given to the expression as a whole. The Federal Court may exercise power under section 31A if, and only if, satisfied that there is no reasonable prospect of success.

PN331

MS PASE: Deputy President, that goes on and the submission goes on into - or that proposition goes on into paragraph 114, but I won't read both for present purposes.

PN332

The costs respondent has admitted in evidence today to recording various private discussions in the workplace held between herself and members of the management team of the costs applicant, as well as a conversation that she had with the owner and founder of the costs applicant, Mr Sam Giunta. It must be said that while the costs respondent started in response to a question - a question was put to her whether she sought permission of the recording or whether she told the other participants to the conversations that she was recording.

PN333

When the costs respondent was asked this about the conversation with Mr Giunta she started her response by saying, no, that she's not, and then changed her response to, 'I can't remember. I can't recall.' And she gave that response in relation to the other conversations which she says that she recorded. So in that respect there's no dispute that the conversations were recorded. However, there appears to be some form of dispute about whether the recordings were covert in the sense of whether the other participants in the conversations were aware of that.

PN334

Deputy President, I ask in this circumstance that you make a finding as to credibility of the costs respondent in giving her evidence about those issues in that she tried to change her response to one of the questions and then went with the 'I don't recall' response for all the others. In our submission the recordings were covert. She does say that she has listened to the recordings recently and that nowhere in those recordings does she ask for permission or does she state that she's recording those calls.

PN335

I also put the proposition that had she intended for those calls to be non-covert or public or known that she was recording them that Ms Heywood would have had no need to consult with the Surveillance Devices Act, which she says that she did, and that she took advice from Mr Raines as to whether she was able, which is the language that she used in her evidence, able to make those recordings.

PN336

The submission that I make is that there would have been no need for Ms Heywood to consult the Surveillance Devices Act if the intention and the act that she was undertaking was disclosing that she was making those recordings or asking permission of the others to make those recordings. We would say that as has been found in multiple decisions of this Commission such conduct, that is covert recordings, constitute serious misconduct on the part of the costs respondent pursuant to the definition of serious misconduct in rule 1.37 of the Fair Work Regulations, which is wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment.

PN337

In *Tawanda Gadzikwa v Australian Government Department of Human Services*, that's [2018] FWC 4878, Deputy President Colman said at paragraph 83:

PN338

Unless there is a justification I consider the secret recording of conversations with co-workers to be highly inappropriate, regardless of whether it may also constitute a criminal offence in the relevant jurisdiction. The reason it is inappropriate is because it is unfair to those who are secretly recorded. They are unaware that a record of their exact words is being made. They have no opportunity to choose their words carefully, be guarded about revealing confidences or sensitive information concerning themselves or others, or to put their best foot forward in presenting an argument or a point of view. The surreptitious recorder, however, can do all of these things, and unfairly put himself at an advantage. Moreover, once it is known that a person has secretly recorded a conversation, this is apt to produce a sense of foreboding in others, an apprehension that they must be cautious and vigilant. This is potentially corrosive of a healthy and productive workplace environment. Generally speaking, the secret recording of conversations with colleagues in the workplace is to be deprecated.

PN339

In the more recent decision of *Roman v Mercy Hospitals Victoria Ltd*, [2022] FWC 711, again Deputy President Colman found that an employee secretly recording a meeting in the workplace was a valid reason for dismissal. In that case Deputy President Colman found as follows at 41:

PN340

It was contrary to her duty of good faith to Mercy. No persuasive reason was offered to justify the recording. It was unfair to the other participants in the meeting. It was not reasonably necessary to protect any valid interest. This conduct warranted dismissal without notice.

PN341

I should note that Deputy President Colman's decision was the subject of an appeal to a Full Bench, but permission to appeal was not granted. Both of those decisions involved employees including Victoria in which the Surveillance Devices Act applies, and I appreciate allows for the lawful recording of conversations to which one is a party without the consent of others in the conversation. However, lawfulness and appropriateness with respect to serious misconduct are two different things.

PN342

I accept that in a decision of yours, Deputy President, you found that the act of surreptitious recording did not provide a valid reason for dismissal. This is the decision of *Moran v KDR Victoria Pty Ltd T/A Yarra Trams*, [2018] FWC 6144. However, in that case the respondent argued that the employee's conduct in covertly recording meetings and discussions jeopardised the prospect of the employer having trust and confidence in the employee.

PN343

In effect you found that conduct that is not known to the employer during the employment cannot be said to ever have had an impact on the relationship of trust as between the employee and the employer, and this makes perfect sense in respect of that case. However here I do not make a submission linking the recordings to a relationship of trust and confidence. Rather I submit that the costs respondent's conduct in covertly recording meetings in the workplace was wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, which means it falls within the definition of serious misconduct in the Fair Work Regulations.

PN344

The reason such conduct in this case was inconsistent with the continuation of the contract of employment is that it was contrary to the costs respondent's obligations of good faith and fidelity owed to the costs applicant. No persuasive reason has been given in evidence today to justify the recording. It was unfair to the other participants in the meetings and the conversations, and it was not reasonably necessary to protect any valid interest.

PN345

Another thing that puts it apart from the decision in *Moran v Yarra Trams* is that one of these conversations that we're talking about was with the owner and founder of the employer, and we would say that a covert recording of the owner of the business in which you are employed would lean towards a finding that it was a wilful and deliberate failure that is inconsistent with the continuation of a contract of employment.

PN346

In light of the conduct being serious misconduct issues as to dismissal process and procedure are irrelevant. Had the costs applicant known of the misconduct, which was voluntarily disclosed by the costs respondent in her letter to the Deputy President, it would have been within its rights to summarily dismiss the costs respondent for serious misconduct in which case a dismissal process would have been unnecessary.

PN347

Having regard to the authorities I have referred to earlier in my submissions per section 611(2)(b) of the Fair Work Act the Commission is required to consider whether it would have been apparent to a reasonable person that Ms Heywood's application had no reasonable prospects of success, giving full weight to this expression as a whole, and for the reasons I have outlined I submit that objectively it should have been reasonably apparent to the costs respondent that by secretly and covertly recording conversations in the workplace she had conducted herself in a highly inappropriate manner, breached her obligation of good faith to her employer, and engaged in conduct that was inconsistent with the continuation of the contract of employment, and this is from the point at which she made the recordings.

PN348

It follows that it should have been reasonably apparent to the costs respondent that any application for a remedy for unfair dismissal had no reasonable prospects of success. In that regard the costs applicant seeks that the Commission exercise its

discretion in order to order that the costs respondent make payments of costs incurred from the date the application for an unfair dismissal remedy was filed, up to the date on which the costs respondent filed her notice of discontinuance the day before the hearing was listed. An itemised invoice for those costs have already been provided as an attachment to the costs application filed by the costs applicant, and my instructions are that that itemised invoice has been prepared in consultation with the schedule of costs in the Fair Work Commission rules.

PN349

I then turn to section 400A, which is the other pillar of our application, and the unreasonable acts or omissions. The first is a settlement offer of 1 September 2022. I refer to paragraph 22 and following of the witness statement of Ms Warren. There can be no dispute that the settlement offer was made. Indeed Ms Heywood has admitted to that in her evidence today and in her statutory declaration. Indeed Ms Heywood forwarded the offer, notwithstanding that it was made on a without prejudice basis, to the Deputy President's chambers, as well as the chambers of Commissioner Yilmaz. That offer was not accepted. Following the making of that offer the costs applicant prepared its material, and on 7 September 2022 the costs applicant filed and served its written outline of submissions and six written witness statements.

PN350

By email later that day on 7 September 2022 the costs respondent sent by email a letter to the Deputy President's chambers in which she disclosed that she had covertly recorded meetings she had engaged in with the costs applicant, meetings which were conducted in the workplace and before her dismissal, and in this regard I refer back to my submissions about this constituting serious misconduct.

PN351

As at 1 September 2022 when the settlement offer of four weeks salary was made to the costs respondent by the costs applicant the costs respondent was obviously aware that she had made those covert recordings. If this matter had proceeded to hearing I submit that the Commission would have or should have made a finding that the covert recordings constituted serious misconduct and a valid reason for dismissal, indeed summary dismissal. The costs respondent's application for an unfair dismissal remedy would have failed for that reason and no compensation would have been awarded.

PN352

Further, and in the alternative, even if the Commission was not of the view that the covert recordings or any other notified reason constituted a valid reason or that there was some other flaw in the procedure or the process the costs respondent would not have been awarded compensation greater than four weeks salary by reason of having engaged in serious misconduct during her employment, being the covert recordings, which would have been a contingency to be applied to the compensation to be awarded to Ms Heywood.

PN353

I think today there's been some issue made, and I'm guessing at a proposition or a submission that might be made by my learned friend, that the reason that the four week settlement offer wasn't accepted is for some failing on the part of my

instructing solicitors, because Ms Heywood wanted to accept the offer, tried to accept the offer by asking for a discussion, and was not able to do so.

PN354

What I put about that is that it's very clear from the evidence that Ms Heywood has given in her statutory declaration, and also in response to questions in cross-examination today, that what she was doing in asking for a discussion, and she admits that she asked for a discussion with my instructing solicitors, was that she had no intention of accepting the four week settlement offer. She wanted to negotiate and get a better deal. So we say that again that should be no response to our claim that the offer of four weeks salary was not an unreasonable act or omission of refusing that offer.

PN355

I turn now to the mentions. There was a mention on 26 August 2022 before the Deputy President. The costs applicant seeks payment of its costs incurred by reason of its attendance at this mention. At this mention, leading up to, Ms Heywood had failed to comply with two sets of directions in respect to the filing of her material, and had filed her material eight days late.

PN356

Per the directions made on 16 June Ms Heywood was to file her material by no later than 5 pm on 7 July 2022. Per the directions made on 1 August 2022 Ms Heywood was to file her material by no later than 5 pm on 12 August 2022. The costs respondent in fact filed her material at 7.35 pm on 19 August 2022. The costs applicant was reasonably concerned about being able to retain the listed hearing date by reason of the late filing of the material, and for that reason in order to maintain the hearing date the Commission granted the costs applicant an extension of time to file its material and vacated a previously issued direction providing for the filing of reply material on the part of the costs respondent. So the mention was listed at the request of the costs applicant, but it was done so necessarily because the directions were no longer going to be able to be met.

PN357

And to be clear the costs applicant seeks its costs to be contained in relation to the preparation and attendance at that mention, and I can take the Deputy President to those specific items if that would assist. If we go to the itemised list which is attached to the application for costs - so we are seeking costs not just in relation to the actual attendance, but all of those costs are from the date on which the material was meant to be filed up until the case management hearing or the mention that was required. So that starts we would say from item 13, the draft email to G. Raines.

PN358

THE DEPUTY PRESIDENT: Yes.

PN359

MS PASE: From the 16th we start seeing emails to the Commission. There were numerous telephone attendances on Ms Heywood and Mr Raines to try and locate them and understand when the material was to be filed; reasonable telephone attendances on the client to update them. And then we get down to 41 which is

preparing for mention; 42, file review for the mention; 43, attending the mention; 44, telling the client about the mention, and again at 45 preparing for an attendance at the mention. So we would say from 13 to 45. That totals \$4,099.50. Some of that is in accordance with the schedule of costs. Some of it necessarily is not because there are no items that match the specific items.

PN360

THE DEPUTY PRESIDENT: Yes.

PN361

MS PASE: Then we turn to the mention on 30 August 2022. The costs applicant seeks payment of its costs incurred by reason of its attendance of the mention on 30 August. This mention was listed at the request of the costs respondent, because effectively she disagreed with the course that the Deputy President had elected to take in terms of the timetabling of the matter leading up to the hearing. That is the fact that the Deputy President had vacated the direction for the costs respondent to file reply material.

PN362

At the mention on 30 August 2022 I am instructed that the costs respondent effectively sought to overturn those directions, and the costs respondent sought an opportunity to file reply material which had already been vacated. The Commission declined to issue any such order. On that basis the mention was of no consequence and did not alter the timetable of the matter leading up to hearing, and the costs applicant ought be awarded its costs thrown away for attendance at that hearing.

PN363

Deputy President, if I take you back to the itemised costs schedule that is items 53 to 58, all dated 30 August which was the date of the mention - sorry, 52 to 58, all dated the date of the mention, with the exception - I do want to make one concession here - it appears to me that 54 and 55 seem to be the same narration. I am instructed that there were two lawyers present at the mention from Russell Kennedy, Ms Newman and Ms Warren. Ms Warren's attendance is 57. I can only assume that 54 and 55 might have been an error in terms of Ms Newman attending. So I'm willing to concede that one of those two 72s should probably be discounted.

PN364

THE DEPUTY PRESIDENT: Yes.

PN365

MS PASE: And I confess I actually haven't done the calculation. I can do that quickly now. And that arrives at \$639.50, Deputy President.

PN366

THE DEPUTY PRESIDENT: Yes, thank you.

PN367

MS PASE: And they're the submissions of the costs applicant.

PN368

THE DEPUTY PRESIDENT: Thank you. Mr Raines?

PN369

MR RAINES: Thank you, your Honour. As your Honour is aware I am not a lawyer, but I will say that Ms Heywood does rely on the submissions that are already provided as were carefully put together by a barrister and they certainly talk to many of the matters that were raised by my learned friend, but also matters that she has raised. I understand that today the scope has been limited somewhat to just several issues. We certainly say that the scope - well, we appreciate that we've looked at them today - we say that the scope is the entire matter, the termination and the submissions already provided.

PN370

THE DEPUTY PRESIDENT: Mr Raines, just so that I'm clear which submissions are you referring to?

PN371

MR RAINES: The submissions provided - - -

PN372

THE DEPUTY PRESIDENT: On 11 October.

PN373

MR RAINES: Yes.

PN374

THE DEPUTY PRESIDENT: Yes, and just so we're talking about the same document this is a document, the first sentence reads, 'Ms Mary Heywood (original applicant) was unfairly dismissed'?

PN375

MR RAINES: Yes, your Honour.

PN376

THE DEPUTY PRESIDENT: All right.

PN377

MR RAINES: May I tender that?

PN378

THE DEPUTY PRESIDENT: You don't have to tender it. I'm just trying to understand how it is that you say those submissions engage with anything that counsel for the costs respondent has submitted today.

PN379

MR RAINES: So effectively we talk to many of those - - -

PN380

THE DEPUTY PRESIDENT: It seems to me that this is a submission which appears to be akin to the submission made in respect of the merits of the application.

PN381

MR RAINES: That's correct, the reasonable merits of the application, which clearly it speaks to section 611.

PN382

THE DEPUTY PRESIDENT: For a start the submission doesn't engage with for example the submissions made by counsel for the costs applicant about the covert recordings.

PN383

MR RAINES: Yes, your Honour, and as you might appreciate that wasn't raised today, and I'm happy to talk to that.

PN384

MS PASE: It is in our submissions.

PN385

THE DEPUTY PRESIDENT: I understand. I know that.

PN386

MR RAINES: What I would say is that the submissions that we've provided have been carefully prepared, and we understand today's scope has been limited, but we certainly say that the Commission has an obligation to look at the matter as a whole, the reasons for the termination.

PN387

THE DEPUTY PRESIDENT: I wasn't raising the issue about your submissions or how broad they are. I was simply asking you to explain to me how they engage with any matter that counsel raised. I can't see how they engage with any of the matters relating to the covert recording, the unreasonable refusal to accept an offer of settlement of 1 September, or the two mentions.

PN388

MR RAINES: And certainly we would argue that those limited - I understand that those limited issues, your Honour, the applicant would like to focus in on them, but the Act talks about - - -

PN389

THE DEPUTY PRESIDENT: You're missing my point. You made the submission that the submissions that were filed on behalf of Ms Heywood were carefully prepared and engage with much of the submissions made by the costs applicant. I'm asking you to point me in the right direction in relation to those submissions where they in fact engage with any of the four matters counsel has today made submissions about.

PN390

MR RAINES: Okay, I retract that comment.

PN391

THE DEPUTY PRESIDENT: That was all.

PN392

MR RAINES: I say to the Commission that the Commission - - -

PN393

THE DEPUTY PRESIDENT: I'm not asking you to - you can continue submissions now.

PN394

MR RAINES: Yes, thank you, your Honour. So what I am saying is that - - -

PN395

THE DEPUTY PRESIDENT: Perhaps you might take my hint though to address those matters. Not right now, but at some stage.

PN396

MR RAINES: Yes, I do intend to, thank you, your Honour.

PN397

THE DEPUTY PRESIDENT: All right. Go ahead.

PN398

MR RAINES: So, your Honour, what I am asking for you to listen to is that this matter, I understand the limited scope today, but we're certainly saying that scope is the termination, is what led to the termination, why Ms Heywood made the application and why she continued the application, the issues of the covert recording, the issues of the offer to settle. To one agree they're a mute point.

PN399

Ms Heywood would certainly be arguing, and her submissions argue that she had a very good case. She was encouraged by staff at the Fair Work Commission. She was told at both conciliations that she had merit. There was nothing indicating that she wouldn't be successful in her outcome. If not she had a reasonable chance, and those submissions talk to that. I understand that my friend wants to limit the scope and just look at a couple of issues. I'd certainly be saying that those issues are - I won't call them mute points, but I'd say that they're smaller points. I'm happy to talk to those points.

PN400

As Ms Heywood has mentioned 15 years I was an investigator licensed with Victoria Police. Over that time I've assisted a lot of people with disabilities, and in all of those cases they are permitted to make recordings for their own purposes. Ms Heywood clearly identified the reasons why she made the recording, and those reasons were as she mentioned she has a disability and she wished to remember what was being said, so she could go away. She hasn't distributed that. Victoria as your Honour is aware has specific laws different than other states. In Victoria we do not have to provide the other party - we don't have to ask their permission. Permission would need to be granted, sought if they were going to be played somewhere else.

PN401

If we were to ask for your Honour to listen to those recordings it would have been put to you seeking an order for that to occur. So we certainly say that the covert

recordings are not the issue that's been raised today as far as serious misconduct. It's generally accepted that an employee if they need to for other reasons are able to record and make notes from that recording, and Ms Heywood has done that. She did, she sought my permission, she asked if it was okay and I explained that, yes, it's fine. As I mentioned the Surveillance Devices Act sets down what is illegal, and that's the use of the recording. It certainly doesn't speak to her credibility. It doesn't speak to her serious misconduct, and it certainly wasn't a reason for her termination.

PN402

Her termination, which is what I do point to the submissions, and I do say that the scope must take this into account when we refer to section 611, and that the application was made vexatiously or without reasonable cause. Well, the application wasn't made vexatiously, and certainly the reasons why she made the application stand out. She was terminated for serious misconduct without a support person, even though a meeting was being arranged.

PN403

Once the employer found out that she was bringing somebody else they terminated her before that meeting. She didn't receive any allegations, and it seems that since that point, since that time the employer has not taken any steps to make an offer except for this without prejudice offer, which Ms Heywood did take steps to accept. Now, I understand your Honour's point that she didn't make a phone call. The applicant didn't make a phone call. Ms Heywood didn't realise that - - -

PN404

THE DEPUTY PRESIDENT: The costs applicant set out terms on which it was prepared to settle. It set them out in pretty clear and unambiguous terms in five paragraphs in a letter, which dealt with admittedly other things, but it was four weeks pay, withdrawal of the termination, and entering into a deed and mutual confidentiality.

PN405

MR RAINES: Yes.

PN406

THE DEPUTY PRESIDENT: None of those things are terribly controversial.

PN407

MR RAINES: Yes, your Honour. The applicant didn't understand some of the lingo. She did ask to meet with them. She had intended to accept the offer, and she's told the Commission that today. I assume that's one of the reasons why we came today and the matter wasn't heard on the paper because we wanted to hear from Ms Heywood herself.

PN408

THE DEPUTY PRESIDENT: One of the reasons it wasn't determined on the paper is because when I received the submission it seemed as though you wanted to run the unfair dismissal case, because that's what your submissions were all about.

PN409

MR RAINES: Yes. I understand that, and the barrister explained that the submissions were talking directly to whether the matter had it gone ahead whether it would have been considered vexatious or without any reasonable prospect of merit. And I understand that it's quite - if we had of got to that point we may have seen an outcome. Now, twice during conciliation Ms Heywood was encouraged by the Fair Work staff. She was told at the first conciliation that her case had merit and was very strong, and then with Commissioner Yilmaz - - -

PN410

THE DEPUTY PRESIDENT: Even if I were to accept any of that, which I struggle, given that there's no evidence about it other than your client's say so, but in any event the words quoted of Commissioner Yilmaz don't necessarily correspond with the assertion. I put that to one side. What seems to be clear enough though is that in none of those conversations did your client disclosed, for example, 'By the way I recorded my employer surreptitiously.'

PN411

MR RAINES: And, your Honour, you're aware that under the Surveillance Devices Act in Victoria - - -

PN412

THE DEPUTY PRESIDENT: I'm aware. That's not the point.

PN413

MR RAINES: Yes.

PN414

THE DEPUTY PRESIDENT: That's not the point that's being made.

PN415

MR RAINES: The reason why - I guess it's a point on why she's recorded it, her motives.

PN416

THE DEPUTY PRESIDENT: Yes, but an assessment as to merits, if somebody actually gave one, would have been informed by those facts. And so even if the assessment were made I'm not sure where it takes the matter given that the matters on which the costs applicant now relies, the surreptitious or covert recordings as counsel put it, were knowledge which your client had, which those expressing the view as to merit did not. It's trying to give legal advice without being across all of the facts.

PN417

MR RAINES: Yes, your Honour, I understand, and I would certainly suggest that that was not the reason why Ms Heywood was terminated or made the application.

PN418

THE DEPUTY PRESIDENT: And because the employer didn't know.

PN419

MR RAINES: That's right, yes, your Honour.

PN420

THE DEPUTY PRESIDENT: But you're pointing to something that you say Commissioner Yilmaz said during conciliation. The point I'm making is that even if I were to accept Commissioner Yilmaz gave or expressed a view that your client's case, or Ms Heywood's case had some merit, that opinion was given absent an important bit of information, and we don't know what Commissioner Yilmaz would have made of that important bit of information in the assessment that she gave.

PN421

MR RAINES: We did deal with that, your Honour.

PN422

THE DEPUTY PRESIDENT: You did deal with what?

PN423

MR RAINES: We dealt with the recordings. I guess for the benefit of today's recording I would like to raise the scope again, raise the submissions that have been put in, and to raise the fact that the applicant made this application based on why she was terminated, the process that was taken at that time, and the first conciliation. At that first conciliation all of these matters were raised. At that first conciliation it was raised with the respondent as well, that I was not going to be conducting the matter as far as emailing me or contacting me. So speaking to the actual emails, and it's quite clear that - - -

PN424

THE DEPUTY PRESIDENT: Sorry, I think we are at cross purposes. I was talking about the recordings, not about whether you were going to represent the costs respondent.

PN425

MR RAINES: Okay. So thank you, your Honour. With regard to the recordings the Surveillance Devices Act as you are aware - - -

PN426

THE DEPUTY PRESIDENT: I understand that. As counsel submitted that something is lawful doesn't mean it can't also be misconduct.

PN427

MR RAINES: Exactly. If it's done - and that's why we had Ms Heywood here today talking about why she (indistinct) those recordings, and for the purpose of the recording I will again reiterate that she has a disability, she made careful recordings so she could remember what was said. She hasn't shown anybody, she hasn't used it at the time of her termination. She raised the issues to be honest and truthful about what had occurred and the circumstances that she was in, how much stress she was suffering.

PN428

So we certainly say that the recordings were not taken in any type of malicious way or to give her an advantage, other than to recall what had been said to her and what was happening. I appreciate, your Honour, what you are saying about the recordings, but clearly why the recordings were required and needed to be made is very important.

PN429

THE DEPUTY PRESIDENT: Just bear with me for a moment. Yes, go on.

PN430

MR RAINES: So a decision today with regard to the recording in claiming that it does merit costs would certainly send a terrible message to a lot of disabled employees who I certainly assist that are assisted by many unions, by many other organisations who are told that they can record it for their own purposes. Not to be used in any other method, not to be played to your family, to your friends or to anybody else, but to be recorded for your own purposes because you have a significant disability, and that's certainly the case here, and Ms Heywood has spoken to that.

PN431

We say that that's a very dangerous implication if that is seen to be her actions. While I understand your Honour's point about the reasons for it Ms Heywood has certainly spoken to why she made the recording and what her use for it was.

PN432

THE DEPUTY PRESIDENT: Mr Raines, just to be clear I haven't formed a view about whether the conduct amounts to misconduct or whatever. I was simply - - -

PN433

MR RAINES: I totally understand, your Honour.

PN434

THE DEPUTY PRESIDENT: I was simply dealing with the issue of the contention that somehow a staff member of the Commission in a conciliation and a Commissioner in a conciliation expressed a particular view, which you seem to suggest encouraged your client to continue the application. All that I'm saying is that those people were not appraised of all of the facts.

PN435

MR RAINES: Your Honour, and I understand that, I understood your point about - - -

PN436

THE DEPUTY PRESIDENT: Yes.

PN437

MR RAINES: And you are familiar with the Surveillance Act, and I guess the motive for taking - why you would record it, and I just speak to that. With regard to the mention hearings and there being late submissions again I would certainly point to that, and your Honour would appreciate that he also put the respondent in

that matter on notice for their material being late. The mention hearing certainly wasn't, and those matters were not Mary Heywood's fault. Despite the conciliation, the first conciliation being explained to the employer that I wasn't - they were not to email me, they were to contact Mary - it seems like a lot of correspondence went to an organisation that I used to work with.

PN438

THE DEPUTY PRESIDENT: The issue of compliance with the directions is a matter which was entirely in your client's hands, was it not? It's nobody else's fault, is it?

PN439

MR RAINES: Your Honour, the first matter that you dealt with was because we didn't receive the material, and we certainly put affidavits in to that extent.

PN440

THE DEPUTY PRESIDENT: I note that's what you said, and I noted it at the time.

PN441

MR RAINES: Yes.

PN442

THE DEPUTY PRESIDENT: But ultimately there was nothing wrong with the email addresses that were in the correspondence that was sent to you.

PN443

MR RAINES: Yes, to an old organisation, not to Mary.

PN444

THE DEPUTY PRESIDENT: No, no. There was nothing wrong with any of the email addresses to the directions which required compliance - - -

PN445

MR RAINES: No. Yes, your Honour, correct.

PN446

THE DEPUTY PRESIDENT: So the notion that you didn't receive it was unexplained.

PN447

MR RAINES: It was, and my explanation was that we didn't receive it. On the second occasion I did write to the associate and explained that what we did receive had something wrong with it and we couldn't open the file. So that could have been why it wasn't received, but we certainly didn't receive the first one, but, your Honour - - -

PN448

THE DEPUTY PRESIDENT: Apart from that - - -

PN449

MR RAINES: Yes, you did, you fixed that up pretty quickly.

PN450

THE DEPUTY PRESIDENT: - - - but you were also at the directions hearing when I made the directions orally.

PN451

MR RAINES: Yes, your Honour, and when we - - -

PN452

THE DEPUTY PRESIDENT: Where I announced the dates orally.

PN453

MR RAINES: That's right, and so on that occasion you gave the respondent in that matter an extended period of time. They weren't disadvantaged.

PN454

THE DEPUTY PRESIDENT: No, no. Before the written directions were issued there was a directions hearing at which I made the directions orally and then sent out the directions.

PN455

MR RAINES: Okay. So that wasn't the first email that we received. The first email and the reason why we needed an adjournment was because we didn't receive - - -

PN456

THE DEPUTY PRESIDENT: No, you're coming back - I understand you say you didn't receive the directions - - -

PN457

MR RAINES: The original ones for that mention, yes.

PN458

THE DEPUTY PRESIDENT: - - - which required compliance. The point that I'm making is that when I was first allocated the matter a directions hearing was convened, and at that directions hearing I made directions.

PN459

MR RAINES: That's right, your Honour, and that was the one that was eight days or seven days late from that - - -

PN460

THE DEPUTY PRESIDENT: Well, there was non-compliance with the directions. The reason given for non-compliance was that you didn't receive the directions.

PN461

MR RAINES: For the seven, eight days late?

PN462

THE DEPUTY PRESIDENT: Yes.

PN463

MR RAINES: No, I did receive that. The affidavit we put in is we didn't receive the original listing. We never received the original listing.

PN464

THE DEPUTY PRESIDENT: In any event - - -

PN465

MR RAINES: So the matter that you're talking about is the submissions, the particulars, and you did make the point that the respondent hadn't also complied with your orders. So you gave more time for all parties. You did raise the point that they also had not submitted their particulars, and we'd certainly argue that they were given - they were not disadvantaged, and then they actually missed that, they were non-compliant on that occasion as well, and their submissions, their full submissions weren't received until late that night before the conciliation.

PN466

THE DEPUTY PRESIDENT: I think in full context what I said to the costs applicant was that it could have filed its submissions and its evidential material. Its complaint was that it couldn't respond to your case, but it could put on a positive case, which is the point that I made - - -

PN467

MR RAINES: Yes, your Honour. Yes, I recall that. Their submissions after that were also late. They weren't through until I think 9 pm that night before the conciliation the next morning. So the idea that they were disadvantaged or put to extra cost we'd certainly reject. This matter was going to a hearing - - -

PN468

THE DEPUTY PRESIDENT: The point that counsel makes is if your client had of complied with the directions the mention hearing wouldn't have taken place and its seeking its costs in relation to that.

PN469

MR RAINES: Yes, your Honour.

PN470

THE DEPUTY PRESIDENT: That is the omission and failure to comply with the directions.

PN471

MR RAINES: Yes, your Honour, and we certainly - as your Honour has pointed out that was on me, and I say that I submitted them and I did raise an issue with you which I was happy to be investigated over, and I can still raise that issue if you would like. So we certainly filed things - - -

PN472

THE DEPUTY PRESIDENT: I think my recollection, Mr Raines, with respect, is that you took umbrage to my wanting to see the original documents and I could actually verify for myself when they were created, and I never got the original documents.

PN473

MR RAINES: I'm happy to submit that.

PN474

THE DEPUTY PRESIDENT: It's a bit late now, Mr Raines. You had an opportunity. I asked you for them and you didn't provide them.

PN475

MR RAINES: I wasn't aware you were asking for them.

PN476

THE DEPUTY PRESIDENT: You took umbrage at my request, Mr Raines.

PN477

MR RAINES: Sorry, you took that - - -

PN478

THE DEPUTY PRESIDENT: You suggested that I was somehow questioning your character or your truthfulness. You were jumping to conclusions, but that's what you said in your - - -

PN479

MR RAINES: Your Honour, I didn't mean to offend you and I certainly - - -

PN480

THE DEPUTY PRESIDENT: You didn't offend me, Mr Raines, I'm just telling you what was said.

PN481

MR RAINES: Yes. So one of the points that I did make there as well was that Ms Heywood - if there is some sort of allegations or some sort of disappointment in me that that shouldn't be a reflection on Ms Heywood.

PN482

THE DEPUTY PRESIDENT: Mr Raines, whenever a party tells me that they had sent a document, that they had prepared a document and sent it, which wasn't received by my chambers, and then it's sent again in a PDF version it automatically raises questions in my mind.

PN483

MR RAINES: So I rewrote the document, your Honour.

PN484

THE DEPUTY PRESIDENT: And I asked for it in a Word document, original Word document. So if it had been prepared at an earlier point in time, that document prepared at an earlier point in time, because that document will tell me when it was created.

PN485

MR RAINES: It was created later because I had to rewrite it because I was overseas. That was the thing that I was mentioning to you. There was an assumption that I was - - -

PN486

THE DEPUTY PRESIDENT: Mr Raines, this is of no assistance.

PN487

MR RAINES: That's right, and so, your Honour, we were talking about an omission by me, the suggestion is, and I would certainly put to your Honour that we should raise that matter with the president. I did write that to you, and I am absolutely positive that we can have a look at that and I will come - I've raised the matter, it's gone to Federal Police before, a similar matter, but for the purposes of the recording today I'd put to the Commission that what's being suggested, that non-compliance was somehow due to an omission by me can be cleared up very easily, and we certainly haven't lied in any of the affidavits, and I'd certainly also put that it hasn't disadvantaged the other side. Your Honour gave them opportunity to submit their material.

PN488

This matter was going to a hearing, but the idea of a Commissioner, a member assisted conciliation at the very end of a matter, is because it usually gets results, and in this case it did. Otherwise this matter was going to go to a hearing before yourself, but the matter came to what seemed to be a settlement. The problem was Ms Heywood didn't put in her discontinuance form that she was accepting the offer. The four weeks was put back on the table for them to accept and they didn't. They put a counter offer. They would not seek costs, and that offer was left open until the following day.

PN489

THE DEPUTY PRESIDENT: Where is that in Ms Heywood's statement?

PN490

MR RAINES: There was an offer which carried over - - -

PN491

MS PASE: It's in the same paragraph, Deputy President, that we were talking about that starts with 'On 4 September', where she says, 'I took the same approach at the member assisted conciliation and my final offer was the same, four weeks.'

PN492

THE DEPUTY PRESIDENT: Yes, I understand that. It's suggested now that what came back was, 'No, you discontinue and we won't seek costs.'

PN493

MS PASE: Yes, at the bottom of that paragraph.

PN494

THE DEPUTY PRESIDENT: Yes, I see. And that this was left open.

PN495

MS PASE: Pardon?

PN496

THE DEPUTY PRESIDENT: And that this was left open to the following day.

PN497

MS PASE: Yes, that's right, your Honour.

PN498

THE DEPUTY PRESIDENT: Is that right? That's really where I was going, that the proposition wasn't put to the witness.

PN499

MS PASE: Yes.

PN500

MR RAINES: So, your Honour, certainly in my closing I would say that this matter if it hadn't of been for Commissioner Yilmaz would have proceeded to the hearing. Ms Heywood wouldn't have been represented, but she certainly would have been putting forward similar to the submissions that were put forward about why she was terminated at the time she was terminated. Some of these issues about the covert recording, the issues about whether an email suffices as an intention to accept an offer would have been mute points.

PN501

Now, it may be the case that your Honour, and Commissioner Yilmaz certainly did say this, that your Honour may find against Ms Heywood, but she certainly indicated that it would be very close and it could go either way. She certainly indicated that Ms Heywood had a very reasonable chance of success. She did point to the fact that Ms Heywood was going to experience a lot of stress, a lot of anxiety and it may not be worth it, but one of the fantastic things about the Fair Work Commission the way that these matters proceed is that there is a member assisted conciliation at the very end, and this often gets a resolution, and that's exactly what's happened here. An offer was left open, and I'm sure Commissioner Yilmaz will remember, there was four weeks that Ms Heywood was offering and then there were zero weeks, but discontinue and we won't seek costs.

PN502

Since the time we understand that Ms Heywood didn't tick settlement. Since that time she has sent the discontinued by settlement through to Commissioner Yilmaz once she realised that she didn't tick the appropriate box. So we certainly say that some of the - - -

PN503

THE DEPUTY PRESIDENT: Did she communicate her acceptance of that offer to the costs applicant?

PN504

MR RAINES: No, your Honour, she c.c'd them in.

PN505

THE DEPUTY PRESIDENT: She c.c'd them in to the notice of discontinuance in the email.

PN506

MR RAINES: Yes.

PN507

THE DEPUTY PRESIDENT: I'm looking at the email, the email itself doesn't set out this is filed in accordance with the settlement offer. This is at AW11 to Ms Warren's statement.

PN508

MR RAINES: Yes, your Honour. In a perfect world like these little things would have been done properly, similar to the email and whether she should have phoned and spoken to Russell Kennedy about wanting to accept the offer, but she certainly does in her submissions say that she was going to accept the offer. Whether she wanted to try and negotiate an extra week that doesn't speak to the fact that she wasn't going to accept their offer. She was going to accept their offer.

PN509

And with regard to the mention hearings there was no disadvantage. Mention hearings as your Honour would appreciate, and a subsequent conciliation, are quite often part of the process. Section 611 as far as awarding costs the Commission must be satisfied that the application was made vexatiously and without reasonable merit. We'd certainly argue that there was a lot of merit to this one, and that was seen by various members of the Fair Work Commission staff and it is contained again - and I understand you asked me why I referred to the barrister's submissions. I referred to them because it's certainly the scope of this as opposed to the limited scope of the three issues we're looking at today. Thank you, your Honour.

PN510

THE DEPUTY PRESIDENT: Yes, thank you. Anything in reply?

PN511

MS PASE: Just a few minor things, Deputy President. One, in relation to the mentions Mr Raines keeps talking about there being no disadvantage to the respondent. Well, clearly having to attend mentions is a disadvantage to the costs applicant, which is exactly the costs that the costs applicant is seeking. It doesn't matter that there was no disadvantage in terms of the orders or the directions leading up to the hearing, it's the attendance at those mentions.

PN512

There's been a couple of references to section 611(a), and I appreciate that it's only today that the application has been narrowed, but just for the avoidance of doubt the costs applicant is not relying on section 611(a), vexatious or - and I can't recall the other words - but we're not suggesting vexatious, we're suggesting that under 611(2)(b) there was no reasonable prospect of success.

PN513

Just in relation to the covert recordings piece there sort of seemed to be a submission made that the covert recordings was not a reason for termination. Obviously it wasn't because the covert recordings were not known to the employer at the time of the termination. However, this doesn't mean that it cannot be considered serious misconduct and a valid reason for dismissal, and in that respect I refer to - - -

PN514

THE DEPUTY PRESIDENT: You don't need to persuade me about that. The question for the Commission is always whether there is a valid reason, not whether the reason relied on by the employer was a valid reason.

PN515

MS PASE: Indeed. The other point there was a submission made that the costs respondent suffers a significant disability. There's been absolutely no evidence that has been put on as to any disability, significant or otherwise, as to that having any impact as to the reason why the covert recordings needed to be done without the permission or consent or even trying to get permission or consent of the other parties to those conversations, and no finding we would say that the Commission can make as to any disability on that point.

PN516

Then there was one other submission that was made that suggested that the 4 September settlement offer, which is the one that we say was an unreasonable act or omission by not accepting that, there was a submission made that it was a sole or a lone settlement offer. That's not the case, and it's clear from all of the material, and particularly the witness statement of Ms Warren, that there were other offers of settlement that were made to the costs respondent.

PN517

Then just on that last point that the Deputy President was dealing with was in relation to the timeline, and the evidence that the costs respondent gave that the offer of four weeks settlement was put to her, that offer was open until 5 September. That offer was neither accepted nor rejected save for this email that said she wanted to have a discussion, which was taken as a rejection unless she accepted, which she did not.

PN518

Then the submission has been made, and it is in the evidence, that the costs respondent re-put that offer of four weeks at the conciliation conference that was before Commissioner Yilmaz on 8 September. And one just needs to look at the dates to see that on 4 September when that offer was made, it expired on 5 September, the material for the respondent was due on 7 September, and one can see from the itemised costs that a great deal of work went on, on 6 and 7 September by reason that that offer had not been accepted on the 5th. And then there was the member assisted conciliation on 8 September. So, yes, we accept that the offer was not accepted and a counter offer may have been put that did not include four weeks salary, but it's pretty clear to see what the reason for that is, which is the extent of work that had gone on in the interim between the 5th and the 8th. They're the reply submissions of the costs applicant.

PN519

THE DEPUTY PRESIDENT: Wasn't the offer of withdrawal and we won't pursue costs left open?

PN520

MS PASE: At the conciliation conference?

PN521

THE DEPUTY PRESIDENT: Yes.

PN522

MS PASE: That I can't get instructions on.

PN523

MR RAINES: Your Honour, I recall that it was.

PN524

THE DEPUTY PRESIDENT: Just sit down for a minute, Mr Raines. Do you want a few moments to get some instructions?

PN525

MS PASE: I might need a few moments on that.

PN526

THE DEPUTY PRESIDENT: All right, do that. If such an offer were made and it was left open, and albeit that the applicant didn't accept the offer as such - - -

PN527

MS PASE: Yes, I appreciate where it's going.

PN528

THE DEPUTY PRESIDENT: - - - but she took - - -

PN529

MS PASE: I understand that. My instructions currently are that we're not sure, we think it was withdrawn, but we will clarify that.

PN530

THE DEPUTY PRESIDENT: Thank you. We will adjourn.

SHORT ADJOURNMENT

[12.48 PM]

RESUMED

[12.56 PM]

PN531

MS PASE: Yes, Deputy President, my instructions are that it was an offer that was put in the conciliation for the purposes of the conciliation, and it was not left open. There were some discussions the next day about whether the offer should be re-put, but ultimately - - -

PN532

THE DEPUTY PRESIDENT: Internally you mean?

PN533

MS PASE: Yes, but ultimately that was not the case.

PN534

MR RAINES: Your Honour, I have spoken to Commissioner Yilmaz after that time. I spoke to her and wrote to her as well with regards to the fact that the

matter was left open. I'd ask that if you could at some stage before you make a decision speak to Commissioner Yilmaz.

PN535

THE DEPUTY PRESIDENT: I am not going to Commissioner Yilmaz. It's a matter for you to lead evidence before me. I'm not going to go behind the record of the Commission and start talking to members of the Commission. If you've got an email that confirms this from Commissioner Yilmaz I will consider admitting it into evidence, but I am not going to speak to another member of the Commission in relation to matters that ought properly - - -

PN536

MR RAINES: For the purpose of the recording I would indicate that both myself and Ms Heywood were at that conciliation. We're happy to take the stand to that effect.

PN537

THE DEPUTY PRESIDENT: Ms Heywood has already effectively given that evidence. The proposition wasn't put to the costs applicant's witness that that was the case.

PN538

MR RAINES: It was put to them. They didn't actually file any sort of statement or affidavit denying that at the time. I understand that it's in their interest at the moment to say that they didn't, but they certainly didn't sign a statement in that regard, and they did know that we were certainly putting that forward.

PN539

THE DEPUTY PRESIDENT: Yes. I will take that as a submission. I understand what you're making.

PN540

MR RAINES: Thank you, your Honour.

PN541

THE DEPUTY PRESIDENT: Is there anything else in reply?

PN542

MS PASE: No, Deputy President.

PN543

MR RAINES: Sorry, your Honour, just in reply to what - with regard to the disability I'm instructed and I have seen - - -

PN544

THE DEPUTY PRESIDENT: You don't really get a reply, but off you go.

PN545

MR RAINES: Thank you, your Honour. Okay, I'll just keep it to the disability, your Honour. Ms Heywood did talk about - - -

PN546

THE DEPUTY PRESIDENT: Ms Heywood, you can take a seat. You don't need to stand.

PN547

MR RAINES: Ms Heywood did take the stand and advised the court under oath that she has a disability. There certainly is a lot of correspondence between her and her employer about her illness and her disability. I understand my friend here might not have that correspondence, but I've certainly seen - there's certainly no - I (indistinct) the suggestion is that she doesn't have a disability, but she's given evidence here today that she does, and that is the reason why she recorded those meetings.

PN548

THE DEPUTY PRESIDENT: Yes. I think the point that counsel was making was there's no evidence about the nature of the disability in order for me to make an assessment as to whether in light of the disability the explanation proffered by your client is one that might explain the reasons for the recording. That was the substance of the submission.

PN549

MR RAINES: Yes, I understood that, your Honour. Thank you, your Honour.

PN550

THE DEPUTY PRESIDENT: Yes, all right. All right, well can I thank both parties for their written and oral submissions today. I will reserve my decision. I will publish my decision in due course. Otherwise we're adjourned. Have a good day.

ADJOURNED TO A DATE TO BE FIXED

[1.00 PM]

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