



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER HUNT

C2022/7866

s.739 - Application to deal with a dispute

**Oliver Petrie
and
Jakes Trading Corporation Pty Ltd T/A Gmn/Vegie Prepi
(C2022/7866)**

Brisbane

10.09 AM, FRIDAY, 17 MARCH 2023

Continued from 16/01/2023

PN1

THE COMMISSIONER: Thank you. Good morning, parties. I'll take the appearances, thank you. Please stand when you address me, and address me as Commissioner. Thank you. Yes, please stand and state your name.

PN2

MR O PETRIE: Oliver Petrie, Commissioner.

PN3

THE COMMISSIONER: Mr Petrie, and you have with you your father?

PN4

MR PETRIE: Yes, we have.

PN5

THE COMMISSIONER: Mr Petrie Senior, is that how we'll address you?

PN6

DR S PETRIE: Dr Petrie, thank you.

PN7

THE COMMISSIONER: And for the respondent?

PN8

MS Z MILLS: Good morning, Commissioner. Zoe Mills.

PN9

THE COMMISSIONER: Ms Mills, thank you, and you're from Brismark?

PN10

MS MILLS: Brismark, yes.

PN11

THE COMMISSIONER: And Ms Rigato?

PN12

MS S RIGATO: (Indistinct.)

PN13

THE COMMISSIONER: Thank you, and we've got Mr Meredith. Thank you. Take a seat, thank you.

PN14

Parties, the matter before me is a section 739 dispute, and as indicated in the correspondence sent to you all, the Commission only has arbitration powers if the employment was live at the time the dispute was raised, and that is not when the application to the Commission was raised but when the dispute to the employer was raised. I've made that clear to you, haven't I, Mr Petrie? Very good.

PN15

Well, I'm going to be most interested in when did the employment end. We might have all views, and I'll have to ultimately decide when the employment ended. If it ended after 27 November at 9.02 am when the email was sent by you, Mr Petrie, well then the Commission may find that the employment was live when the matter was first brought to the employer's attention.

PN16

As to which instrument applies, whether it's the enterprise agreement or the award, that's a secondary issue, so I'm not as interested in that this morning as I am in rather the issue of when did the employment end.

PN17

I need to conduct this matter as a hearing, which is quite formal and it requires you to come into the witness box and give evidence. I'm happy to hear from you informally though before we hear evidence, if that's what you wish, or would you prefer, Mr Petrie, to go straight into the witness box and give evidence?

PN18

MR PETRIE: It doesn't really bother me, your Honour.

PN19

THE COMMISSIONER: All right. I think I'll have you – do you wish to say anything else, parties, before I hear evidence?

PN20

MS MILLS: No, Commissioner.

PN21

THE COMMISSIONER: No. Dr Petrie?

PN22

DR PETRIE: (Indistinct) Commissioner, I think there is an issue about - - -

PN23

THE COMMISSIONER: Just stand when you're addressing me, thank you.

PN24

DR PETRIE: Sorry – the definition of 'casual worker' and what that actually means; what are the requirements of a casual worker. That concerns our son and (indistinct).

PN25

THE COMMISSIONER: Yes. Look, it's not clear to me at the moment what exactly happened, but I do have some specific questions I'd like answered, which might help me crystallise when the employment came to an end, because there are some signals, which I'll bring to your attention. But I do need some further answers.

PN26

All right, Mr Petrie, please come to the witness box. Please bring with you anything that you wish.

PN27

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

PN28

MR PETRIE: Name is Oliver Simon Johnson Petrie, (address supplied).

<OLIVER SIMON JOHNSON PETRIE, SWORN [10.12 AM]

EXAMINATION-IN-CHIEF BY COMMISSIONER [10.13 AM]

PN29

THE COMMISSIONER: Mr Petrie, when do you think the employment came to an end?---Basically after I received the note saying that I'd asked (indistinct) moved on, the text message saying that, yes.

PN30

That's on 17 November?---Yes.

PN31

So you know that doesn't help your case here?---Well, it's just the truth. That's about all I can say.

PN32

And you were asked to return your glove?---I was.

PN33

What does the glove look like? Is it - - -?---It's a mesh glove, basically used for butchering, the vegetable (indistinct), anything to do with machinery pretty much.

*** OLIVER SIMON JOHNSON PETRIE

XN COMMISSIONER

PN34

Are you right-handed?---Yes.

PN35

So you wear it on your left hand?---Yes.

PN36

To make sure you don't cut your fingers?---Yes, basically so – it's meant to be able to stop you from losing your limbs pretty much.

PN37

And did you return the glove?---I haven't, no. Not yet, but I will.

PN38

And you didn't ask what was meant by that text message?---It was pretty clear that they thought I'd moved on. I hadn't, but as far as I'm concerned it was just – it wasn't really worth any – I mean, yes, not really worth going back to work for three-hour shifts. So, yes, that's basically it, your Honour.

PN39

And then 10 days later you write the email because you think that they shouldn't have been applying that enterprise agreement to your employment?---Well, it was completely wrong to begin with, and I didn't get a contract at the start of the employment. We did ask on several occasions for them to give me the contract I was meant to be working under, and never received it; still haven't.

PN40

You've seen my emails, haven't you?---Yes.

PN41

It's not wrong. They are lawfully entitled to use this zombie agreement?---No, I completely understand that, but again, like, every place I've worked I've received a contract. I probably wouldn't have worked for them as long as I had if I had've known that that was the contract that I was working under.

PN42

And you knew that when you worked the odd hours, et cetera, that you weren't getting penalty rates that you might otherwise under an award?---I did, and I was happy not to receive those when the hours were decent, but then having to turn up for a three-hour shift and then not any indication that it was going to be three-hour shift and then be sent home, it sort of defeats the purpose of actually turning up to work, because I spent pretty much half the pay getting to and from work.

*** OLIVER SIMON JOHNSON PETRIE

XN COMMISSIONER

PN43

The matter before me is whether you were an employee, and your opinion counts to some degree, but then at the end of the day I'll make the decision as to whether you were an employee as at 27 November. But you've said in evidence you probably don't think you were, because of the text message. The employer has said they think they owe you about \$7000?---Well, we can't do any – the (indistinct) were made from my pay slips was I was owed about \$40 grand, and we did ask - - -

PN44

That's if you think the award applies to you?---If the award applies to me, but even if it doesn't, it'd be still up past \$7000.

PN45

All right. I'll ask this of you, Ms Mills, just now, because it's relevant, and please stand when I address you. If the respondent thinks that \$7000 is owed, is that that it's confident the \$7000 is owed?

PN46

MS MILLS: Based on the calculations we've done, yes, Commissioner.

PN47

THE COMMISSIONER: So why hasn't it been paid? Why are you making it subject to some terms?

PN48

MS MILLS: I believe my colleague has – my colleague, Lisa Dwyer, made that calculation.

PN49

THE COMMISSIONER: But it's not a without prejudice calculation, is it? The respondent thinks that \$7000 is owed under the agreement.

PN50

MS MILLS: Under the agreement, yes.

PN51

THE COMMISSIONER: Well, then it should be paid to Mr Petrie, without him signing terms to say that he won't bring further claims.

PN52

MS MILLS: I'm not sure, your Honour.

PN53

THE COMMISSIONER: What's your experience?

PN54

MS MILLS: This is my first time at the Commission.

PN55

THE COMMISSIONER: And what is your role?

PN56

MS MILLS: HR work health and safety adviser.

*** OLIVER SIMON JOHNSON PETRIE

XN COMMISSIONER

PN57

THE COMMISSIONER: Well you would know that if somebody is owed money that they're entitled to be paid it, whether they sign terms or not. I mean terms are a compromise. If he thinks he's owed \$40,000 and you know that he's owed near \$7, then he needs to be paid the \$7, whether terms are signed or not. If you owe somebody a debt you pay it.

PN58

MS MILLS: Yes, Commissioner.

PN59

THE COMMISSIONER: If he came back and said well I'll take \$12, and you go well we don't think you're owed \$12, we know you're owed \$7, you pay the \$7 and you don't have terms. All right, take a seat. Thank you.

PN60

Mr Petrie, you've heard my views there. If the respondent satisfies itself that it owes you money, in my view it should pay it to you promptly. How would you feel about getting that near \$7000?---Considering that they owe me a lot more than that, \$7 is a bit of a joke, to tell you the truth, your Honour.

PN61

Well, if it's owed it's owed. Now, if you think that the award applies, then this is not going to be the place for you it would seem. You'd have to go to a court. You'd have to go to the Magistrate's Court?---Well, as you said, if the money's owed it's owed. It's just like – I mean we've tried to do everything by the book. We've tried to work out the calculations. Mysteriously, as we talked on the phone to you, that their clock-on, clock-off machine went down. We asked for – I mean, even if we had rosters to go off, but there aren't any rosters to go off. So we can't give an exact claim amount.

PN62

No, and if you were to go to a court, it's up to you to demonstrate to the court's satisfaction that you are owed moneys. You know, if the guess work is not there, the court won't guess?---Yes.

PN63

Now, of course it is the employer's responsibility to have the time and wages records. If it doesn't have them it doesn't have them, but I'm just looking at – where is the near \$7000? That's been in correspondence I think, parties, that you sent to each other but only recently included the Commission, is that right? Is that right, Mr Petrie, you've been - - -?---Page 58 – sorry.

PN64

Yes, which page?---Page 58.

*** OLIVER SIMON JOHNSON PETRIE

XN COMMISSIONER

PN65

Thank you. I haven't seen this until it formed part of the court book, but this is a letter to you, Mr Petrie, where they say that they've calculated your night shift allowance, overtime, public holiday payments, and say that you should have earned \$49,922.78. You earned \$42,937.20, and therefore they believe that \$6985.38 should be paid to you. I'm looking for signed terms, but in my view you've heard what I've had to say to Ms Mills. If they believe the money is owed, the money should be paid to you without you signing terms that you won't bring any further claims. Okay?---Mm.

PN66

Well, you've heard what I'm here to decide today, and that is, was the employment alive as of 27 November?---Yes.

PN67

And you accept, do you, that I'm going to struggle to find it was live?---Well, how else am I meant to prove that it was, being a casual employee?

PN68

You didn't ring on 21, 22, 23, 24 November and say hi, I'm available?---I didn't have to. I never had to. I just – like, all the correspondence up until then was me saying that, look, I'm sick, I'm not going to be able to attend work.

PN69

Well you weren't sick as of the 14th of - - -?---No, not at that – at the 14th, no, I wasn't. But I'm casual. I don't have to give them any notice at all, and vice versa from them. So it makes it difficult to say whether I was employed or not.

PN70

You arrived at 8 pm on the last day that you worked, expecting it to be an 8 pm shift, but it was in fact a 10 pm shift?---Yes. Well I arrived at 8 pm thinking it was going to be a 9 o'clock shift, which is when we usually started. Then got told it was a 10 o'clock shift, and I'd already – I hate being late, so I'm pretty much always early, so I'd been sitting in the car park for an hour-and-a-half before I turned up, and then discovered that I had to wait another hour-and-a-half/two hours. It was just, like, well it's not worth it.

PN71

And what did you say, you said you were out, or I'm going home?---No, I just said I'm going home. I didn't say anything other than that – I'm just going home.

PN72

And then you didn't turn up the next day?---I didn't turn up the next day.

PN73

Nor the day after?---No.

PN74

And that's when Ms Rigato texted you to say - - -?---That I was under no contract agreement saying that I had to turn up.

*** OLIVER SIMON JOHNSON PETRIE

XN COMMISSIONER

PN75

But you didn't suggest that she was wrong and that you were still an employee?---No, by that stage, your Honour, I'd had enough, because it had been ongoing for a couple of weeks, and I had raised the issue saying, you know, three-hour shifts aren't good enough. I mean, I have no life, because I work every night pretty much. I'm meant to be compensated for the days that I do work, but I'm not getting compensated for the weekends that I work, I'm not getting compensated for the public holidays I'm working. I mean, I get pretty much one day off a week, because I've got to sleep the first one, and then it's mainly half a day, because I've got to go to bed at 4 o'clock in the afternoon so I can get up – or not 4 o'clock in the afternoon, but I've got to go to bed early so I can get the other shift. That is to say, what is the point in turning up to a job that you have no life. I did raise it. I said, look, you know, three-hour shifts, who can afford to live off three-hour shifts, you know – it's not possible, and especially with the rates that we were getting. You can't, even if you are working 12-hour shifts. I mean, that's the truth. If it's not what you wanted to hear, your Honour, I'm sorry, but - -

PN76

No, it's not a matter of what I want to hear. This is your application. Yes, Dr Petrie?

PN77

DR PETRIE: Commissioner, can I make a point about – on page 118, 119 where there are copies of the texts, we have a text from Ms Rigato on 17 November saying, 'I understand you want to move on. Could you please bring' – there is then a text message, which I assume is the same day:

PN78

On advice from the Fair Work Commission I'll be forwarding a letter to you in due course outlining my claim for outstanding entitlements. I will return the glove in due course.

PN79

There is no suggestion there that he had resigned or had decided otherwise at that point. He was then taking advice.

PN80

THE COMMISSIONER: Well, what you're putting to me, Dr Petrie, is submissions.

PN81

DR PETRIE: Yes.

PN82

THE COMMISSIONER: I'm interested in evidence over submissions, and Mr Petrie is telling me that he thinks that the employment's at an end at that date.

PN83

DR PETRIE: Okay.

PN84

THE COMMISSIONER: I'm interested in submissions, but they do not outweigh evidence.

*** OLIVER SIMON JOHNSON PETRIE

XN COMMISSIONER

PN85

DR PETRIE: All right. Well I thought they would.

PN86

THE COMMISSIONER: I wanted to hear today about the glove. I've heard that it hasn't been returned.

PN87

DR PETRIE: No.

PN88

THE COMMISSIONER: But I've also heard from Mr Petrie that, you know, he didn't make himself available in that next week, because his evidence is that he considered it over?---Sorry, your Honour, it's pretty hard to make yourself available when you have no roster. Like, how can you tell what's going on and what's not going on. Also, like, again, would staff actually turn up if they were going to get a three-hour shift.

PN89

Well, that's it, you didn't turn up on the 16th and 17th, did you?---No, I didn't, but again I was a casual employee, so I didn't have any legality for turning up.

PN90

Yes. You've also signed the application form to the Commission on 29 November as an ex-employee. I'll just read exactly – you've said 'ex-food processor.' So at the time of making application - - -?---Well, because on the 29th I wasn't working for them anymore.

PN91

When do you consider that you were no longer working for them?---Well, pretty much that day, because I was waiting to see what Fair Work would say, and then - - -

PN92

Well, your earlier evidence was that you considered on 17 November that you weren't an employee?---Well, physically, no, I wasn't, because I wasn't at work, but on the books I was still an employee.

PN93

I'm interested in the employment relationship. When do you consider the employment relationship came to an end?---My employment relationship pretty much came to an end when I received a message saying that you've moved on, because that made me pretty much assume that I wasn't welcome back.

PN94

And you didn't correct them?---I didn't see any point.

PN95

So you thought the relationship was at an end then?---(No audible reply.)

*** OLIVER SIMON JOHNSON PETRIE

XN COMMISSIONER

PN96

All right, thank you. Any further questions, Dr Petrie, you have?

PN97

DR PETRIE: No.

PN98

THE COMMISSIONER: All right. Any questions that you have in cross-examination?

PN99

MS MILLS: Yes, Commissioner.

CROSS-EXAMINATION BY MS MILLS

[10.28 AM]

PN100

MS MILLS: Can I please ask, who did you raise the issues with?---I raised them with John. There is no HR, so it's pretty hard to raise issues when there are no HR

people. Brismark is not Vegie Prepi, so it's incredibly hard again. No one told me that I could raise it with Brismark. It should have been in the contract, but didn't receive a contract. So basically I was flying blind.

PN101

At any time did you raise the concerns with Sue or Penny?

PN102

THE COMMISSIONER: Can we just go back a bit? Sorry to intervene, but what did you raise with John?---I said, like, it's not good enough, like - - -

PN103

The three hours issue?---Three hours, three-hour work.

PN104

But that's it? You didn't raise the underpayment issue and the agreement issue?---I said, look, you know, we've got people coming from Ipswich to work for them. Myself, I travel 40 minutes, and it's just – yes, I mean, would you turn up, your Honour, if you knew that you were going to get a three-hour shift?

PN105

I'm not going to answer that question?---Yes. I mean - - -

PN106

But it's the three-hour issue that you raised with John, is that right?---That and the hours that had been significantly getting less and less and less from the start of my employment.

PN107

Ask away, thanks.

*** OLIVER SIMON JOHNSON PETRIE

XXN MS MILLS

PN108

MS MILLS: How did you know when to come in to work for day and the time?---It was basically word of mouth.

PN109

From who?---Well, from basically all the other staff. You just turned up when all the other staff were going to turn up.

PN110

And what times, days – was it a regular time and day that you turned up?---It was a regular time of day. Some days it was 5 pm, open-ended shift, as they all were, because we never knew what time it would end. Monday was 9 o'clock, Tuesday 8 o'clock, Wednesday 9 o'clock, and Thursday again back to 5 o'clock. On Sunday it was a 5 o'clock shift too.

PN111

So the start times were the same for those days every week?---They were meant to be. They weren't, but they were meant to be.

PN112

Okay. Thank you.

PN113

THE COMMISSIONER: All right. Anything arising out of that cross-examination? Anything you want to say, Mr Petrie?---No.

PN114

DR PETRIE: Sorry, Commissioner. My understanding is that Oliver had raised the issues about the hours, but had also previously raised the issues of pay. Now, the agreement says raise issues with supervisor. There was an assumption made that that had been then passed on to the employer.

PN115

THE COMMISSIONER: Mr Petrie, did you raise issues about matters that are in your application on page 10?---I did.

PN116

Well let's have a look at it. This is what your application before the Commission is, a dispute about, one, whether the agreement applies, and essentially, on page 10 the bold 1 through to 6 is raise. The application doesn't really deal with minimum hours of work?---No, it doesn't, and I understand casual labour doesn't – it doesn't require minimum work, but it also requires getting paid for overtime when you work a 12-hour shift and penalties at night. It doesn't matter how far it goes back, but it could go back 10 years.

PN117

Were you raising those issues with John?---It was common knowledge that we were getting underpaid.

*** OLIVER SIMON JOHNSON PETRIE

XXN MS MILLS

PN118

Well I'm not sure you were, unless, you know, I dig deep into what the employer says is the \$7000. But you've said that you didn't even know about the enterprise agreement?---Didn't know about the enterprise agreement, because, like, as far as we were aware, we were told to rock up to a shift – this is the time we're going to rock up. After the first week or two it was a set standard time, but there was no paperwork to prove that it was set standard time. There was no - - -

PN119

So what were you disputing with John?---Basically the cut back in hours. Having to turn up at a 5 o'clock shift and then having to wait for an hour for the day shift to finish, which happened on several occasions. But as we're concerned, or I was concerned, he should've been paying us from 5 pm, which is basically when we were told to turn up. Also, again, not getting any overtime, not getting any penalty rates. I mean – yes, I mean that's basically it. Like, it was just unsatisfactory. I mean, we received a minimum amount of training, if that; we worked in a kitchen which they said that they have no employees that work in their kitchen, yet this is a government-sponsored company, and on the video that

the government has sponsored there are people working in a wet kitchen. So basically the whole thing was a bunch – well, I was employed on a pack of lies.

PN120

I'm just not clear what you were disputing with John regarding the non-allowances, no allowances paid?---I'm not disputing John with anything. I'm disputing Vegie Prepi for not paying their staff (indistinct) - - -

PN121

Well I need to know did you raise a dispute?---Yes, I did - - -

PN122

With John?--- - - - and it was word-of-mouth.

PN123

You raised the dispute with John?---I raised the dispute with John personally.

PN124

When and how? What did you say?---I went out in the, well, I'll say break area, which is a car park, and basically said to him, look, I understand that the hours go up and down; I'm not disputing that, and I know it's the name of the game, but having people turn up for a three-hour shift without any notice, or being turned up and then having to be sent home because there is no more work – we're not getting paid what we should be getting paid, as in, again, the penalties and the night – the loading. What else do you want me to do? There's no HR to go to. There's no contact according to positions that we know of as employees. I mean, it's either turn up to work, shut up, do your work and go home.

*** OLIVER SIMON JOHNSON PETRIE

XXN MS MILLS

PN125

Were you disputing the number of hours that you were being given?---I was basically disputing the number of hours that we were receiving, because they'd dropped from roughly 40 hours a week to less than 30. I was disputing why we weren't getting paid what we should have been paid with the loading. Yes, I mean, they'd done nothing right. I don't know why I stayed so long, but because it was a job and I couldn't afford not to work, I had to go. Just with all the other stuff, there was still work in there. I mean, if you'd like me to call witnesses from - - -

PN126

No, I'm interested in what you were doing, Mr Petrie?---Yes.

PN127

And you understand that I find that you did raise a dispute while your employment was live, and you say that the agreement doesn't apply and the award does, the respondent just needs to stand up and say we don't consent to arbitration and there's nothing I can do for you?---Well, that's fine. If that's all – if that's all that happens – all – I want the money that I'm owed, that's all I want.

PN128

I think you should get that near \$7000, that's my view. I've made that very clear?---Yes.

PN129

And whether you go to a Magistrate's Court and try and argue before a Magistrate, you may not be - - -?---Well I - - -

PN130

I'm not finished?---I'm sorry.

PN131

You may not be experienced with respect to awards and enterprise agreements, and try and prove, because you have to prove to that court that you are covered by one of those instruments and you're owed money, then - - -?---Well, technically - - -

PN132

- - - that could take up another year of your life?---At the moment I've got nothing to lose, your Honour, and it is a criminal crime to, like, thief from employees by underpaying them, which is what they've done.

PN133

Well we don't know that they've done that yet. Now, you can be satisfied that as of 6 December this year this zombie agreement won't live. Is there going to be any application to seek termination of that before? I mean, I could discuss this in any decision that I make and bring it to the attention of employees, and they might bring an application to have the agreement terminated.

PN134

MS MILLS: Sorry, Commissioner, I don't believe there will be an application to extend it, no.

*** OLIVER SIMON JOHNSON PETRIE

XXN MS MILLS

PN135

THE COMMISSIONER: So you're going to have this zombie agreement live until 6 December 2023?

PN136

MS MILLS: Yes, Commissioner.

PN137

THE COMMISSIONER: Unless one of your former colleagues who is still an employee wants to bring an application?---How can they?

PN138

Yes, they can?---No, they can't, because they'll be unemployed if they do.

PN139

No, they won't?---Yes, they will.

PN140

They're protected?---No, seriously, they will.

PN141

Well then, they can bring an application one hour before they walk out the door, Mr Petrie?---But they can't afford to walk out the door. That's what I'm saying, your Honour.

PN142

Look, a zombie agreement – this zombie agreement will die on 6 December, unless an employee makes an application beforehand and that's considered and determined by the Commission. But as for you, what do you want to achieve, given I've outlined the various steps that need to be taken here, and if you're right then it's unlikely the Commission's able to arbitrate your matter?---Well that's all right. I'll just take the money that you've said that I'm owed.

PN143

Well, I believe that you're owed. If they've said that they think it's owing, then the right thing to do is pay it. I can't make them pay it?---No, that's fine, but they will be hearing - - -

PN144

I can expose it in a decision?---They will be hearing from the police if they don't.

PN145

The police will not be involved, Mr Petrie. Please do not think that they will be involved. That's not correct?---Well, then everyone's made up their mind, your Honour. Like, what else do you want me to do?

PN146

All I can advise is that, if you think that you're owed money beyond the \$7000, then to obtain that you need to prove that in a court?---I'm prepared to do that, but, you know, I still have - if they've said that they owe me money and they haven't paid it why haven't they paid it?

*** OLIVER SIMON JOHNSON PETRIE

XXN MS MILLS

PN147

They're going to potentially think about what I've had to say today, and that it shouldn't be subject to terms. If they are of the view that it is owed to you, you shouldn't have to sign terms to waive your rights?---Then I'm happy with that, your Honour, whatever - whatever (indistinct).

PN148

All right. Well, I'm still here - - -?---Because I mean - - -

PN149

- - - deciding whether or not - - -?---But my hands seem to be tied, don't they?

PN150

I am still left here to decide whether or not you raised a dispute whilst you were employed, and then if you're right about that and if you're then right about the

award applying and not the agreement applying then the respondent says we do not consent to arbitration, then my involvement ends?---So be it.

PN151

All right. Anything arising out of the questions put to the witness?

PN152

MS MILLS: No, Commissioner, no.

PN153

THE COMMISSIONER: All right, you can return to the Bar table, thank you, Mr Petrie?---Thank you, your Honour.

<THE WITNESS WITHDREW

[10.40 AM]

PN154

THE COMMISSIONER: All right. We will hear from you then, Ms Rigato. Please come to the witness box, bring anything that you wish with you, thank you.

PN155

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

PN156

MS RIGATO: Susan Frances Rigato, (address supplied)

<SUSAN FRANCES RIGATO, SWORN

[10.40 AM]

EXAMINATION-IN-CHIEF BY THE COMMISSIONER

[10.40 AM]

PN157

THE COMMISSIONER: Thanks, Ms Rigato. You've made two witness statements in these proceedings?---Do I need to - sorry, do I need to stand up to talk to you.

*** SUSAN FRANCES RIGATO

XN THE COMMISSIONER

PN158

No. Just do the same as what Mr Petrie did. You've made two witness statements in these proceedings?---Yes.

PN159

And are they true and correct?---Yes, they are.

PN160

Any changes that you wish to make to your statement?---No.

PN161

Very good. Any questions that you want to ask there, Ms Mills?

PN162

MS MILLS: No.

PN163

THE COMMISSIONER: Any questions in cross-examination, Mr Petrie, Dr Petrie?

PN164

DR PETRIE: Sorry, are we referring to the witness page 69?

PN165

THE COMMISSIONER: Yes, and also the supplementary statement from page 130. I called for more evidence because I wasn't given enough direct evidence.

PN166

DR PETRIE: With permission, Commissioner, the issue that we have is that there seems to have been some discussion about whether he actually turned up for a rostered shift. For example point 10, 'Mr Meredith advised me that Mr Petrie had not attended work for his rostered shift that night.' There were no rosters and it was open-ended. So there's an issue here about what constituted the actual operation of work in that workplace for a casual worker. Mr Petrie has stated that there were some starting times, but they were open-ended, and even the staffing times didn't necessarily apply.

PN167

THE COMMISSIONER: You didn't ask Mr Petrie in the witness box whether or not he knew that he was scheduled to work on 16 November and 15 November. So what do you know about that, Ms Rigato? You say that on 15 November you were at work and he wasn't there?---John informed me that he wasn't there on those particular nights, correct.

PN168

And what did you understand he was rostered to work?---I was - because they do have that regular roster so it was understood that he was there to work, and John informed me that he wasn't. Now, I have numerous employees that just don't turn up and then you've got to find out whether they are going to continue work with you or not, hence the text to him to see whether he was going to be back or not.

*** SUSAN FRANCES RIGATO

XN THE COMMISSIONER

PN169

What does the roster look like; I would have no idea?---It's a verbal roster, and it's probably John would need to be the one to discuss that with you because I don't come into that. John is his immediate boss. So I don't do the rosters.

PN170

There's no texts, there's no nothing on a noticeboard as far as you're aware?---As far as I'm aware the start time is the same and the finish time is different because it depends on our customers what they have got on and how busy it is.

PN171

You're a director, do you think that John says, 'Please come in tomorrow', what do you know?---What I know is that there were regular - so every night it was regular. So you - I mean they started at the same time each week on the same - - -

PN172

What time?---Well, each day was different.

PN173

So how would I know if I was required the next night?---Well, John would have told you the whole roster for the week, and the start times were the same every day as far as I'm aware, so - - -

PN174

And what time is that?---I think it is actually in here, which it starts Sunday and Thursday 5 o'clock, and I think it was 9 o'clock the other nights, and 10 o'clock on a Wednesday.

PN175

So do you think your employees are told verbally by John - - -?---Yes, Yes.

PN176

- - - 'Please come in tomorrow' or 'I don't need you tomorrow'?---Correct.

PN177

And how many nights in advance might they be notified?---Well, I think most of them know that that roster stays the same the whole time. It's just when it ends there's a difference. So the start times stay the same. So you have some people that just want to work three nights a week, so they start the same time those three nights a week, and the people that work five nights a week or four days a week the roster stays the same, unless they're texted and told differently. I'm assuming that would be text, but I mean I don't - I mean that's why I have John there. He runs - he runs the floor. So I'm not too sure. I leave that up to him to run.

*** SUSAN FRANCES RIGATO

XN THE COMMISSIONER

PN178

You don't know whether you've got five people working for you or 12, you don't know, you leave it up to John?---No. I mean I've got over 50 staff. You know, I can't keep track of every single person working. I mean I work very long hours, but I mean I'm running a business as well, so I can't see who has come and who hasn't. I rely on my managers to - you know, they manage up to me.

PN179

So you've sent the text, 'Hi Ollie, I understand that you want to move on. Could you please bring back your glove and we'll finalise your pay on Friday. Thanks heaps, Sue.' What would finalising his pay mean?---Well, that would be his final pay and that is it. There's no more employment, further employment.

PN180

And he's a casual employee?---Correct.

PN181

So finalising means what?---It means your final pay, that there's no more pay or work after that.

PN182

It was a question, wasn't it, or a statement?---Both.

PN183

And bringing back his glove, why would he need to bring it back?---Because we supply the glove. They are stainless steel mesh glove and they're worth over \$100 for these gloves, and then they are passed on for the - to another person once they leave.

PN184

So they can be used by subsequent people?---Absolutely, yes.

PN185

And he didn't respond other than - - -?---He did respond.

PN186

- - - other than he would return his glove, and he didn't return his glove?---No, he didn't, but he - no, he didn't return his glove. But by him saying 'I'll return the glove' I knew that he wouldn't be back.

PN187

You considered it the end, did you?---Correct.

PN188

Is there any codes on the payroll for example where something is input when you consider employment has come to an end?---No.

PN189

So how does the payroll know when somebody is no longer an employee?---Because it's my sister. So I just tell her that that's his final pay.

PN190

With a casual there's no annual leave for example to wrap up, it's just paying the wages that he earned?---Correct.

*** SUSAN FRANCES RIGATO

XN THE COMMISSIONER

PN191

And your sister doesn't do anything with payroll like close somebody off for example?---(No audible reply.)

PN192

You will need to give an oral answer?---No. Sorry. No, I just told her that he'd finished up, this will be his final pay, and she said 'Okay'.

PN193

When do you think you did that?---When did I do that?

PN194

Yes?---I did it on the day that I - when she got in, she starts at about 9 o'clock in the morning, and I let her know then.

PN195

You did that orally, did you?---Yes.

PN196

All right. Mr Petrie, Dr Petrie, any questions in cross-examination?

PN197

MR PETRIE: Sure.

PN198

THE COMMISSIONER: Please ask the witness directly and you look at each other. Thanks.

CROSS-EXAMINATION BY MR PETRIE

[10.49 AM]

PN199

MR PETRIE: Getting a text message from the general manager of - - -

PN200

THE COMMISSIONER: Make sure you speak up.

PN201

MR PETRIE: Sorry. Getting a test message from the general manager of the business basically if it was John's job to inform me that it was my last shift and all that sort of stuff why did it go to you?---Because it's my business.

PN202

Because I basically take that as, well the general manager's contacted me, so that basically means I don't have a job (indistinct) if I wanted one?---Ollie, you could have responded saying, 'I have intentions of returning', or picked up the phone. I mean you're making it as if I'm never there. You know I was always at work. You could walk into my office any time and speak with me. You're making it as if I'm never available, which I'm probably the most available person that there is.

*** SUSAN FRANCES RIGATO

XXN MR PETRIE

PN203

That's not the point. That's not the point that I'm asking. You've just tried to point it off to John saying it was his job and his responsibility to do the rosters and everything like that?---Correct, and it is.

PN204

So it was his job to contact me and ask what was going on, not yours, so basically - - -?---Not necessarily. I'm the owner of the business, I can make that decision.

PN205

All good. Thank you very much.

PN206

THE COMMISSIONER: Anything else from you, Dr Petrie? No. All right, anything arising?

PN207

MS MILLS: No, Commissioner.

PN208

THE COMMISSIONER: All right, thank you, Ms Rigato, that's all I need to hear?---Thank you.

PN209

You're welcome to go back.

<THE WITNESS WITHDREW

[10.50 AM]

PN210

THE COMMISSIONER: We will hear from you then, Mr Meredith. Parties, I don't normally have respondent witnesses in the hearing room, but because there was so much evidence given in-chief and not in witness statements that I deemed it necessary to allow the witnesses to stay in the room. Yes. You will be asked to take an affirmation or an oath, Mr Meredith.

PN211

THE ASSOCIATE: Mr Meredith, could you please state your full name and address.

PN212

MR MEREDITH: Yes, John Paul Meredith, (address supplied).

<JOHN PAUL MEREDITH, AFFIRMED

[10.51 AM]

EXAMINATION-IN-CHIEF BY THE COMMISSIONER

[10.51 AM]

PN213

THE COMMISSIONER: Mr Meredith, at page 131 of the court book you've made a statement or a statutory declaration. Is it true and correct?---Yes, it is, Commissioner.

JOHN PAUL MEREDITH

XN THE COMMISSIONER

PN214

Any changes that you wish to make to it?---No, I do not.

PN215

All right, thank you. I am going to admit the entire digital court book as evidence, parties.

EXHIBIT #CB1 DIGITAL COURT BOOK

PN216

THE COMMISSIONER: So everybody's evidence is in. All right. Tell me more about this way of asking people to come to work?---Okay. Since I took over the role of manager in that - - -

PN217

Speak up?---Sorry. Since I took over the role of the manager of the prep room, the nightshift, any employment or any new employees respond or apply to an advertisement that has the actual hours in terms of the start times for particular days, and it's explained that the end time will vary depending on the demands and the workload of the business. As it's been mentioned we have some people that work three days a week, some people that work the full five days a week, and those - basically those positions or those shifts are set in stone with the exception of public holidays. And occasionally as there was one instance where we did push the start time back an hour because - - -

PN218

So casual employees know that I'm going to come into work on Thursday, I'm going to work - - -?---At 5 pm and, yes, definitely, Thursday 5 pm, Saturday - sorry, Sunday 5 pm, Monday 9 pm, Tuesday 9 pm now, Wednesday 9 pm, and then back to the 5 pm on Thursday, and that's set in stone.

PN219

So they know that unless they indicate that they're unavailable?---Exactly, yes, and that's not me giving them information.

PN220

So you don't have to remind them, nag them, tell them?---The only time that I put any effort into, how would you say, letting people know when their start times, because it would vary, is the public holidays, and to the point where I actually do a typewritten piece of paper with the exact - because obviously doing nightshift it can be a little bit confusing what days the public holidays relate to our trading hours. So I get it typed up and then hand a copy out to everybody.

PN221

So what days of the week did Mr Petrie work?---Five days a week.

PN222

Sunday until - - -?---Sunday to Thursday.

*** JOHN PAUL MEREDITH

XN THE COMMISSIONER

PN223

Right. So you knew that and he knew that?---Correct.

PN224

And you didn't tell him each day - - -?---I didn't tell anyone.

PN225

- - - 'Are you coming in tomorrow? I need you tomorrow'?---I didn't do that for anyone.

PN226

He last worked on the 14th and he sent you a text, didn't he?---That was his last shift.

PN227

To say, 'Going home' - on the 15th. He arrives at 8, but it's at 10. So what happened there?---Yes. There was a pushback of that Wednesday shift, or Tuesday night, sorry, for the Wednesday, just because it had become somewhat quieter earlier in the new year, and there wasn't enough hours for everybody to get reasonable hours. So it's easier to start everybody an hour later to preserve what hours there are.

PN228

Did you tell him?---I did tell everybody. I'm not too sure whether he was in the building at the time. He was on shift that night, and everyone else got the information. I must admit I probably didn't walk around and say it to everybody individually, but at the talk - - -

PN229

He's arrived super early, so he's probably right in that he didn't know?---Well, that's right, but my - and I can't say this for a fact because I don't have access to the payroll information as to whether he was on shift the Wednesday prior when that decision was made and that communication to the rest of the staff, but everybody else that worked the previous Wednesday was aware of it, and, yes, arrived at the correct revised starting time.

PN230

So he sent a text saying 'Going home'?---Yes.

PN231

And you thought that pertained to that night?---Yes, I did.

PN232

And then when he didn't arrive the next night what did you think?---I must admit I didn't even think to start with, I was sort of busy dealing with other things. Yes, when I realised that he hadn't shown up based on the previous evening's correspondence I assumed that he didn't want to work anymore.

PN233

You assumed that?---Yes, based on the previous text and the fact that he hadn't shown up the following night.

*** JOHN PAUL MEREDITH

XN THE COMMISSIONER

PN234

Why didn't you text him?---I just didn't have time to be honest. I'm dealing with a lot of other issues.

PN235

You told Ms Rigato that that was your view?---What's that? No, I didn't. No, I just passed the information on.

PN236

So it was Ms Rigato who determined that he wanted to move on; is that right, not you?---Yes. I didn't send a text, Commissioner, so, no.

PN237

You didn't convey that?---No, not at all.

PN238

You just said, 'He's not here'?---I just gave the information, yes.

PN239

And it was Ms Rigato who identified that he wasn't there on the 17th?---Correct.

PN240

So it was her assumption and not yours that Mr Petrie didn't want to be there?---Well, I shared a similar assumption based on the fact that - yes, the fact that he hadn't shown up, definitely. It doesn't show that you want a job.

PN241

You felt that he didn't want a job?---Yes.

PN242

But you didn't convey that to Ms Rigato?---To be honest with you I don't recall. I just remember passing the information on. Sometimes I don't have, yes, a lot of time to maybe communicate as well as I would like to, particularly with the boss, but that's just from business pressures and having a lot of responsibility dealing with - - -

PN243

When did you become aware that Ms Rigato had sent the text to Mr Petrie?---I think the next shift she conveyed that to me.

PN244

And did she convey that Mr Petrie had said he would return his glove?---No. No, I didn't even pursue it to be honest. I think I was - - -

PN245

Did she tell you - - -?---I don't recall.

PN246

- - - that Mr Petrie - you don't recall?---No.

*** JOHN PAUL MEREDITH

XN THE COMMISSIONER

PN247

Had you initiated text messages with Mr Petrie or it was always him telling you when he was unavailable?---Correct. I think I maybe asked on one occasion.

PN248

You were responsive to his text messages?---I was always responsive. I acknowledged - - -

PN249

But you didn't really text him?---No, never had a need to.

PN250

All right. Any questions, Ms Mills, that you have of Mr Meredith?

PN251

MS MILLS: No, Commissioner.

PN252

THE COMMISSIONER: All right. Mr Petrie, Dr Petrie?

CROSS-EXAMINATION BY MR PETRIE

[10.58 AM]

PN253

MR PETRIE: Just with the public holidays, well during the phone conference that we had I was told that you didn't work public holidays, whereas I had worked public holidays?---Everyone - everyone worked public holidays.

PN254

So what you're saying is you lied in the phone conference, or not yourself, but - - - ?---Sorry, I'm not understanding. What's going on here, Commissioner?

PN255

THE COMMISSIONER: I don't have any notes about the conference. I can't recall.

PN256

MR PETRIE: With the phone conference - well, it was recorded because you've got - - -

PN257

THE COMMISSIONER: No.

PN258

MR PETRIE: They don't record?

PN259

THE COMMISSIONER: No, I definitely didn't record my conferences, and I don't have my notes here before me because I don't consider it relevant.

*** JOHN PAUL MEREDITH

XXN MR PETRIE

PN260

MR PETRIE: All right. Fair enough. Then I've got no more questions apart from - - -

PN261

THE COMMISSIONER: All right, anything arising out of that, Ms Mills?

PN262

MS MILLS: No, Commissioner.

PN263

THE COMMISSIONER: Very good. All right, thank you, Mr Meredith, you're welcome to return?---Cheers. Thank you, Commissioner.

<THE WITNESS WITHDREW

[10.59 AM]

PN264

THE COMMISSIONER: All right, parties, I will be going away to consider whether or not I think that the employment was alive or on foot as at 27 November. My preliminary view at this stage is that I am likely to find that it wasn't in that you didn't raise a dispute, Mr Petrie, but I need to give some further thought and I will order the transcript and sit on that, but that's my preliminary view at this stage. Ms Mills, I know that I have put the respondent on the spot today about that near \$7000, but do you have instructions that that is the respondent's position, that it is owed?

PN265

MS MILLS: Not directly in front of me, Commissioner, but I will follow up when I get back to the office.

PN266

THE COMMISSIONER: All right. Well, you've got Ms Rigato there. Do you need a few minutes to liaise? I mean I am just not clear what the correspondence is. Is it that it's a compromise position or that your calculations are that it's owed?

PN267

MS MILLS: Can I just have a quick moment with Ms Rigato?

PN268

THE COMMISSIONER: Yes, please have a chat between yourselves. If you want to go outside you're welcome to.

PN269

MR PETRIE: Would you like us to leave the room?

PN270

THE COMMISSIONER: No, they can go. I won't be discussing anything with you, they will just go outside and have a quick chat.

*** JOHN PAUL MEREDITH

XXN MR PETRIE

PN271

MS MILLS: Sorry, Commissioner, are we able to have more time because the person who actually did the calculations is on leave and I wasn't involved in making the calculations.

PN272

THE COMMISSIONER: You are free to do what you wish. I was simply seeing whether or not it was a position that you could take today. It is your correspondence of 11 January under the hand of Ms Dwyer, but I assume that she's acting with the instructions that Ms Rigato has given her. It just appears to me on the face of the letter to Mr Petrie that it's accepted that this amount is owed, and if it is, if that is the formal position of the respondent it seems to me that Mr Petrie should not be obliged to sign terms that says that he can't bring claims elsewhere.

PN273

MS MILLS: Okay.

PN274

THE COMMISSIONER: Do you understand what I'm saying, Ms Mills?

PN275

MS MILLS: Yes, I understand.

PN276

THE COMMISSIONER: Very good. All right. If I ultimately decide that the industrial instrument, whichever one applies, and I'm not going to go into which one applies, but either, the industrial instrument exists, whether it's the award or the enterprise agreement, but the two have access to the disputes procedure within it, the employment needs to be live. If it's dead there is no disputes procedure to bring before the Commission.

PN277

That's the point that I have been making, but if you press this application, Mr Petrie, I will write a decision. In that decision I am going to explore a lot of things, parties, and I am going to expose for the public consumption's reading the fact that this zombie agreement exists. Whether employees choose to make an application for that to be terminated earlier is a matter for existing employees or unions acting on their behalf. Just the fact that the decision is out there will highlight this, whereas it's secretly hidden within the other 100,000 zombie agreements that have been published by the Commission (indistinct). All right. But you do press your application, Mr Petrie, you want me to make a decision on this?

PN278

MR PETRIE: Yes, please, your Honour.

PN279

THE COMMISSIONER: All right, very well, I will. I will reserve my decision and you will be the first to know when it is released.

PN280

MR PETRIE: Thank you very much.

PN281

THE COMMISSIONER: It won't be a particularly lengthy decision, but you will read about it. Is there anything further that anybody wishes to address with me?

PN282

MS MILLS: No, Commissioner.

PN283

MR PETRIE: No, your Honour. All good, thank you.

PN284

THE COMMISSIONER: Are you sure? I think there's something that you want to address with me, but - - -

PN285

DR PETRIE: Well, on the question of the payment, Commissioner, if the payment is to be made there are recalculations to be done. Ms Mills has indicated that somebody is away. When are they likely to be back?

PN286

MS MILLS: She's back at the start of April.

PN287

THE COMMISSIONER: This letter is of 11 January where Ms Dwyer has written that, it appears to me on my reading of it, that the respondent accepts that nearly \$7000 is owed.

PN288

DR PETRIE: That's the way we read it.

PN289

THE COMMISSIONER: And there's no strings attached. I ask you, Ms Rigato, to have a look in the mirror and ask yourself if you think \$7000 is owed then it should be paid in my view to Mr Petrie, no strings attached. Do you understand?

PN290

MS RIGATO: Yes, Commissioner.

PN291

THE COMMISSIONER: You can seek the advice that you need, but if the respondent is saying that the calculations demonstrate that \$7000 is owed it should be paid no strings attached. If you don't accept his claim beyond that, that's fine, that's a position you're entitled to take, but if a debt is owed the debt should be paid without Mr Petrie having to sign away his rights to bring any future claims. Anything else? No? Very good. Thank you, parties, we will adjourn this hearing.

ADJOURNED INDEFINITELY

[11.07 AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

OLIVER SIMON JOHNSON PETRIE, SWORN.....	PN28
EXAMINATION-IN-CHIEF BY COMMISSIONER.....	PN28
CROSS-EXAMINATION BY MS MILLS.....	PN99
THE WITNESS WITHDREW	PN153
SUSAN FRANCES RIGATO, SWORN	PN156
EXAMINATION-IN-CHIEF BY THE COMMISSIONER	PN156
CROSS-EXAMINATION BY MR PETRIE.....	PN198
THE WITNESS WITHDREW	PN209
JOHN PAUL MEREDITH, AFFIRMED.....	PN212
EXAMINATION-IN-CHIEF BY THE COMMISSIONER	PN212
EXHIBIT #CB1 DIGITAL COURT BOOK	PN215
CROSS-EXAMINATION BY MR PETRIE	PN252
THE WITNESS WITHDREW	PN263